



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

SECOND SECTION

**CASE OF NERVA AND OTHERS v. THE UNITED KINGDOM**  
*(Application no. 42295/98)*

JUDGMENT

STRASBOURG

24 September 2002

**FINAL**

*24/12/2002*

**In the case of Nerva and Others v. the United Kingdom,**

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

Mr J.-P. COSTA, *President*,  
Mr A.B. BAKA,  
Sir Nicolas BRATZA,  
Mr GAUKUR JÖRUNDSSON,  
Mr L. LOUCAIDES,  
Mr C. BÎRSAN,  
Mr M. UGREKHELIDZE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 11 September 2001 and 3 September 2002,

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

**PROCEDURE**

1. The case originated in an application (no. 42295/98) 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 Mr Sandro Nerva, an Italian national, and three Spanish nationals, Mr José Pulleiro, Mr Julio Rodriguez and Mr José Gigirey-Cabo (“the applicants”), on 18 August 1997. The first two applicants are currently living in London, England. The fourth applicant lives in Spain. The third applicant is since deceased. His application is being pursued in his name by his brother, Mr José Antonio Rodriguez Montega, who lives in Spain.

2. The applicants, who had been granted legal aid, were represented before the Court by Ms C. Scrivens, a lawyer employed with the Central London Law Centre. The United Kingdom Government (“the Government”) were represented by their Agent, Ms J. Foakes, of the Foreign and Commonwealth Office.

3. The applicants alleged, in particular, that their rights under Article 1 of Protocol No. 1 and under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 had been breached given that the domestic courts of the respondent State had ruled that money which was left to them as tips by customers passed to their employer to be used as it wished and, in their case, to discharge the employer’s statutory obligation to pay them a basic minimum wage.

4. 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).

5. The application was originally allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court), which declared it admissible on 11 September 2001.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). The application was allocated to the Second Section of the Court. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. The Government, but not the applicants, filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were employed as waiters at the material time. When the applicants received a tip in cash directly from a customer, the money was placed in a box called a “tronc” and distributed proportionately among the waiters at the end of the week by the “tronc master”.

9. Initially, tips left by customers which were paid to the restaurant by way of an addition to a sum paid by cheque or credit card were dealt with by removing from the cash register a sum equivalent to the tip paid by cheque or credit card and placing it in the tronc, out of which it would be distributed at the end of the week in the same way as cash tips.

10. In 1979, following an inspection from the tax authorities, the applicants’ employer was required to treat tips left by cheque or credit card within the “Pay-As-You-Earn” (“PAYE”) system. Under the PAYE system an employer had to ensure that employees’ income tax and national insurance contributions were deducted from the sums paid, and that employers’ national insurance contributions were paid on those sums. In the applicants’ view, the tax authorities in 1979 were simply insisting that as cheque and credit card tips passed through the hands of the employer the latter was responsible for distribution and should be responsible for ensuring that tax and national insurance were properly deducted through PAYE.

11. Rather than distributing cash sums equivalent to those left by customers on cheque and credit card vouchers, the applicants’ employer

included “additional pay” in their weekly pay slip. It would appear that the method of distribution was the same as the method hitherto applied to *tronc* money.

12. Although initially opposed, this new system was eventually agreed to by the staff. The first applicant was already a staff member at the time of the introduction of the system. The remaining applicants agreed to the system when they took up employment. The applicants submitted that the staff agreement to the new system was not intended to alter the fact that the gratuities were to be paid in full to employees.

13. The cheque and credit card gratuities were the subject of deductions by the employer in respect of tax and national insurance contributions. The employer bore the charges of the credit card companies, varying at the time from 3% to 5% on the amount of the gratuities. When a credit card voucher was improperly completed and rejected by a credit card company, the employer wrote off the amount and, it would appear, did not seek to recover any sums distributed to waiters in respect of any gratuity included on the voucher; it does not appear either that the employer sought to recover from the waiters any sums which it did not receive as a result of dishonoured cheques. The applicants highlighted their view that this was not a new practice, but that it applied before 1979.

