A House of Lords

Matthews *v* Ministry of Defence

[2003] UKHL 4

2003 Jan 13, 14; Feb 13

B Lord Bingham of Cornhill, Lord Hoffmann, Lord Hope of Craighead, Lord Millett and Lord Walker of Gestingthorpe

Crown proceedings — Tort, liability of Crown — Armed forces — Serviceman claiming in tort for injury during service — Statute exempting Crown from liability in tort — Whether exemption substantive or procedural — Whether incompatible with right to fair hearing to determine civil rights — Crown Proceedings Act 1947 (10 & 11 Geo 6, c 44), s 10 — Human Rights Act 1998 (c 42), Sch 1, Pt 1, art 6(1)

C

The claimant served in the Royal Navy as an electrical mechanic between 1955 and 1968. In September 1999 he was diagnosed as suffering from asbestos related injuries. He issued a claim for damages for personal injuries against the Ministry of Defence alleging negligence or breach of statutory duty in exposing him to asbestos fibres and dust during his service in the Navy. The ministry denied the claim in D reliance on section 10 of the Crown Proceedings Act 1947[1], which exempted the Crown from liability in tort for injuries suffered by members of the armed forces as a consequence of events which occurred before 1987, and a certificate was issued on behalf of the Secretary of State under section 10(1)(b) stating that in so far as the injury in question was due to anything suffered by the claimant during service it would be treated as attributable to service for the purposes of pension entitlement. On a trial of preliminary issues the judge held that section 10 was incompatible with E the right to a fair trial in article 6(1) of the Convention for the Protection of Human Rights and Freedoms as set out in Schedule 1 to the Human Rights Act 1998[2] in that it unjustifiably deprived the claimant of his civil right to sue. The Court of Appeal allowed the ministry's appeal.

On appeal by the claimant—

Held, dismissing the appeal, that "civil rights" in article 6 of the Convention was autonomous and could not be interpreted solely by reference to the domestic law of F the member state; but that in protecting a litigant's access to the court article 6(1) applied only to civil rights which could, on arguable grounds, be recognised under domestic law and where the restriction on the right of access was procedural in nature; that the Crown's liability in tort had been consistently precluded in respect of claims concerning the armed services both at common law and by the express terms of section 10 of the 1947 Act where the Secretary of State certified in accordance with subsection (1)(b) that the injury was attributable to service for the purpose of a pension; and that, in substituting by the certification G procedure a no-fault system of compensation for a claim for damages, section 10 imposed a limitation which operated not as a procedural bar but as a matter of substantive law under which the claimant had no civil right to which article 6 might apply (post, paras 3, 15, 19, 21, 22, 32, 39, 53, 74, 77, 86–89, 99, 107, 116, 121, 142–143, 145).

Z v United Kingdom (2001) 34 EHRR 97 considered.

Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249 and *Fogarty v* H *United Kingdom* (2001) 34 EHRR 302 distinguished.

Decision of the Court of Appeal [2002] EWCA Civ 773; [2002] 1 WLR 2621; [2002] 3 All ER 513 affirmed.

[1] Crown Proceedings Act 1947, s 10: see post, para 115.
[2] Human Rights Act 1998, Sch 1, Pt 1, art 6(1): see post, para 121.

The following cases are referred to in the opinions of their Lordships:

Adams v Naylor [1946] AC 543; [1946] 2 All ER 241, HL(E)
Adams v War Office [1955] 1 WLR 1116; [1955] 3 All ER 245
Ashingdane v United Kingdom (1983) 6 EHRR 69; (1985) 7 EHRR 528
Bell v Secretary of State for Defence [1986] QB 322; [1986] 2 WLR 248; [1985] 3 All ER 661, CA
de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69; [1998] 3 WLR 675, PC
Derry v Ministry of Defence [1999] PIQR P204, CA
Duncan v Cammell Laird & Co Ltd [1942] AC 624; [1942] 1 All ER 587, HL(E)
Dyer v United Kingdom (1984) 39 DR 246
Fayed v United Kingdom (1994) 18 EHRR 393
Feather v The Queen (1865) 6 B & S 257
Fogarty v United Kingdom (2001) 34 EHRR 302
Golder v United Kingdom (1975) 1 EHRR 524
Holland v Lampen-Wolfe [2000] 1 WLR 1573; [2000] 3 All ER 833, HL(E)
James v United Kingdom (1986) 8 EHRR 123
Ketterick v United Kingdom (1982) 5 EHRR 465
König v Federal Republic of Germany (1978) 2 EHRR 170
Macgregor v Lord Advocate 1921 SC 847
Mulcahy v Ministry of Defence [1996] QB 732; [1996] 2 WLR 474; [1996] 2 All ER 705, CA
Osman v United Kingdom (1998) 29 EHRR 245
Pellegrin v France (1999) 31 EHRR 651
Pinder v United Kingdom (1984) 7 EHRR 464
Powell and Rayner v United Kingdom (1990) 12 EHRR 355
Quinn v Ministry of Defence [1998] PIQR P387, CA
R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46; [2003] 1 AC 837; [2002] 3 WLR 1800; [2002] 4 All ER 1089, CA and HL(E)
R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
Royster v Cavey [1947] KB 204; [1946] 2 All ER 642, CA
Stubbings v United Kingdom (1996) 23 EHRR 213
Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249
Van Droogenbroeck v Belgium (1982) 4 EHRR 443
Waite and Kennedy v Germany (1999) 30 EHRR 261
X (Minors) v Bedfordshire County Council [1995] 2 AC 633; [1995] 3 WLR 152; [1995] 3 All ER 353, HL(E)
Z v United Kingdom (2001) 34 EHRR 97

The following additional cases were cited in argument:

Ambruosi v Italy (2000) 35 EHRR 125
Berler v Germany (Application No 12624/87) (unreported) 10 July 1989, ECHR
Denimark Ltd v United Kingdom (2000) 30 EHRR CD 144
International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158; [2003] QB 728; [2002] 3 WLR 344, CA
Nyambirai v National Social Security Authority [1996] 1 LRC 64
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] ICR 291; [1993] 1 All ER 42, HL(E)

APPEAL from the Court of Appeal

The claimant, Alan Robert Matthews, appealed with permission of the Court of Appeal (Lord Phillips of Worth Matravers MR, Mummery and Hale LJJ) from their decision given on 29 May 2002 whereby they allowed an appeal by the defendant, the Ministry of Defence, from Keith J who, on

A 22 January 2002, determined in the claimant's favour preliminary issues, on his claim for personal injury sustained while serving in the Royal Navy between 1955 and 1968, that he was entitled to rely on article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, that section 10 of the Crown Proceedings Act 1947 prima facie infringed his rights under that article, that it could not be read and given B effect so as to comply with the claimant's right under article 6(1) and that it was accordingly incompatible with that article.

The facts are stated in the opinion of Lord Walker of Gestingthorpe.

Richard Gordon QC and *Robert Weir* for the claimant The essential concern of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is to protect, by procedural C guarantees, a claimant's right of access to the courts. The article is to be broadly interpreted but it does not by itself guarantee the content of civil rights and obligations in the substantive law of any member state and is only engaged where a bar operates to limit the claimant's right of access to the court: see *James v United Kingdom* (1986) 8 EHRR 123; *Pinder v United Kingdom* (1984) 7 EHRR 464; *Golder v United Kingdom* (1975) 1 EHRR 524; *Fayed v United Kingdom* (1994) 18 EHRR 393; *Dyer v United* D *Kingdom* (1984) 39 DR 246 and *Ashingdane v United Kingdom* (1983) 6 EHRR 69.

If the bar is substantive rather than procedural, so that it operates to preclude an actionable claim against the defendant, article 6 will not be engaged: see *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355; *Z v United Kingdom* (2001) 34 EHRR 97 and *X (Minors) v Bedfordshire* E *County Council* [1995] 2 AC 633. As long as the claimant can prove the existence of an established domestic cause of action up to the time the bar operates, the bar will be held to be procedural; and it will remain so, whatever its effect, and whether it operates automatically or as a matter of discretion: see *Stubbings v United Kingdom* (1996) 23 EHRR 213; *Pinder v United Kingdom* 7 EHRR 464; *Dyer v United Kingdom* 39 DR 246; *Waite and Kennedy v Germany* (1999) 30 EHRR 261; *Tinnelly & Sons Ltd v* F *United Kingdom* (1998) 27 EHRR 249 and *Fogarty v United Kingdom* (2001) 34 EHRR 302.

The purpose of the Crown Proceedings Act 1947 was to permit actions to be brought against the Crown as if it were a private person of full age and capacity, thereby furthering the fundamental principle of equality before the law: see section 2. Section 10 provides an exception to that purpose and G should therefore be construed restrictively. Section 10(1) confers a discretionary power on the Secretary of State: entitlement to a pension award will follow only if the Secretary of State so certifies as a matter of discretion. The scope of the Secretary of State's power is to be determined without recourse to contemporaneous parliamentary materials : see *Pepper v Hart* [1993] AC 593.

Although the right of access to the court guaranteed by article 6 is not H absolute (see *Ashingdane v United Kingdom* (1985) 7 EHRR 528), a restriction of the right must satisfy the test of proportionality. The state must demonstrate that the means used to impair the right are no more than are necessary to achieve the objective: see *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69;

Nyambiri v National Social Security Authority [1996] 1 LRC 64 and *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532. The appropriate time for determining whether the conditions are met is the date of the alleged infringement, namely, the issue of the certificate, since it is at that time that the claimant's right of access is barred.