14. At the relevant time there was a legal requirement that various categories of workers, including waiting staff like the applicants, be paid a minimum sum as remuneration. This requirement was embodied first in the Wages Councils Act 1979 and then, as from 1 January 1987, in the Wages Act 1986.

15. The applicants sued their employer for breach of contract and challenged the employer’s right to count the tips included in cheque or credit card payments as part of their statutory minimum remuneration. The applicants’ claim covered the six-year period prior to 6 March 1989 and therefore straddled both of the above-mentioned Acts. In the Government’s view, the issue between the parties was whether the “additional pay” constituted money paid to them by their employer. If the applicants’ claim was upheld, the consequence would have been that their employer had been paying them remuneration less than the statutory minimum over a period of years, in breach of contract, entitling them to substantial damages. The applicants maintained that the dispute centred on whether the “additional pay” constituted money paid to the applicants by their employer or, they emphasised, by their employer in respect of time worked.

16. On 25 May 1994 a High Court judge, Mr Justice Mance, held on a preliminary point that tips included in cheque and credit card transactions did count against the minimum remuneration requirement. Mr Justice Mance rejected the applicants’ submission that the tips paid in this manner were held in trust for them by the employer. In his judgment, the employer

obtained the legal title to a tip paid by credit card or cheque, with the result that it became the employer's property.

17. The applicants appealed to the Court of Appeal. By the time of the hearing before the Court of Appeal, the applicants had accepted that property in the cheque and credit card tips passed to their employer and no longer relied on the argument that they were to be considered beneficiaries of money held on trust for them by the employer.

18. In its judgment of 15 May 1996, the Court of Appeal dismissed the applicants' appeal.

19. Lord Justice Staughton observed that it was not disputed that the relevant legislation (the Wages Councils Act 1979 and the Wages Act 1986) embodied the rule that what was paid by the employer and not by any other person counted as remuneration for the purpose of that legislation. For that reason, tips paid in cash to waiters or to the *tronc* did not count as remuneration. However, he considered that the same reasoning could not apply to tips which were built into payments made by cheque or credit card to their employer since the amounts became the latter's property. The employer thereafter paid an equivalent amount to the applicants. In his view, tips paid in this manner should count against the minimum remuneration requirement. Lord Justice Staughton rejected the attempts of the applicants' counsel to interpret the applicable legislation differently. He further rejected counsel's argument that the applicants had a right to the cheque and credit card tips as money had and received for their use. In Lord Justice Staughton's opinion, it was decisive that the employer was paying the tips with its own money even if they had been paid by the customers to the employer in the belief that the latter would pass the tips on to the waiters and on the understanding that it would do so.

20. As to the issue of the customers' intention when adding the tip to the cheque or credit card payment, Lord Justice Staughton considered:

“This is relevant ... in deciding whether the money became the property of the employers or the waiters. But it is clear and (in this court) uncontroverted in this case that it became the property of the employers. Beyond that, as it seems to me, the intention of the customers has no part to play. ... ”

21. Mr Justice Douglas Brown concurred. As to the applicants' reliance on customer intention, Mr Justice Douglas Brown stated that the intention of the different customers could only be the subject of speculation.

22. Lord Justice Aldous dissented. As to tips paid by cheque or credit card, Lord Justice Aldous accepted that the amount was paid to the employer and therefore it could not be said that the tip so paid never became the employer's property. However, in his opinion the intention of the customer was the same when paying a tip by credit card or cheque as when paying by cash and, in either case, the customer had no intention of giving anything to the employer. Lord Justice Aldous stated:

“It was paid to the employer by the customer as a gratuity with the intention that it should be passed to the staff in the same way as cash payments would be and was accepted upon that basis as was apparent from the way that it was operated. The money added to the slip was taken out of the till and added to the tronc. That being so, I do not believe that tips paid by way of cheque or credit card should be considered ‘remuneration’ when cash tips would not be.”

23. Lord Justice Aldous further observed that there was no difference in principle between tips paid in cash and tips paid by cheque or credit card. In his opinion, the only difference was that in the latter cases the employer acted as agent for the customer and, when doing so, had to carry out its duties under the relevant tax legislation to ensure that tax was levied on the tips. However, the fact that tax on cheque and credit card tips was deducted under the PAYE system, instead of being paid by the waiters, did not affect the relationship between the customer and the employee and the intention of the customer that his tip would find its way into the hands of the employee rather than enriching the employer’s bank account.

24. On 14 June 1996 the applicants applied for leave to appeal to the House of Lords. On 28 October 1996 the applicants were informed that the Appeal Committee had provisionally decided that leave to appeal should be given and that the applicants’ employer was invited to submit objections to the applicants’ petition before 11 November 1996. On 4 February 1997 the Appeal Committee referred the matter for an oral hearing before three Law Lords.

25. On 20 February 1997 the hearing was held. The applicants’ counsel was given the opportunity to speak to the petition for leave and to address the employer’s written objections. The hearing lasted five minutes. On the same day the Appeal Committee refused leave to appeal without giving reasons.

## II. RELEVANT DOMESTIC LAW

26. Section 1 of the Wages Councils Act 1979 provided for the establishment of wages councils by order of the Secretary of State for Employment in respect of those workers described in the order and their employers. Under section 14, wages councils were empowered, *inter alia*, to fix the rate of remuneration for any workers in relation to which they operated. Under section 15, contracts of employment providing for payment of less than the minimum remuneration prescribed by a wages council would have effect as if the contractual rate were superseded by the statutory minimum rate. A wages council was established for workers in licensed residential establishments and licensed restaurants. Minimum remuneration for those workers was laid down in the Wages (Licensed Residential Establishment and Licensed Restaurant) Order 1982. Paragraph 3 of the 1982 Order specified the minimum rate to be paid for forty hours’ work as

well as the rates for overtime, night work, etc. Paragraph 12 of the 1982 Order provided that if in any week in which a worker performed some work for his employer the total amount of gratuities from customers received by the worker was less than 8.40 pounds sterling (GBP), the employer had to pay the worker such sum as the amount of gratuities fell short of GBP 8.40. There had to be a written agreement between the worker and the employer to this effect. Where such an agreement existed, the worker had to be paid the appropriate amount reduced by twenty-one pence per hour for the first forty hours worked by him in any week.

27. Section 17 of the Wages Councils Act 1979 defined remuneration as the amount obtained or to be obtained in cash by the worker from his employer after allowing for the worker's necessary expenditure, if any, in connection with his employment.

28. The definition of remuneration under section 17 of the Wages Act 1986 also took as its starting-point the total amount of any money payments made by the employer to the worker. The applicants draw attention to the terms of section 17(I)(a), which provided:

“For the purposes of determining, for the purposes of this Part, the amount of remuneration paid to a time worker by an employer in respect of time worked by the employee in any week there shall be added together -

(a) the total amount of any money payments made by the employer to the worker, on or before the relevant pay day, by way of remuneration in respect of time worked by him in that week ...”

29. The applicants stressed in the above connection that they were regarded as time workers at the material time.

30. The Wages Act 1986 made provision for the continued existence of wages councils, although with reduced powers. Under section 16, a worker could claim as additional remuneration the difference between a statutory minimum set by a wages council and the amount he was actually paid under contract.

31. Under section 1 of the Wages Act 1986 (now re-enacted in section 13 of the Employment Rights Act 1996), employers were prevented from making deductions from the wages properly payable to their employees, save in certain defined circumstances and, in particular, where the employee had given prior consent to the deduction in writing.

32. In *Saavedra v. Aceground Ltd t/a Terazza Est* ([1995] Industrial Relations Law Reports 198), the Employment Appeal Tribunal held that a restaurant owner who kept for himself a proportion of the sums paid by customers as a service charge had contravened section 1 of the Wages Act 1986. Whilst it was at the restaurant owner's discretion how the tronc was allocated, this did not extend to permitting him to allocate some of the money to himself.