It is appropriate for the court to consider parliamentary materials when assessing the proportionality of a restriction (see *Pepper v Hart* [1993] AC 593), since the Human Rights Act 1998 requires the national court to examine the legislative objective of a provision when assessing its compatibility with the Convention rights: see section 3. When assessing the proportionality of a restriction it is for the reviewing court to weigh the balance which the legislature has struck and note the traditional immunity of the Crown from action by all citizens, including members of the armed forces (see *Mulcahy v Ministry of Defence* [1996] QB 732) and the existence of a war pension scheme.

Whether the stated legislative objective, namely, to ensure that the efficiency and discipline of the armed forces were not prejudiced by the threat of legal action as a result of injuries sustained during training exercises, was legitimate in 1947, it was no longer so in 1987 when the provision was prospectively repealed by the Crown Proceedings (Armed Forces) Act 1987. That repeal amounted to a declaration by Parliament that section 10 did not pursue a legitimate aim. By 2002 the absence of a legitimate aim signified that section 10 necessarily breached article 6.

In any event, the terms of section 10 are not rationally connected: the section is drafted to provide a blanket immunity not limited to the purposes of training exercises. The all-embracing immunity goes further than what is necessary to achieve its stated objective: see *Quinn v Ministry of Defence* [1998] PIQR P387 and *Derry v Ministry of Defence* [1999] PIQR P204.

In the light of the 1987 Act, the effect of section 10 is to treat a serviceman who has recently discovered that he has sustained injuries as a result of tortious conduct prior to 1987 less favourably than a serviceman who sustains injury in similar circumstances after that date. Such far-reaching impact could not be justified by the war pensions provisions, given the inherent uncertainty of obtaining a pension (see *Bell v Secretary of State for Defence* [1986] QB 322) and the lack of comparability with damages in personal injury awards: see Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 1983 (SI 1983/883).

Section 10 cannot be justified on the ground of proportionality and the limitation it imposes is in breach of article 6. Section 10 cannot, by applying section 3 of the 1998 Act, be read down so as to bear a meaning which is compatible with article 6.

David Pannick QC, Philip Sales and *Kate Gallafent* for the Ministry of Defence. Article 6 does not apply because the claimant has no relevant civil right under domestic law. Article 6(1) guarantees a right of access to a court for the determination of civil rights and obligations which are recognised under the domestic law; it does not impose on the state any obligation to confer civil rights and it does not apply where the legislature has restricted the scope of civil rights under the domestic law. Article 6(1) only applies where the domestic law imposes procedural bars which prevent or limit the bringing of a claim to enforce a civil right. In determining the proper interpretation of a statutory limitation importance should be attached to the

A legislative context: see *Berler v Germany* (Application No 1264/87) (unreported), 10 July 1989; *Z v United Kingdom* 34 EHRR 97 and *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

There was no civil right to sue the Crown in tort before the enactment of the 1947 Act. The civil rights it conferred depended on the statutory scheme as a whole. Sections 2 and 10 are to be read together as part of a single B package which defines rights and obligations as between the Crown and the individual. The two sections give effect to the legislative decision that where a serviceman suffers injury which is attributable to service he should not enjoy a right of action in tort dependent on fault but should instead have a potential entitlement to a pension, irrespective of fault, as a matter, not of procedure, but of substantive law.

Section 10 neither imposes a procedural bar nor confers an immunity C from a prior liability established under section 2. The legislative technique involving the issue of a certificate does not alter the categorisation of the limitation imposed and convert a substantive limitation into a procedural bar. The certification process is only a convenient mechanism for ensuring that claims in tort are excluded only in relation to cases where the injury is in fact attributable to service, such that the Secretary of State acknowledges D that the individual is entitled to protection under the pension scheme, subject to the individual satisfying standard conditions of entitlement to payments. Section 10 qualifies the right conferred by section 2 so that such a right is defeasible on the face of the statute from the outset. Section 10 therefore does not bar an action in limine: contrast *Stubbings v United Kingdom* 23 EHRR 213; *Waite and Kennedy v Germany* 30 EHRR 261; E *Fayed v United Kingdom* 18 EHRR 393, *Tinnelly & Sons Ltd v United Kingdom* 27 EHRR 249 and *Fogarty v United Kingdom* 34 EHRR 302.

The claimant could not assert that he had a substantive right unless and until the certificate was issued. Since in practice a claim would be defeated by the issue of the certificate the assertion would be inconsistent with the basic Convention principle that courts are concerned with practical reality, not with technicalities: see *Van Droogenbroeck v Belgium* (1982) 4 EHRR F 443 and *R (Anderson) v Secretary of State for the Home Department* [2003]1 AC 837. Section 10 operates as a substantive limitation (see Hansard (HL Debates), 31 July 1947, col 849; the Crown Proceedings (Armed Forces) Act 1987 and *Pinder v United Kingdom* 7 EHRR 464) but it is incorrect to conclude that article 6 can apply to substantive limitation on civil rights if it is arbitrary (see *James v United Kingdom* 8 EHRR 123 and G *Powell and Rayner v United Kingdom* 12 EHRR 355).

The question of proportionality does not arise but, if it were to arise, section 10 is a proportionate restriction on civil rights: see the *Pinder* case. The right of access protected by article 6(1) is not absolute; limitations are impliedly permitted since such a right by its nature calls for state regulation which may vary according to individual and communal needs and resources. Since the state enjoys a margin of appreciation, Parliament was entitled to a H broad measure of deference since it was concerned not only with whether service personnel should be allowed to sue or should be confined to benefits under a no-fault pension scheme and on the related allocation of resources, but also with the extent to which claims in tort should be extended into new areas against the Crown: see *International Transport Roth GmbH v*

Secretary of State for the Home Department [2003] QB 728 and *Denimark Ltd v United Kingdom* (2000) 30 EHRR CD 144.

To be compatible with article 6(1) a limitation, objectively assessed, must pursue a legitimate aim: see *Ambruosi v Italy* (2000) 35 EHRR 125. Section 10 has a legitimate aim: to provide, in relation to injuries attributable to service, that compensation should not be available by means of liability in tort, but should be provided under the terms of a war pension scheme.

Parliament's decision in 1987 to adopt a different balance of interests between the Crown and the individual did not mean that section 10 lacked a legitimate aim or was disproportionate prior to 1987. In 1947 and in 1987 Parliament was entitled to make a judgment as to how far to extend the ambit of enforceable claims having regard to available resources.

Accordingly even if article 6(1) were to apply section 10 would not be incompatible with it.

Gordon QC replied.

Their Lordships took time for consideration.

13 February. **LORD BINGHAM OF CORNHILL**

1 My Lords, the first question in this appeal by Mr Matthews is whether in English law he has what is to be regarded, for purposes of article 6 of the European Convention on Human Rights, as a "civil right" to claim damages for tort against the Ministry of Defence. If that question is answered in his favour two further questions arise: whether section 10(1) of the Crown Proceedings Act 1947 infringes Mr Matthews's right guaranteed by article 6 to a fair trial of that claim, and whether (if so) such infringement can be justified.

2 I am indebted to my noble and learned friend Lord Walker of Gestingthorpe for his summary of the facts and the history of the proceedings, his recitation of the relevant provisions of the 1947 Act and the Convention and his account of the most important Strasbourg jurisprudence, none of which I need repeat. I can turn directly to the first question expressed above.

3 There is much common ground between the approaches of the parties to this question. It is recognised, first, that the expression "civil rights" in article 6 of the Convention is autonomous: *König v Federal Republic of Germany* (1978) 2 EHRR 170, 192–193, para 88. This means that the concept of a "civil right" cannot be interpreted solely by reference to the domestic law of the member state. It is the view taken of an alleged right for Convention purposes which matters. But, secondly, the Strasbourg case law is emphatic that article 6(1) of the Convention applies only to civil rights which can be said on arguable grounds to be recognised under domestic law; it does not itself guarantee any particular content for civil rights in any member state: see, for example, *Z v United Kingdom* (2001) 34 EHRR 97, 134–135, 137, paras 87, 98. Thus for purposes of article 6 one must take the domestic law as one finds it, and apply to it the autonomous Convention concept of civil rights. It is evident, thirdly, that the Strasbourg jurisprudence has distinguished between provisions of domestic law which altogether preclude the bringing of an effective claim (as in *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355 and *Z v United Kingdom*

34 EHRR 97) and provisions of domestic law which impose a procedural bar on the enforcement of a claim (as in *Stubbings v United Kingdom* (1996) 23 EHRR 213, *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249 and *Fogarty v United Kingdom* (2001) 34 EHRR 302). The European Court of Human Rights has however recognised the difficulty of tracing the dividing line between procedural and substantive limitations of a given entitlement under domestic law, acknowledging that it may be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy: see *Fayed v United Kingdom* (1994) 18 EHRR 393, 430, para 67. An accurate analysis of a claimant's substantive rights in domestic law is none the less the first essential step towards deciding whether he has, for purposes of the autonomous meaning given to the expression by the Convention, a "civil right" such as will engage the guarantee in article 6.