## THE LAW

### I. PRELIMINARY ISSUE

33. The Court notes at the outset that the third applicant (Mr Julio Rodriguez) died shortly after the introduction of his application and that his brother has informed the Court that he wished to pursue the application introduced by him (see paragraph 1 above). Although the heirs of a deceased applicant cannot claim a general right that the examination of the application brought by the latter be continued by the Court (see *Scherer v. Switzerland*, judgment of 25 March 1994, Series A no. 287), the Court has accepted on a number of occasions that close relatives of a deceased applicant are entitled to take his or her place (see *Deweert v. Belgium*, judgment of 27 February 1980, Series A no. 35, p. 19, § 37, and *Raimondo v. Italy*, judgment of 22 February 1994, Series A no. 281-A, p. 8, § 2).

For the purposes of the instant case, the Court is prepared to accept that the third applicant's brother can pursue the application initially brought by Mr Rodriguez.

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

34. The applicants contested the decision of the domestic courts to treat tips included by customers in cheque or credit card payments, and intended for them, as the property of their employer with the result that the latter was entitled to treat such tips as remuneration. In the applicants' submission, the effect was to interfere with their right to the peaceful enjoyment of their possessions, in breach of Article 1 of Protocol No. 1, which states:

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

35. The Government emphasised that shares in the tips left by customers in cheque and credit card vouchers were in fact paid to the applicants by their employer. The applicants ultimately obtained property in those sums. It was clear from the terms of their contract of employment that they had a legitimate expectation that the tips would pass to them – but only after the tips had become the property of their employer. However, the applicants could not rely on the principle of legitimate expectation to base an argument

that it was the intention of the customers to transfer property in the tips directly to them without the tips first becoming the property of their employer. The domestic courts rejected their customer-intention plea and the Government relied on the reasons given by the domestic courts in this connection (see paragraphs 20 and 21 above).

36. Furthermore, the applicants could not have had a legitimate expectation that the cheque and credit card tips would not be treated as remuneration. The Government stressed in this respect that it had been the consistent position in domestic law for many years that, with the exception of payments in respect of an employee's business expenses, all payments by an employer would count as remuneration, both for minimum wage and other purposes. In addition, it was not disputed by the applicants in the Court of Appeal proceedings that their employer paid them the equivalent, indeed slightly greater sums, out of its own money; nor should it be overlooked that the applicants themselves agreed that cheque and credit card tips should be paid to them through the PAYE system.

37. In the Government's submission, it was crucial to bear in mind that the applicants received their agreed share in the tips left by the customers in cheques and credit card vouchers. Indeed, they received more than the employer actually received in respect of tips from those customers since the employer bore the burden of cheque and credit card transaction charges and of bad debts. Furthermore, the applicants received the money days or weeks before it was received by the employer and could hold the employer to account under domestic law if the latter did not pay the amount due to them.

38. The applicants maintained in reply that at the moment a gratuity was handed over by a customer the waiter had a right to receive a share in it, which was capable of computation at that point. This was so whether the gratuity was paid in cash into the tronc administered by the tronc master, or by cheque or credit card to be administered by the employer. In either case, the employee had a legal right to claim the payment from the intermediary. That legal right was a property right. In their submission, the applicable legislation made it clear that they were to receive remuneration for time worked and their employer in reality appropriated their entitlement to shares in the tips left by customers who paid by cheque or credit card in order to discharge its statutory obligations.

39. The applicants stated that none of the judges in the domestic proceedings suggested that customers intended to assist the employer in paying its wages bill. The applicants relied in particular on the reasoning of Lord Justice Aldous in the Court of Appeal proceedings (see paragraphs 22 and 23 above). They further maintained that it was irrelevant that the employer paid the entire sum collected by way of tips on credit cards and cheques rather than make deductions to cover matters such as transaction charges. Had the employer wished to avoid having to bear the burden of

such charges, it could have agreed a different scheme with the staff, for example by insisting that customers always pay tips in cash.