4 Few common law rules were better-established or more unqualified than that which precluded any claim in tort against the Crown, and since there was no wrong of which a claimant could complain (because the King could do no wrong) relief by petition of right was not available: *Feather v The Queen* (1865) 6 B & S 257, 295–297; *Robertson, Civil Proceedings By and Against the Crown* (1908), pp 350–351. The potential injustice of this rule was mitigated in several ways: by permitting actions against the personal author of the injury to the claimant and by the practice of the Crown in standing behind its delinquent servant (if he had been acting in the course of his duty) and accepting responsibility for any damages awarded (ibid, and see *Mulcahy v Ministry of Defence* [1996] QB 732, 740); by making provision for the payment of pensions to members of the services injured by other members in the course of their duties, as more fully described by my noble and learned friends Lord Hope of Craighead and Lord Walker; and, in cases where the individual author of the claimant's injury could not be identified, by appointing a nominee defendant to enable the claim to proceed.

5 Despite these palliatives, however, the Crown's position as litigant became the subject of strong criticism and in 1921 the Lord Chancellor and the Law Officers were agreed that a change should be effected and that legislation should be introduced as soon as a Bill could conveniently be prepared. One of the changes expressly envisaged was that the Crown should become liable to be sued in tort. A very strong committee, chaired by the Lord Chief Justice, Lord Hewart, was accordingly appointed to propose such amendments of the law as the committee might consider advisable and feasible having due regard to the exceptional position of the Crown and to prepare a Bill. In 1924 the committee's terms of reference were modified and it was asked to prepare a Bill to provide (among other things) that the Crown should become liable to be sued in tort on the assumption that that alteration in the law was both desirable and feasible.

6 The committee in due course annexed its proposed Bill to a brief report dated February 1927: Crown Proceedings Committee: Report (Cmd 2842). In clause 11 of the draft Bill, under the heading "Substantive Rights", it was provided: "Subject to the provisions of this Act, the Crown shall, notwithstanding any rule of law to the contrary, be liable in tort." This provision was however subject to a saving in clause 29(1)(g) providing:

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

Thus in this restricted field the immunity of the Crown was to survive, subject to the palliatives already noted.

7 But the proposed Bill was not enacted and in 1946 one of the palliatives noted above, the practice of appointing a nominee defendant in tort actions against whom damages could be awarded, was disapproved by the House of Lords in *Adams v Naylor* [1946] AC 543, a decision followed shortly thereafter by the Court of Appeal in *Royster v Cavey* [1947] KB 204. Thus in a case (such as the present) in which the claimant could identify no individual Crown servant as responsible for causing him injury, he would have no right to redress save under any relevant pension arrangements. In both these decisions it was strongly urged that the law be changed, and they greatly strengthened the pressure for reform. But in neither case was the injured plaintiff a member of the armed services: in the first case the victims were children playing on a beach where mines had previously been laid, in the second a factory worker injured on her way to work.

8 The Crown Proceedings Bill 1947 was based on the draft Bill of 1927 but with modifications of both substance and form. It was introduced into the House of Lords, where it was amended. What became clause 2 (in Part I, "Substantive Law") provided for the general liability of the Crown in tort. This clause of the Bill was in the same terms as the enacted section 2. But what became clause 10, making special provision for the armed services, read as follows (as amended in the House of Lords, before the Bill went to the House of Commons):

"(1) Nothing done or omitted to be done by a member of the armed forces of the Crown while on duty as such shall subject either him or the Crown to liability in tort for causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Crown and is either on duty as such or is, though not on duty as such, on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the armed forces of the Crown: Provided that this subsection shall not exempt a member of the said forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties as a member of those forces.

"(2) No proceedings in tort shall lie against the Crown for death or personal injury due to anything suffered by a member of the armed forces of the Crown in consequence of the nature or condition of any such land, premises, ship, aircraft or vehicle as aforesaid, or in consequence of the nature or condition of any equipment or supplies used for the purposes of those forces; nor shall any act or omission of an officer of the Crown

A subject him to liability in tort for death or personal injury, in so far as the death or personal injury is due to any of the matters aforesaid.

"(3) Where the defendant in any civil proceedings alleges that, in respect of any damages which may be awarded against him in those proceedings, he would be entitled to contribution from some other person if that other person were not exempted from liability by virtue of the preceding provisions of this section, the defendant may join that other B person as a party to the proceedings; and if it is established that the defendant would be so entitled, the damages recoverable from him shall be reduced by such sum as appears to the court to be equivalent to the contribution which he would have been entitled to recover from the said other person if that other person had not been so exempted.

"(4) The Admiralty or a Secretary of State, if satisfied that it is the C fact:—(a) that a person was or was not on any particular occasion on duty as a member of the armed forces of the Crown; or (b) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not, or were or were not, used for the purposes of the said forces; may issue a certificate certifying that to be the fact; and any such certificate shall, for the purposes of this section, be conclusive as to the fact which it certifies."

D The effect of clause 10(1) is clear. Where a member of the armed forces of the Crown while on duty as such kills or injures another member of the armed forces who is either on duty or on some land, premises, ship, aircraft or vehicle used for the purposes of the armed forces, no liability in tort shall arise against the Crown. I shall, to avoid wearisome repetition, refer to these as "exempted claims". To them the old common law rule was to continue to E apply. The member of the armed forces who actually caused the death or injury was also to be exempt from liability, unless the act or omission causing the death or injury was not connected with the execution of that person's duties as a member of the armed forces. In that respect the effect of the clause was to restrict the common law rights of the injured serviceman. But such claims were not common, perhaps because the doctrine of common F employment effectively precluded them: *Mulcahy v Ministry of Defence* [1996] QB 732, 750.

9 The effect of clause 10(2) was to exempt the Crown and any officer of the Crown from any tortious liability as (primarily) occupier.

10 Clause 10(3), which had no equivalent in the draft 1927 Bill, for obvious historical reasons, was added by amendment in the House of Lords, and attempted to address the potential injustice to a defendant who would G have been entitled to contribution from another party had that party not been exempted from liability under the provisions of subsections (1) and (2). The subsection envisaged that such exempted party could be joined as a party even though nothing could be claimed against him. This provision was deleted in the House of Commons and did not appear in the statute as enacted. But it shows that subsections (1) and (2) were regarded as H exempting the Crown and its servants from tortious liability in the case of exempted claims.

11 Clause 10(4) as initially drafted contained the only certification provision in the clause. It enabled the relevant minister to certify conclusively that a person (whether the person causing the death or injury or the person suffering it) was or was not on duty or that land, premises etc

were or were not used for purposes of the armed forces at a particular time. Such certificate, directed to the terms of subsections (1) and (2), might preclude any claim against the Crown or its servant causing death or injury or might enable the injured serviceman or his personal representatives to defeat any attempt by the person causing the death or injury to claim the exemption provided under subsections (1) and (2). The permissive "may" in subsection (4), preserved in the section as enacted, makes it clear in my opinion that the minister was not to be bound to issue a certificate, even if satisfied of any fact in (a) or (b).

12 The significant points to be made on the Bill are twofold. First, in the case of exempted claims the injured serviceman or his personal representatives would have no right at all to recover damages, either against the Crown or against the serviceman causing the injury or death. Secondly, clause 10 as initially drafted contained no provision equivalent to section 10(1)(b) of the Act as passed (although there was, in clause 10(4), a provision equivalent to what became section 10(3)). Section 10(1)(b) was added by amendment during the passage of the Bill through the House of Commons without opposition.

13 This is a matter of some importance, since Mr Gordon, ably arguing Mr Matthews's appeal, accepted that had the 1947 Act preserved the common law prohibition of claims in tort against the Crown, or had it been enacted so as to have the effect of the original version of clause 10, Mr Matthews would have had no right in domestic law to recover damages against the Crown in tort and hence, for purposes of the Convention, would have had no "civil right" the determination of which article 6 could operate to protect. Mr Gordon's argument depended on the contention that Mr Matthews had a cause of action against the Crown in tort from the moment he suffered significant injury until the Secretary of State gave his certificate under section 10(1)(b). Thus, it was said, Mr Matthews had a substantive right which the Secretary of State's certificate operated to prevent him pursuing, thus acting as a procedural bar which was incompatible with article 6. Only the section 10(1)(b) certification procedure, introduced by amendment in the House of Commons, opened the door to this argument.

14 The question therefore arises whether the effect of sections 2 and 10 of the 1947 Act, read together, was (as Mr Gordon contended) to give a claimant such as Mr Matthews, on facts such as are assumed here, a right to recover damages in tort against the Crown only defeasible if and when the Secretary of State gave his certificate under section 10(1)(b). Differently expressed, the question is what did Parliament intend, a question to be answered by interpreting, in its context, the 1947 Act.

15 I consider it to be clear that Parliament did not intend to confer any substantive right to claim damages against the Crown for the exempted claims. My reasons for reaching that conclusion, cumulatively, are these.

(1) Historically, no such right existed. It was clear that such claims were absolutely barred.

(2) When detailed proposals for reform were put forward in 1927, no cause of action was proposed in relation to the exempted claims. They were to remain absolutely barred.

(3) When the Crown Proceedings Bill was introduced in the House of Lords in 1947 it was again provided that the exempted claims should be

absolutely barred. Those with claims falling within that category were to be compensated, if they fulfilled the qualifying conditions, by the award of a pension, which was then believed to approximate in value to an award of common law damages, but by a procedure which relieved the victim of the need to prove negligence or breach of statutory duty and which could be available in circumstances where a claim at common law would not lie. See the later case of *Bell v Secretary of State for Defence* [1986] QB 322, 329.

(4) There is nothing to suggest that when section 10(1), as it was to become, was uncontentiously amended in the House of Commons, there was any intention to alter the essential thrust of the provision as previously drafted. The inference is, I think, clear that the object of the new certification procedure was to ease the path of those denied any right to a common law claim towards obtaining a pension, by obviating the need to prove attributability, an essential qualifying condition for the grant of a pension. It must be remembered that although section 28 of the 1947 Act provided for discovery by the Crown, the practice at the time was to claim Crown privilege for a very wide range of service documents in accordance with the expansive principle laid down by the House of Lords in *Duncan v Cammell Laird & Co Ltd* [1942] AC 624. Thus it was a benefit to the serviceman if the Secretary of State estopped himself from contesting the issue of attributability.

(5) Whereas the issue of a certificate under what became section 10(3) was discretionary, as shown by the permissive "may", no such permissive language was applied to the issue of a certificate under section 10(1)(b). It was plainly intended that, where the conditions were met, the Secretary of State should issue a certificate, as was the invariable practice of successive Secretaries of State over the next 40 years.

(6) Although different judges have used different language, the English courts have consistently regarded section 10(1) as precluding any claim at common law. Thus one finds references such as these:

"Provided that the other conditions of section 10 are satisfied, the exemption from liability in tort applies . . ." (*Bell v Secretary of State for Defence* [1986] QB 322, 328E, per Sir John Donaldson MR.)

"excludes the Secretary of State's liability in tort . . ." (*Bell's* case, at p 328G.)

"any compensation shall be provided under the service pension scheme contained in the Order in Council and not under the common law." (*Bell's* case, at p 329C.)

"section 10 provides a complete defence at common law." (*Bell's* case, at p 330H.)

"the effect of section 10 of the Act of 1947 was to prevent proceedings being brought in respect of the death of or personal injury to a member of the armed forces caused by the negligence of another member of the armed forces provided that the Secretary of State issued a certificate that the death or injury was attributable to service for the purposes of entitlement to a war pension." (*Mulcahy v Ministry of Defence* [1996] QB 732, 742B, per Neill LJ.)

"Section 10 provides immunity to the Crown . . ." (*Quinn v Ministry of Defence* [1998] PIQR P387, 390, per Swinton Thomas LJ.)

"the defendant is entitled to rely on the defence which [section 10(1)] provides . . . It is easy to see why, in 1947, section 10(1) should have been

thought necessary in order to protect the Crown from claims to common law damages . . ." (*Derry v Ministry of Defence* [1999] PIQR P204, 213, per Chadwick LJ.)

"The immunity conferred by section 10 . . ." (*Derry's* case, at p 214, per Laws LJ.)

(7) It was the absolute nature of the exclusion imposed by section 10(1) on exempted claims (coupled with the discrepancy, by 1987, between the value of a pension and the value of a claim for common law damages) which fuelled the demand for revocation of section 10 that found expression in the Crown Proceedings (Armed Forces) Act 1987. But it was never, to my knowledge, suggested that the exclusion of exempted claims imposed by section 10 was anything other than absolute, whether the claim arose from events with or without an analogy in civilian life, and the revocation of section 10 was only to take effect prospectively.

(8) In deciding whether section 10(1) imposes a procedural bar or denies any substantive right, regard must be paid to the practical realities and not to technicalities: *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, 456, para 38, followed in *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 876, para 13. It is what happens in practice which matters. The practice, as already mentioned, has been uniform and unvarying. Any practitioner asked to advise Mr Matthews on the assumed facts would have advised him, however reluctantly, that a certificate under section 10(1)(b) was bound to be issued, that he could apply for the grant of a pension if his disablement was of sufficient severity to qualify, but that he had no claim which had any prospect of success at common law.

16 Mr Gordon relied on various Strasbourg decisions to support his contention that this was not a case in which domestic law denied any substantive right but one in which the certification provision in section 10(1)(b) operated as a procedural bar. Three of these call for comment. The first of these was *Pinder v United Kingdom* (1984) 7 EHRR 464, which concerned section 10. The Commission posed the question, at p 465, para 3, "whether there can be said to be a 'civil right' where such a right, i e, a right to compensation for negligence, has been expressly removed by a statutory immunity such as that conferred by section 10 of the 1947 Act". "Removed" must here be read in a special sense, since the right had never existed and when the blanket historical bar was abrogated by section 2 of the 1947 Act it did so subject to the provisions of the Act which expressly excluded the exempted claims in section 10. The Commission went on, at p 465, para 5, to acknowledge that "Whether a right is at all at issue in a particular case depends primarily on the legal system of the state concerned". The Commission then referred to authority, at pp 465–466, paras 6–7, establishing that article 6(1) should not be interpreted as enabling member states to remove the jurisdiction of the courts to determine certain classes of civil claim or to confer immunities from liability on certain groups in respect of their actions, without any possibility of control by the Convention organs. I fully recognise and respect this authority: where a right in domestic law exists, any measure restricting its effective exercise must be justified. But it is first necessary to decide, consistently with the Strasbourg jurisprudence, whether such a right does exist in domestic law. Here there was no such right and I question whether the Commission was right to ask, at p 466, para 7, "whether section 10 of the 1947 Act

A constitutes an arbitrary limitation of the applicant's substantive civil claims" when in truth the applicant had no substantive civil claim.

17 The second case particularly relied on was *Fayed v United Kingdom* 18 EHRR 393, in which the applicant sought to challenge the English rules on privilege in the law of defamation. The European Court of Human Rights, at p 429, para 65, footnote 2, cited *Dyer v United Kingdom* (1984) 39 DR 246, a Commission decision to the same effect as *Pinder*, but found it
B unnecessary to decide whether article 6(1) applied since issues of legitimate aim and proportionality in any event arose and would fall to be considered under article 8: see pp 430–431, paras 67–68. In this case, however, the applicant had a right long established and well recognised in domestic law to vindicate his reputation. It is easier in such a case, as compared with the present, to understand how an impediment to the effective exercise of that
C right could be viewed as procedural.

18 The most recent case, and that on which Mr Gordon most strongly relied as indistinguishable from the present, was *Fogarty v United Kingdom* 34 EHRR 302. In that case the immunity against employment claims conferred on foreign states by section 16(1) of the State Immunity Act 1978 was held to be seen, at p 311, para 26, "not as qualifying a substantive right but as a procedural bar, preventing the applicant from bringing her claim
D before the industrial tribunal". This ruling must be understood in the context that the applicant had an express statutory right to compensation for victimisation and discrimination under the Sex Discrimination Act 1975, a right very closely allied to that which she had already successfully exercised against the same employer. Far from being indistinguishable from the present, this case is in my opinion categorically different.

E 19 Mr Gordon was able to point to certain Strasbourg authorities in which there was recognition, in addition to cases where domestic law conferred no legal right whatever and cases in which domestic law conferred a right but imposed a procedural bar on its exercise, of a third class of case in which there was some legal basis for a right in domestic law which was subject to substantive immunity from liability. Such references are to be found in the opinions of the Commission in *Dyer v United Kingdom*
F 39 DR 246, 252, para 6, *Pinder v United Kingdom* 7 EHRR 464, 466, para 7 and *Osman v United Kingdom* (1998) 29 EHRR 245, 287–288, para 119. It is in my opinion unnecessary to explore this authority, since immunity strictly speaking assumes the existence of a right in national law which but for the immunity could be asserted and here, as I have endeavoured to show, the right which Mr Matthews seeks to assert has never, at any time relevant
G to his claim, existed in national law. The decisive nature of this conclusion was recognised by the Court of Human Rights in *Z v United Kingdom* 34 EHRR 97, 138, para 100, where the court said:

> "In the present case, the court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of
H action in domestic law."

The point was further elaborated by Lady Justice Arden in her concurring opinion (pp 150–151, para 0-13):

> "Paragraph 98 of the judgment refers to the *Fayed* case. In that case the court contemplated the possibility that there might be a violation of

the right of access to court if, for example, a state could remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons. At the same time, however, the court also stated that the Convention enforcement bodies could not create by way of interpretation of article 6 a substantive civil right which had no legal basis in the state concerned. Yet that is what the applicants are inviting the court to do in the present case. Once the conclusion is reached that the right on which the applicants seek to rely has no legal basis in national law, the question of whether there was an 'immunity' such as to invoke the principle referred to in the *Fayed* case strictly does not arise."

The court had considerations of this sort in mind when, in the early case of *Golder v United Kingdom* (1975) 1 EHRR 524, 536, para 35, it spoke of taking away the jurisdiction of the courts.

20 The difficulties inherent in Mr Gordon's argument are in my opinion highlighted by consideration of section 9 of the 1947 Act, which has since been repealed and to which no reference was made in argument. It read that, subject as provided in the section, no proceedings in tort should lie against the Crown for anything done or omitted to be done in relation to a postal packet by any person while employed as a servant or agent of the Crown or in relation to a telephonic communication by any person while so employed. So the section preserved the general exemption from liability of those acting in the service of the Post Office, then treated as Crown servants. But the section went on to prescribe, in some considerable detail, the circumstances in which and the conditions subject to which common law claims might, as exceptions to the general prohibition, lie. It would in my opinion be a misreading of the section to interpret these provisions as procedural bars: in truth, they define the limits of the substantive right. But section 9 is clearly one of the provisions referred to in the opening words of section 2(1) of the Act. So there is a general rule of inclusion (section 2(1)), followed by a specific rule of exclusion (section 9(1)), followed by exceptions to this exclusionary rule. In the case of sections 2 and 10 the legislative technique is simpler: a general rule of inclusion followed by a rule of exclusion applying to the exempted claims. In section 9 there is, it is true, no equivalent to the certificate procedure under section 10(1)(b), but to treat that procedure, adopted for a quite different purpose, as leading to a different result for purposes of article 6 would be to elevate form over substance.