40. The Government stressed that, in so far as the applicants complained that there had been an interference with their right to a basic salary since the tips at issue were counted towards the calculation of their statutory minimum wage, it was not open to them to rely on Article 1 of Protocol No. 1. That provision protects the peaceful enjoyment of existing possessions; it does not confer any right to secure further possessions in the future. Should the Court not accept that reasoning in the instant case and find that there has been an interference with the applicants' possessions, the Government contended that it was entirely consistent with the objectives of the minimum wage legislation (to curb unduly low pay), and it was not manifestly without reasonable foundation to treat all payments from an employer as counting towards the minimum level of remuneration. Accordingly, any interference with the applicants' possessions had been reasonable and proportionate, and did not disclose a breach of Article 1 of Protocol No. 1.

41. The Court notes that it has not been disputed that the legal title to tips paid by customers using cheques or credit cards passed to the applicants' employer in the first instance. Tips paid in this manner became the property of the employer for the simple reason that the vouchers signed by customers were made out in the employer's name and were cleared through the latter's account. It has not been disputed either that the applicants duly received from their employer their share in the tips in accordance with the proportion agreed by the waiting staff. Accordingly, there was no interference with each applicant's agreed right to an appropriate share of the tips. They each received, in the form of "additional pay", what the *tronc* system would have intended them to receive, minus tax and national insurance contributions which were payable on the amounts received. It is to be observed that the applicants received the tips in the form of additional pay speedily since, unlike their employer, they did not have to wait until the credit card or cheque payments had been processed. Furthermore, payment of the gratuity was guaranteed even if the credit card or cheque transaction turned out to be fraudulent. The employer bore the risk of fraud and did not require the applicants or other employees to indemnify it against that risk.

42. For the applicants, however, if the gratuities were indeed paid to them along these lines then it must be accepted that wages owed to them under the applicable legislation remained unpaid. The Court does not agree with this argument. The applicants were entitled to a minimum wage, and they have not disputed that their employer complied with its statutory obligations in this connection and, indeed, paid the applicants more than the minimum entitlement, having regard to the additional pay which appeared in their wage slips.

43. The applicants cannot maintain that they had a separate right to the tips and a separate right to minimum remuneration calculated without reference to those tips. In the first place, that assertion is not borne out by the legislation at issue as interpreted by the domestic courts. The fact that the domestic courts ruled in a dispute between private litigants that the tips at issue represented “remuneration” within the meaning of the applicable legislation cannot of itself be said to engage the liability of the respondent State under Article 1 of Protocol No. 1. It would observe in this connection that the interpretation and application of domestic legislation in a given dispute is essentially a matter for the domestic courts. It notes that after full argument on the competing interpretations canvassed for the notion of “remuneration”, the domestic courts ruled that the employer, and not the customer, paid the tips at issue out of its own funds to the applicants and their colleagues. This conclusion cannot be considered arbitrary or manifestly unreasonable, having regard to the scope of the expression “remuneration” and indeed to the applicants’ acceptance that title in the tips at issue passed to the employer. Moreover, the applicants cannot claim that they had a legitimate expectation that the tips at issue would not count towards remuneration. Such a view assumes that the customer intended that this would not be the case. However, this is too imprecise a basis on which to found a legitimate expectation which could give rise to “possessions” within the meaning of Article 1 of Protocol No. 1 (see *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 23, § 51; *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 21, § 31; *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII; and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 83, ECHR 2001-VIII). In the opinion of the Court, it was for the applicants to come to a contractual arrangement with their employer as to how the tips at issue were to be dealt with from the point of view of their wage entitlement. However, they cannot rely on Article 1 of Protocol No. 1 to base a claim to a higher level of earnings.

44. For the above reasons, the Court finds that there has been no breach of the applicants’ right under Article 1 of Protocol No. 1 in the circumstances of this case.