21 For all these reasons, which closely reflect the reasoning of the Court of Appeal, as well as those given by Lord Walker, I would answer the first question adversely to Mr Matthews. That must lead to the dismissal of the appeal. This conclusion obviates the need to consider whether, if section 10(1)(b) were a procedural bar, it could be justified. Although this aspect was fully canvassed in argument before the House, I think it preferable to express no opinion on an issue which does not fall for decision.

LORD HOFFMANN

22 My Lords, I have had the advantage of reading in draft the speech to be made by my noble and learned friend Lord Walker of Gestingthorpe. I agree with it and for the reasons which he will give I would dismiss the appeal. I also add some observations of my own.

A **23** The question before the House is whether the present application of section 10 of the Crown Proceedings Act 1947 to acts or omissions committed before 15 May 1987, when the Crown Proceedings (Armed Forces) Act 1987 was passed, is compatible with article 6 of the Convention. The effect of the section is, subject to the issue by the Secretary of State of a certificate under subsection (1)(b) or (2)(b), to prevent a serviceman who has suffered personal injury in the circumstances described in subsections B (1)(a) or (2)(a) from suing the Crown in tort. The argument for incompatibility is that the effect of the section is to prevent a serviceman from having his civil rights determined by an independent and impartial tribunal.

24 The appellant accepts that, in consequence of section 10, he has no claim in English law. It might therefore be said the law gives him no civil C right which needs to be determined by a court. If there had been any dispute about whether he had such a right or not, it could easily have been resolved by Keith J, before whom these proceedings were brought. He would certainly have been an independent and impartial tribunal. But his services were not called upon for this purpose because the appellant conceded that he has no such right. His argument was that it was incompatible with article 6 that he did not have one.

D **25** That would seem at first sight to be a large proposition. Article 6 is concerned with standards of justice, the separation of powers and the rule of law. It would seem to have little to do with whether or not one should have an action in tort. That is a matter of national policy. Some countries, like New Zealand, do not believe in actions in tort for personal injuries. The Accident Insurance Act 1998 provides a no-fault compensation scheme E instead. Some have more restricted no-fault schemes; New York, for example, has one for certain types of personal injuries arising out of the use or operation of a motor vehicle (see New York State Consolidated Laws, ch 28, article 51). The question of whether a common law action for damages is the most sensible way of providing compensation for accident victims is controversial and Professor Atiyah's *The Damages Lottery* (1997) demonstrates that the existing system is expensive and in many respects F unfair.

26 I start, therefore, with a predisposition to think that whether the appellant should have an action in tort or a no-fault entitlement under a pension scheme has nothing to do with human rights. Whether the pre-1987 no-fault scheme was fair is another matter; it depended upon the generosity of the pension entitlement. In 1987 Parliament took the view that it was not G fair and that servicemen should be put on the same footing as everyone else. But human rights are not about fairness in this sense. Human rights are the rights essential to the life and dignity of the individual in a democratic society. The exact limits of such rights are debatable and, although there is not much trace of economic rights in the 50-year-old Convention, I think it is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery. But they H certainly do not include the right to a fair distribution of resources or fair treatment in economic terms—in other words, distributive justice. Of course distributive justice is a good thing. But it is not a fundamental human right. No one looking at the legal systems of the member states of the Council of Europe could plausibly say that they treated distributive justice

as a fundamental principle to which other considerations of policy or expediency should be subordinated. A

27 Mr Gordon does not argue for the existence of a human right to sue in tort. He concedes that if Parliament had simply said that servicemen should have no right of action, it would not have infringed article 6 or any other provision in the Convention. What makes it objectionable is the provision that the Crown's immunity from suit depends upon the issue of a certificate by the Secretary of State. That means that until the certificate was issued, the appellant had a civil right, a cause of action in tort. If no certificate had been issued, he would have been able to prosecute his action before the courts. So the section gives the Secretary of State a power at his discretion to cut off the appellant's action and prevent him from bringing it before the court. He is denied access to the court to enforce his civil right. And this, says Mr Gordon, is incompatible with article 6. B C

28 If the purpose of section 10(1)(b) and (2)(b) had been to give the Secretary of State a discretionary power to swoop down and prevent people with claims against the Crown from bringing them before the courts, I would agree. That proposition is in my opinion well supported by authority. In the great case of *Golder v United Kingdom* (1975) 1 EHRR 524 the Strasbourg court decided that the right to an independent and impartial tribunal for the determination of one's civil rights did not mean only that if you could get yourself before a court, it had to be independent and impartial. It meant that if you claimed on arguable grounds to have a civil right, you had a right to have that question determined by a court. A right to the independence and impartiality of the judicial branch of government would not be worth much if the executive branch could stop you from getting to the court in the first place. The executive would in effect be deciding the case against you. That would contravene the rule of law and the principle of the separation of powers. D E

29 These principles require not only that you should be able to get to the court room door. The rule of law and separation of powers would be equally at risk if the executive government was entitled, as a matter of arbitrary discretion, to instruct the court to dismiss your action. There are different ways in which one could draft a law to give the executive such a power. It might say that the cause of action was not complete without the government's consent. That would look like a rule of substantive law. Or it could provide that the government could issue a certificate saying that the action was not to proceed. That looks like a procedural bar. But provided one holds on to the underlying principle, which is to maintain the rule of law and the separation of powers, it should not matter how the law is framed. What matters is whether the effect is to give the executive a power to make decisions about people's rights which under the rule of law should be made by the judicial branch of government. F G

30 Mr Gordon's argument was however much more formalistic. He relies upon the distinction, used in several branches of the law, between substance and procedure. The first step, he says, is to ask whether the certificate negates the substantive right of action or whether it is a procedural bar to its enforcement. If there is no substantive right, article 6 is not engaged and that is an end of the matter. If it is a procedural bar, then article 6 is infringed unless the existence of such a bar can be justified at the time when it was sought to be enforced, that is, when the certificate was H

given in 2002. For that purpose, it must satisfy the standard requirements of proportionality. It must pursue a legitimate aim, it must be necessary and suitable for the attainment of that aim and must not restrict the right of access to the court disproportionately in relation to the importance of the aim it pursues.

31 Applying these principles, Mr Gordon says, first, that the certificate was plainly procedural. Until it was issued, the appellant had a cause of action. The certificate prevented him from enforcing it. On the second issue, proportionality, he says that enforcing section 10 in 2002 could not have a legitimate aim because Parliament had acknowledged in 1987 that the section was unfair.

32 I shall say something in a moment about the distinction between substance and procedure, but I shall for the moment take it at face value. Even on that basis, I think that the certificate extinguishes the substantive cause of action and does not merely operate as a procedural bar to its enforcement. It is clear from the researches of my noble and learned friend Lord Bingham of Cornhill, and would I think be clear from the provisions of section 10 itself, that the certificate is no more than a binding acknowledgement by the Secretary of State that the serviceman satisfies the "attributable to service" requirement to qualify for the pension award which is the quid pro quo for his inability to sue in tort. In order to resist a claim in tort, the Secretary of State must be willing to acknowledge that the serviceman will (subject to the other requirements such as disability) qualify for a pension. But in my opinion that is no more a procedural bar than the requirement that a purchaser who sues for delivery of goods must aver that he is ready willing and able to pay the price.

33 The distinction between substance and procedure is a slippery one: in *Fayed v United Kingdom* (1994) 18 EHRR 393, 430, para 67, the court remarked:

> "It is not always an easy matter to trace the dividing line between procedural and substantive limitations of a given entitlement under domestic law. It may sometimes be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy."

34 The distinction is used in a number of areas of the law, of which the conflict of laws is one. In similar vein to the Strasbourg court in *Fayed*, the editors of *Dicey & Morris, The Conflict of Laws*, 13th ed (2000), pp 157–158, para 7-004, say:

> "The distinction is by no means clear-cut. In drawing it, regard should be had in each case to the purpose for which the distinction is being used and to the consequences of the decision in the instant context."

35 The purpose for which the distinction is being used in applying article 6 is that stated with force and clarity by the Strasbourg court in *Golder* 1 EHRR 524 and subsequent cases, namely to prevent contracting states from imposing restrictions on the right to bring one's dispute before the judicial branch of government in a way which threatens the rule of law and the separation of powers. But the requirement of the certificate in section 10 is not to give the government an arbitrary power to stop the proceedings. The circumstances in which Parliament intended that no action

should be brought are fully defined in subsections (1)(a) and (2)(a). The certificate of the Secretary of State cannot prevent the bringing of an action which does not fall within the terms of those subsections. Its purpose is to protect the serviceman by ensuring that he will not fall between two stools and be denied both damages and a pension.

36 My Lords, I turn to the two cases upon which Mr Gordon particularly relied. The first was *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249. The applicants, demolition contractors in Northern Ireland, complained that their tenders for contracts had been rejected because of the perceived religious opinions or political beliefs of their employees, contrary to the Fair Employment (Northern Ireland) Act 1976. They wanted to bring proceedings under the Act. But section 42 of the Act provided:

> "(1) This Act shall not apply to an act done for the purpose of safeguarding national security or of protecting public safety or public order.
>
> "(2) A certificate signed by or on behalf of the Secretary of State and certifying that an act specified in the certificate was done for a purpose mentioned in subsection (1) shall be conclusive evidence that it was done for that purpose."

37 The Secretary of State gave such a certificate in respect of the refusal of the applicants' tender. The Strasbourg court found that they had been denied access to a court. The total ban on the right to complain of discrimination was disproportionate.

38 Was the effect of section 42 substantive or procedural? For some purposes it might be regarded as substantive. "This Act shall not apply . . ." suggests that there is to be no substantive right. But if one looks at the purpose for which the distinction is being applied, namely to give effect to the policy of article 6, the Strasbourg court was in my respectful opinion right to regard section 42 as giving the Secretary of State power to say that for raison d'état the applicants should be denied the right to complain of discrimination. Section 42 is not to create an exception for cases in which Parliament thought that discrimination on political or religious grounds would be justified. It is to allow the Secretary of State to stop proceedings which would otherwise be justified in order to protect a different interest, namely state security. This is something on which the court rightly looks with suspicion and demands justification.

39 But the case is very different from the present, in which Parliament has said that the appellant should not be entitled to sue because, given the existence of the pension scheme, it is not in the public interest that he (or any other serviceman in a like position) should be able to sue. That does not involve any executive power to encroach upon the functions of the judicial branch of government. It is a general provision which goes to the substance of the right.

40 The other case relied upon was *Fogarty v United Kingdom* (2001) 34 EHRR 302, in which the state immunity accorded by section 16(1)(a) of the State Immunity Act 1978 in respect of proceedings concerning the employment of members of a mission was held to be a "procedural bar" which required to be justified. Mr Gordon says that the only reason given by the court (at pp 310–311, para 26) was that "an action against a state is not

A barred in limine: if the defendant state does not choose to claim immunity, the action will proceed to a hearing and judgment . . ." If that is the ground for the decision, the parallel with this case is exact; if the Secretary of State had not chosen to give his certificate, the action could have proceeded to judgment.

41 I do not accept that one can take in isolation the fact that, absent the assertion of state immunity, the action would have been able to proceed. B The 1978 Act conceded to the foreign state, in accordance with international law, that unless it voluntarily submitted to the jurisdiction of the courts of the United Kingdom, they would not adjudicate upon employment relations in its mission. It can be said that this in effect gave the foreign state an option to stop proceedings or submit to them. In that sense there is a resemblance to what the Secretary of State could do in *Tinnelly & Sons'* case 27 C EHRR 249. If, therefore, one equates the discretion of a foreign government to stop the proceedings with the executive discretion in *Tinnelly & Sons'* case, there is a parallel between the two cases. But the grounds upon which the discretion was conferred were in both cases different from the present. The reason for granting state immunity was not because Parliament thought that employees in missions merited different treatment from other people. It was to protect a different value, namely our international relations. In the D present case, the reason why the appellant cannot sue is because Parliament considered that servicemen should not be able to sue for injuries suffered in the specified circumstances.

42 My Lords, I am bound to say that I think that some of the difficulties which have been experienced by the Strasbourg court in applying article 6 to English tort cases have arisen from trying to use the distinction between E substantive rights and procedural bars or immunities without sufficient regard to the underlying purpose for which that distinction is being used. For example, in *Osman v United Kingdom* (1998) 29 EHRR 245 the court decided that the rule that no action lies against the police for alleged negligence in the conduct of a criminal inquiry was an "immunity" conferred upon the police which denied victims of police negligence access to a court. On the other hand, in *Z v United Kingdom* (2001) 34 EHRR 97, 138, F para 100, the court said that it had been misinformed about English law and that the police had no immunity; it was merely that as a matter of substantive law one could not sue them. The minority said, at p 155, that putting the matter in this way made no difference. The fact was that the law gave the police what they called a "blanket immunity".

43 It seems to me, if I may respectfully say so, that instead of arguing G over labels, it would be more helpful to go back to the fundamental principles deriving from *Golder* 1 EHRR 524. A rule that people should not be entitled to compensation out of public funds for loss suffered on account of a failure of the police to take reasonable care in conducting a criminal investigation poses no threat to the rule of law or the separation of powers. It may or may not be fair as between victims of negligent police investigations and victims of road accidents but that, as I said earlier, is not a H question of human rights. It gives the police or the executive no arbitrary powers; it is a rule of general application, based on the perception (which may be right or wrong) that the waste of resources in having lawyers and policemen investigate whether a previous investigation was conducted with reasonable care outweighs the potential unfairness to victims who cannot

claim damages. Nor does the rule grant the police immunity in the sense of preventing judicial examination of the legality of their conduct. There are appropriate civil remedies against the police for any form of unlawful conduct other than negligence in the conduct of investigations. And even in the case of negligence, there are investigatory and disciplinary measures which can be taken if the public interest so requires. The action in damages, as I said at the start of this speech, has many problems and it is by no means obvious that it needs to exist whenever loss has been caused by negligence. These are questions of policy to be developed by the courts, subject if necessary to correction by democratic decision in Parliament. They raise issues of, among other things, fairness, but not of human rights.

44 As I am of opinion that article 6 has no application, I do not find it necessary to deal with the argument about proportionality. I would only observe that although Mr Gordon's argument on the first point is that what requires section 10 to satisfy the test of proportionality is the existence of the certification procedure, he does not apply that test to the certification procedure. He does not ask whether that pursues a legitimate aim, which it plainly does, since its aim is to ensure that the serviceman will get his pension. Instead, he uses the certification procedure as a lever to prise open the question of whether the whole scheme is fair or not. I think it would reflect no credit on the law if the question of whether a court could examine the fairness of the scheme turned solely on the question of whether it required a procedural step to be taken by the Crown, irrespective of the relevance of that step to the fairness of the scheme.

LORD HOPE OF CRAIGHEAD

45 My Lords, the law relating to the liability of the Crown in tort for things done by members of the armed services has had a chequered history. The appellant, Alan Robert Matthews, claims to have sustained personal injury due to exposure to asbestos fibres and dust while he was serving as an electrical mechanic in the Royal Navy between 1955 and 1968. But he has the misfortune to have served during a period when the Crown enjoyed a complete immunity under section 10 of the Crown Proceedings Act 1947 from liability in tort for things done by members of the armed forces or the nature or condition of land, premises, ships, aircraft or vehicles used for their purposes.

46 Prior to the decision of your Lordships' House in *Adams v Naylor* [1946] AC 543 which disapproved of this practice, the rigour of the Crown's immunity at common law was eased by the fact that, acting through the Treasury Solicitor, departments often defended actions which were raised against individuals who were nominated as defendants and the Treasury, as a matter of grace, paid damages if the defendant was found liable. The Crown Proceedings Act 1947 was then enacted to permit the Crown to be sued in tort. But section 10 of that Act maintained the exclusion of liability in the case of members of the armed forces.

47 The law remained in that state until December 1986 when the Secretary of State for Defence announced that the government accepted that section 10 of the 1947 Act ought to be repealed. It was suspended with effect from 15 May 1987 by section 1 of the Crown Proceedings (Armed Forces) Act 1987. Section 2 of that Act provides that section 10 of the 1947 Act may be revived by the Secretary of State if it appears to him that it is necessary or

A expedient to do so by reason of any imminent national danger or for the purposes of warlike operations overseas. For the time being therefore the Crown has no immunity from liability in respect of injuries caused by acts or omissions on the part of members of the armed services or by the nature or condition of ships of the kind that the appellant was serving in when he claims to have been exposed to the asbestos dust and particles. But the B appellant's period of service pre-dated the 1987 Act, which is not retrospective.

48 As the Court of Appeal observed at the end of its judgment [2002] 1 WLR 2621, 2643, para 79, it does seem harsh that servicemen who are now discovering that they have sustained injury as a result of tortious conduct prior to 1987 should be treated so much less favourably than servicemen who have sustained injury in similar circumstances but as a C result of more recent events. But there is no doubt that this is the effect of the regime which has been created by the statutes unless, as the appellant now claims, section 10 of the 1947 Act is incompatible with his right to a fair trial under article 6(1) of the European Convention.

The Convention issue

D **49** The question which lies at the heart of this appeal is one of statutory construction. But the context is provided by the jurisprudence of the European Court of Human Rights. It has described the principles which must be applied. Article 6(1) provides that in the determination of his civil rights everyone is entitled to a fair hearing by an independent and impartial tribunal established by law. The court has held that this provision must be read in the light of the rule of law referred to in the preamble to the E Convention, of which the principle whereby a civil claim must be capable of being submitted to a judge is an integral part: *Golder v United Kingdom* (1975) 1 EHRR 524, 535–536, para 35. In other words, article 6(1) guarantees to each individual a right of access to a court for the determination of his civil rights.