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

45. The applicants further submitted that the impugned decision was discriminatory since they, as waiters, were treated less favourably than employees in other service industries. Such unjustified discrimination

amounted, in their view, to a breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. Article 14 provides:

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

46. The Government submitted that the definition of “remuneration” in the applicable legislation was of general application and did not apply only to particular industries or groups. They pointed out that the applicants themselves conceded in a letter of 18 August 1997 to the former Commission that the Court of Appeal’s judgment affected the nature of the practice of leaving tips in “any service industry”. Accordingly, they could not complain of discriminatory treatment.

47. The applicants contended that only Part I of the Wages Act 1986 was of general application, dealing as it did with unlawful deductions from wages. However, the Wages Councils Act 1979 and Part II of the Wages Act 1986 applied only to those industries and workers whose terms and conditions were governed by wages councils, such as shops, hotels, restaurants and public houses – businesses which typically employ high levels of ethnic minorities and immigrant labour and where there is limited trade union representation.

48. The Court agrees with the Government’s submission. It reiterates that Article 14 of the Convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention. However, not every difference in treatment will amount to a violation of this Article. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction (see *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1507, § 72). For the Court, the applicants have not established that either the applicable legislation or its interpretation by the domestic courts discriminated against them *vis à vis* employees in other sectors of employment covered by that legislation. Indeed, the applicants, being in a sector covered by the minimum wages legislation, were treated more favourably than employees in sectors outside the then scope of that legislation who were not guaranteed a minimum wage.

49. Accordingly, there has been no violation of the applicants’ rights under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been no violation of Article 1 of Protocol No. 1;
2. *Holds* unanimously that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Done in English, and notified in writing on 24 September 2002, 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 dissenting opinion of Mr Loucaides is annexed to this judgment.

J.-P.C.  
S.D.

## DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the finding of the majority in this case that there has been no interference with the applicants' right under Article 1 of Protocol No. 1.

The key issue in the case is whether the tips paid by customers using cheques or credit cards passed into the "possessions" of the applicants in their capacity as waiters for the purposes of Article 1 of Protocol No. 1 or became the absolute property of their employer, to be used as it wished. The majority in the Court of Appeal in the United Kingdom found that such tips became the employer's property and therefore could be used by it in order to satisfy the minimum wage to which the applicants were entitled under the law independently of the tips, in other words as part of their "remuneration". The same approach was followed by the majority of the Court in this case.

I do not think that it can seriously be disputed that in giving the tips the customers intended that they would be specifically handed over in full to the waiters independently of and on top of their salary. I do not think that it can reasonably be assumed that when a customer gives a tip in a restaurant in any form (cash, credit card or cheque) he wants the tip to become the absolute property of the owner of the restaurant. As rightly pointed out in the British case of *Wrottesley v. Regent Street Florida Restaurant* ([1951] 2 Law Reports: King's Bench Division 277), which concerned cash tips:

"The customer has no intention of giving anything to the employer ... It seems to us that there is no ground for saying that these tips ever became the property of the employer ... When the tronc money is shared out the waiters are dividing up their own money. Accordingly, we hold that the sums received from the tronc by the waiters cannot be taken into account in computing the amount paid by the respondents to them."

I also endorse the following statement of Lord Justice Aldous in his dissenting opinion in this case:

"The tips given by the customer are not given to increase the bank account of the employer, nor are they accepted upon that basis. The tips are given and accepted to be transferred to the tronc or dealt with along the same lines. The tips are not given to discharge any liability of the employer to pay a minimum wage. They are paid to the employer who acts as the agent of the customer in their distribution."

I am not convinced that cheque and credit card tips should be treated differently. The intention of the customer remains the same when paying a tip by credit card or cheque as when paying cash.

In these circumstances, I believe that the applicants must be taken to have had a property right with respect to the tips: a right derived from the intention of the customers and the role of the employer in ensuring that that intention was respected. I am not persuaded by the Government's argument that it was the employer, and not the applicants, which bore the risks and delays which accompanied the processing of payments made by cheque or credit cards. As regards sums lost to the employer as a result of, for

example, fraudulent credit card transactions, I would observe that there is no reason why the employer could not request its employees to forego their right to any tips included in the sums of which it was defrauded and did not receive as a consequence.