50 As the court explained in *Golder*, and the Commission emphasised F in *Ashingdane v United Kingdom* (1983) 6 EHRR 69, 74, para 93 and *Pinder v United Kingdom* (1984) 7 EHRR 464, there would be no protection against the danger of arbitrary power if a state party were to be permitted to remove the jurisdiction of the courts to determine certain classes of civil claim or to confer immunities from liability on certain groups in respect of their actions. In *Ashingdane v United Kingdom* (1985) 7 EHRR 528, 546–547, para 57 the court said that the limitations applied by the state G must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

51 But in order to invoke this principle one must first be able to say that the individual has a claim for the infringement of a civil right. The European Court of Human Rights has made it clear that this is a matter for the domestic law. Article 6(1) does not have anything to say about the content H of the individual's civil rights, nor does it impose an obligation on the state party to confer any particular rights in substantive law on the individual: *James v United Kingdom* (1986) 8 EHRR 123, 157–158, para 81; *Z v United Kingdom* (2001) 34 EHRR 97, 134–135, 137, 138, paras 87, 98 and 100–101. As it was put in *James v United Kingdom* 8 EHRR 123, 157, para 81, article 6(1) extends only to "contestations" over civil rights and

obligations which can be said, at least on arguable grounds, to be recognised in domestic law. Where limitations on a person's right of action are in issue, therefore, there is a dividing line which must be identified between those which are the product of rules of procedure and those which are the product of substantive law.

52 As the European Court itself has recognised, it is not always an easy matter to trace the dividing line between procedural and substantive limitations of a given entitlement under domestic law: *Fayed v United Kingdom* (1994) 18 EHRR 393, 430, para 67. It is of course in the nature of exercises of this kind that cases which lie at either extreme are easy to place into the appropriate category. In *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355 section 76(1) of the Civil Aviation Act 1982 was held to exclude liability for trespass or nuisance as a matter of substantive law, with the result that the applicants had no substantive civil right to relief for which they could claim protection under article 6(1): see p 366, para 36. In *Z v United Kingdom* 34 EHRR 97 it was held that the decision of the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 did not remove the arguability of the claims retrospectively but that it was concerned instead with a novel category or area of negligence into which the law was not to be extended: see 34 EHRR 97, 136–137, para 96. On the other side of the line are *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249, in which the Secretary of State's certificate was held not to define the scope of the substantive right to protection against unlawful discrimination but to provide him with a defence to the complaint: see p 285, para 62; and *Fogarty v United Kingdom* (2001) 34 EHRR 302 where the grant of state immunity in answer to the applicant's victimisation claim was held to be a procedural bar to a claim for damages for a cause of action well known to English law: see pp 310–311, para 26.

53 The detailed reasoning of the European Court in these cases does not provide us with much by way of guidance as to how the dividing line between these two concepts is to be identified. It is not possible to find a clear ratio in these decisions which will lead to the right result in every case. So it is better to have regard instead to the underlying principles. On this matter I have reached the same conclusion as my noble and learned friend Lord Hoffmann. One can at least say that there is a plain and obvious difference in principle between a procedural bar which impairs or restricts the enjoyment or enforcement of a right on the one hand and a substantive bar which prevents an alleged right from ever coming into existence at all. What article 6(1) seeks to do is to protect the individual against anything which restricts or impairs his access to the courts for the determination of a civil right whose existence is at least arguable. But the precise scope and content of the individual's civil rights is a matter for each state party to determine. These are the broad Convention principles. They are likely to provide the best guide as to the side of the line on which any given case lies.

The 1947 Act

54 There is no doubt that the Crown Proceedings Act 1947 was designed to make new law. Until the coming into force of that Act the Crown had been protected from liability by two rules which were deeply rooted in English law. These were the rule of substantive law that the King could do no wrong, and the procedural rule that the King could not be sued

in his own courts. The product of these rules was not only that the Crown could not be sued in respect of wrongs which it had expressly authorised but that it was also immune from liability in respect of wrongs committed by Crown servants in the course of their employment.

55 Increasing concern was expressed in the early years of the last century about this anomaly. In the Scottish case of *Macgregor v Lord Advocate* 1921 SC 847, for example, a claim for damages by a member of the public who had been knocked down by a motor car driven by a driver in the Royal Army Service Corps in the course of his duty was dismissed as incompetent on the ground that an action of damages did not lie against the Crown in respect of a wrongful act committed by one of its servants. It was accepted, despite the meagre state of the Scottish authorities on this issue, that the English rule which had already been applied in two previous cases in the Court of Session should be accepted as part of Scots law. The position in these matters had to be the same on both sides of the border. But Lord Salvesen expressed his unease about this result, at pp 852–853:

> "If this question were open, the argument for the reclaimer would be almost irresistible. No reason has been suggested why a department of state should not be answerable, like a municipal corporation or any ordinary employer, for the proper conduct of its business. The present state of the law, as it has been settled in England, does not appear to me to be satisfactory, because it leaves it in the option of a department to accept liability where it pleases, and to repudiate liability where pressure is not brought upon it, possibly from political sources, to accept liability. I do not think it is desirable, from the point of view of public policy, that a department should be in that position, and it may well be that the present state of matters ought to be the subject of legislative amendment."

56 In 1927 a Committee presided over by Lord Hewart, initially as Attorney General and later as Lord Chief Justice, proposed that the law relating to the privileges of the Crown in litigation and its immunity from liability in tort should be reformed: Crown Proceedings Committee: Report (Cmd 2842). But this proposal was opposed by some government departments, including in particular the Post Office and the departments which were responsible for the armed services and it was not proceeded with: for a detailed account, see Joseph M Jacob, "The Debates behind an Act: Crown Proceedings Reform, 1920–1947" [1992] PL 452. The decision in *Adams v Naylor* [1946] AC 543, where the court refused to entertain a claim against a nominated army officer arising from injuries which children had sustained in a derelict minefield, gave rise to further debate on this issue. It was not long before the legislation with which your Lordships are concerned in this case was introduced. Its progress through Parliament has been described by my noble and learned friend Lord Bingham of Cornhill. I am in full agreement with him about the conclusions which are to be drawn from this history.

57 Part I of the Crown Proceedings Act 1947 is headed "Substantive Law". Part II deals with jurisdiction and procedure. Section 2, which appears in Part I of the Act, deals with the liability of the Crown in tort. The principle which was adopted in the framing of this section was that the Crown should be under the same liability in tort as if it were a private person of full age and capacity. Three areas of the common law were affected by

this reform. They were torts committed by servants or agents of the Crown, duties of care owed to servants or agents by the Crown as their employer and obligations arising from the ownership, possession or control of property: see section 2(1). The same principle was applied to cases where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers: section 2(2). The generality of these provisions is qualified in various ways by the following subsections. There then follow a number of other sections which are designed to define further the extent of the Crown's liability.

58 Careful attention must of course be paid to the details in order to understand the scope which was given to this new liability. It is not necessary for the purposes of this case to explore every aspect, and many of the original provisions have been removed from the 1947 Act by later legislation. Those in respect of Crown ships, Crown docks and harbours, salvage claims against the Crown and Crown rights to salvage, for example, were all repealed by the Merchant Shipping Act 1995. But the nature of the reform cannot be fully understood without observing what Parliament was enacting in Part I of the 1947 Act. As the long title of the Act indicates, this was a complete package of law relating to the civil liabilities and rights of the Crown. The area in which it was operating is one which is regarded by the European Court for the purposes of article 6(1) as the exclusive responsibility of domestic law.

59 The main exceptions that ought to be noted, as well as that relating to the armed forces, are those relating to the discharge of judicial functions and to the Post Office. Section 2(5) provides that no proceedings shall lie against the Crown in respect of the acts or omissions of any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him or which he has in connection with the execution of judicial process. Here one finds an undoubted immunity which has the effect of excluding all actions falling within its scope from the jurisdiction of the courts. But it would be wrong to regard this provision as "removing" a class of claim from the court's jurisdiction or as "creating" an immunity from a liability which had previously been recognised. Mr Gordon for the appellant quite rightly accepted that this provision was an integral part of the overall package of substantive law, and that it fell clearly on that side of the dividing line. So too in the case of the immunity given to the Post Office by section 9, which it continued to enjoy until it was repealed by the Post Office Act 1969 when the Post Office ceased to be a government department and became an independent corporation: see now the Postal Services Act 2000, sections 90 and 91. The effect of this provision was that neither the Crown or an officer of the Crown could be held liable for any act or omission in relation to an unregistered postal packet. There is no doubt that this exception also was a matter of substantive law, not procedure.

Section 10

60 Section 10 of the 1947 Act too is to be found in Part I of the Act. Its effect is to prevent members of the armed forces from suing the Crown or other members of the armed forces for damages in tort for death or personal injury. At first sight the immunity which it gives to the Crown in respect of members of the armed forces falls into precisely the same pattern as the immunities which were given to those discharging duties of a judicial nature

and to the Post Office. It appears to form part of the overall package of substantive law. But the section requires more careful study in view of the conditions mentioned in subsections (1)(b) and (2)(b), the fulfilment of which depends upon the issuing by a minister of a certificate. It is that aspect of the section which is said by the appellant to distinguish it from the other exceptions which are accepted as being part of the substantive law and to impress this immunity instead with a procedural character.