The majority followed the line of the majority of the Court of Appeal in the United Kingdom to the effect that the tips paid by credit card or cheque became the employer's property since the vouchers signed by customers were made out to the employer and were cleared through the latter's account. I find this approach too formalistic and unconnected with the reality of the situation. In this connection, it is important to bear in mind that this Court is not bound by the definitions of the concept of "possessions" or "property" given by the national legislation or the national judicial decisions. According to the jurisprudence of the Court, the notion of "possessions" in Article 1 of Protocol No. 1 has an autonomous meaning. In *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands* (judgment of 23 February 1995, Series A no. 306-B, p. 46, § 53) the Court stated that

"... the notion 'possessions' (in French: *biens*) in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions', for the purposes of this provision".

I believe that this notion must be considered broad enough to cover a right to assets, such as the tips at issue, which are entrusted by one party to another party with the express or implied intention that they will be specifically handed over in full to a third party for the latter's benefit. In such circumstances, the assets become the "possessions" of that third party. In simple legal terms the tips become the property or "possessions" of the waiters by virtue of the legal act commonly known in many legal systems as a gift or donation. And a gift or donation does not become less valid in law because it is made through a third party. In the instant case, the legal destination and effect of the tips are not frustrated as result of the fact that they pass through the account of the employer. The latter is still bound to hand over the tips to their beneficiaries. No question of a simple legitimate expectation on the part of the waiters arises in this case. The waiters are entitled *eo jure* to the gifts given for them – and only them – by the customers through the intermediary of the employer.

There was even a contract between the employer and the waiters to the effect that tips added to credit card vouchers or included in cheque payments would be paid over to them in the amount determined by the operation of the tronc system. The Government have not contested the fact that the applicants had a right to sue their employer in the event of the latter's failure to pay them the tips.

As the tips should be considered as belonging entirely to the waiters, firstly, they should have been treated separately from the remuneration which was due to the waiters for the work they rendered under their contract

of employment, and, secondly, the waiters' minimum level of remuneration for that work should have been calculated without reference to those tips. It was for the employer to cover the applicants' minimum wage out of profits or other resources, to the exclusion of the use of their "possessions", namely the tips. This view is further supported by the fact that cash tips continued to be administered under the *tronc* system and were not counted towards remuneration. Yet the money intended for the applicants' sole benefit was diverted by the employer in order to offset a portion of the wages which it was statutorily obliged to pay the applicants. Even though in the final analysis the applicants received the tips at issue in the form of "additional pay" minus the tax and national insurance contributions payable by each of them on the tips, it cannot be overlooked that the employer treated the tips as money which belonged to it by law and which could therefore be used to help make up the minimum wage to which the applicants were entitled independently of the tips.

It is my opinion that the interpretation given by the domestic courts to the notion of "remuneration" constituted a disproportionate interference with the applicants' right to the peaceful enjoyment of their possessions since it allowed what was intended for and owed to the applicants to be used to satisfy the employer's debt to them under the minimum wage legislation. I agree with the view of Lord Justice Aldous in the Court of Appeal (see paragraph 23 of the judgment) that such a practice, as condoned by the domestic courts, in effect authorised the employer to enrich itself at the expense of its staff.

I do not share the view of the majority that the case simply raised a question of "interpretation and application of domestic legislation in a given dispute [which] is essentially a matter for the domestic courts". Whether the tips in this case could be regarded as "possessions of the applicants" for the purposes of Article 1 of Protocol No. 1 on the basis of the autonomous meaning of that term as established by the case-law of this Court was a matter which could and should have been determined by this Court in order to find whether there had been an interference with the relevant right of the applicants.

For the above reasons, I find that there has been a breach of the applicants' rights under Article 1 of Protocol No. 1.