61 Section 10 contains three subsections. Subsection (1) deals with the liability of the Crown and members of its armed forces in respect of torts committed by them while on duty causing death or personal injury to another person while he is a member of the armed forces of the Crown. Subsection (2) deals with the liability of the Crown for death or injury due to anything suffered by a member of the armed forces of the Crown in consequence of the nature or condition of property, including ships, aircraft and vehicles, used for the purposes of the armed forces. Subsection (3) enables the Crown to deal with certain evidential matters by means of a certificate of a Secretary of State which is to be conclusive evidence of the fact which it certifies: see also provisions to the same effect in sections 11(2) and 40(3).

62 The appellant's complaint is that he was required to work on board ship in boiler rooms where boilers and pipes had been lagged with asbestos from which asbestos fibres and dust were dissipated into the air. So it appears that subsections (1) and (2) are both in issue in his case. They both have the same basic structure. They both begin with a declaration of immunity in respect of death or personal injury suffered by a member of the armed forces of the Crown. These provisions are then qualified by two conditions, each of which must be fulfilled if that immunity is to apply. The first condition in each subsection relates to the state of the facts at the time of suffering the thing causing the death or personal injury. Subsection (1)(a) makes it a condition of the immunity that the person killed or injured was on duty as a member of the armed forces at the time or was on property for the time being used for the purposes of the Crown. Subsection (2)(a) makes it a condition of the immunity that the property, equipment or supplies in consequence of whose nature or condition the thing causing death or personal injury was suffered was for the time being used for the purposes of the armed forces. Mr Gordon accepts that, had it not been for the further condition about the Secretary of State's certificate, it would have been plain that these provisions formed part of the substantive law relating to the scope or extent of the immunity.

63 The argument that section 10 is incompatible with article 6(1) depends therefore entirely on the presence in this section of the conditions set out in subsections (1)(b) and (2)(b). Subsection (1)(b), as amended, is satisfied, in the case of the death or injury of a member of the armed forces due to a thing suffered by him while on duty as such or while on property for the time being used for the purposes of the armed forces, if:

> "the Secretary of State certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant, Order in Council or Order of His Majesty relating to the disablement or death of members of the force of which he is a member."

Subsection (2)(b) follows the same pattern. It is satisfied if "the Secretary of State certifies as mentioned in the preceding subsection". A

The section 10(1)(b) certificate

64 The background to the wording of this provision lies in the fact that it had been the practice for many years for pensions and other grants to be paid to disabled members of the armed forces and their widows, children and other dependants under a series of Royal Warrants, Orders in Council and Orders of His Majesty. Provision was made by Royal Warrant to enable this to be done in respect of service during the period from 4 August 1914 to 30 September 1921. The system which was current at the time of the enactment of the 1947 Act in regard to death or disablement in consequence of service during the 1939 World War was that described in the Royal Warrant of 12 April 1946 (Cmd 6799) as amended by the Royal Warrant of 8 May 1947 (Cmd 7124). B C

65 It was a basic condition of an award under these warrants that the disablement or death of a member of the military forces was due to war service: see article 3 of the Royal Warrant of 1946. Entitlement to an award depended on certification that the disablement was due to a wound, injury or disease attributable to or aggravated by war service or that the death was due to or was hastened by such a wound, injury or disease. Where a disablement was claimed or death took place not later than seven years after the end of war service there was no onus of the claimant to prove that the conditions for entitlement were fulfilled: article 4. In cases falling outside the seven year period entitlement had to be proved by reliable evidence: article 4A. Similar provisions are to be found in the current Order in Council, which is the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 1983 (SI 1983/883), articles 3, 4 and 5. The benefit of the scheme is now available in any case where death or disability is due to service as a member of the armed forces at any time after 2 September 1939. D E

66 Claims for a war pension under the scheme are made in the first instance to the minister. If the claim is rejected by the minister on certain grounds, including the ground that the disablement or death was not attributable to war service, an appeal may be made to a pensions appeal tribunal on the issue whether the claim was rightly rejected on that ground: Pensions Appeal Tribunals Act 1943, section 1. When the 1947 Act was enacted the relevant minister was the Minister of Pensions. Subsections (1)(b) and (2)(b) of section 10, as originally enacted, provided that the certificates to which they refer were to be given by him. But as a result of a series of subsequent amendments references to the Secretary of State were later substituted. The war pensions functions are now vested in the Secretary of State: the Transfer of Functions (War Pensions etc) Order 2001 (SI 2001/3506), article 2. F G

67 The important point to notice, for a proper understanding of the function of section 10(1)(b) and (2)(b), is that Secretary of State who is required under these provisions to certify that the thing that caused the disablement or death has been or will be treated as attributable to service for the purposes of entitlement to an award under the war pensions scheme and the minister who is responsible for administering the scheme are one and the same. The effect of the Secretary of State's certificate is to provide the H

A claimant with a guarantee that the condition of entitlement under the scheme for which he himself is responsible has been or will be treated as satisfied.

68 The fact that the Secretary of State has issued a certificate under section 10(1)(b) is no guarantee that the person in respect of whose case it is issued will be awarded a pension: *Adams v War Office* [1955] 1 WLR 1116. It does not bind the minister by whom the scheme is administered to pay a pension to the claimant under the scheme. This is because a pension can be awarded only if all the relevant conditions are satisfied. As Sir John Donaldson MR said in *Bell v Secretary of State for Defence* [1986] QB 322, 328, the Secretary of State's certificate is not required to state that an award will be paid under the Order in Council. All it has to state is that the basic condition for an award is satisfied. That this is so is demonstrated by the facts in the present case. The Secretary of State issued a certificate under section 10(1)(b) on 11 March 2002 that the appellant's suffering of exposure to asbestos "will be treated as attributable to service" for the purposes of entitlement to an award under the scheme. But the appellant accepts that his medical condition is unlikely to be considered to be sufficient disablement under the current scheme to entitle him to a pension as the pleural plaques which he has developed are relatively symptomless.

69 The certificate is not however without some value to the claimant. In *Bell v Secretary of State for Defence* [1986] QB 322 the father of a serviceman sought damages for the death of his son. The defendant then issued a certificate that the son's death would be treated as attributable to service for the purposes of entitlement to a pension under the pension scheme. The certificate was held to be a valid certificate notwithstanding the fact that there was no person who was immediately entitled to a pension. Balcombe LJ said, at p 333:

> "At the time when the certificate was issued, neither of Trooper Bell's parents satisfied the personal requirements under article 40(1) so as to be eligible for an award, but this does not mean that one or other (or both) may not in due course become eligible, and under article 4(1) no time limit is prescribed for the making of a claim in respect of death provided that—as has happened here—it is certified that Trooper Bell's death was attributable to service.
>
> "Thus it can be seen that the certificate of the Secretary of State can fulfil a most useful purpose: it can establish, before memories have faded, that one of the pre-conditions for an award, viz that the death was attributable to service, is satisfied, even though there is no person presently eligible to claim an award."

Discussion

70 The question is whether the effect of section 10(1)(b) and (2)(b) is to impose a procedural bar on the appellant's right to claim damages under section 2 of the 1947 Act, or whether it qualifies the section 2 right from the outset as a matter of substantive law.

71 I do not think that this question should be answered by examining these provisions in isolation, without regard to the overall context in which they were enacted. In isolation section 10(1)(b) and (2)(b) might be thought to leave it to the option of the Secretary of State to accept or to repudiate

liability as he pleases—the very thing to which Lord Salvesen took exception in *Macgregor v Lord Advocate* 1921 SC 847, 852–853. If that were so, there would be much to be said for the view that these provisions were procedural in character because they enabled the Secretary of State to remove a claim which was otherwise actionable in law from the jurisdiction of the courts. Viewed in the overall context however these provisions can be seen to have an entirely different function which impresses them firmly with the character of substantive law.

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

73 As for section 10 itself, an examination of its provisions shows that, if the state of the facts is such as to satisfy condition (a) in each of the two relevant subsections, it must follow that the suffering of the thing in question is attributable to service for the purposes of entitlement to an award under the pension scheme. Condition (b) adds nothing to the factual circumstances giving rise to the immunity. The function of the certificate to which condition (b) refers is to bridge the gap which might otherwise emerge between the tort claim and the pension scheme. It proceeds on the assumption that if a claim is made under section 2 of the Act the Secretary of State will have to form a view, on the facts, as to whether or not the case is covered by the immunity. The Secretary of State is told that he cannot have it both ways. He is not allowed to assert the immunity without making a statement in the form of a certificate in the terms which the condition lays down. This has the effect of preventing him, as the minister responsible for the administration of the war pension scheme, from contesting the issue whether the suffering of the thing was attributable to service for the purposes of entitlement to an award under that scheme. This is a matter of substantive law. It is an essential part of the overall scheme for the reform of the law which the 1947 Act laid down. It does not take anything away from the claimant which he had before. On the contrary, it has been inserted into the scheme of the Act for his benefit.

Conclusion

74 For these reasons, and for the reasons given by my noble and learned friend Lord Walker of Gestingthorpe whose speech I have had the advantage of reading in draft and with which I am in full agreement, I would hold that section 10 of the 1947 Act creates a substantive limitation on the right to sue the Crown in tort under section 2 which, had section 10 not been enacted, would otherwise be available. The condition about the Secretary of State's certificate forms part of the substantive law. It is not a procedural limitation, so it is not incompatible with article 6(1) of the Convention. I would dismiss the appeal.

A **LORD MILLETT**

75 My Lords, in March 2001 Mr Matthews brought proceedings against the Ministry of Defence for damages for negligence. He alleged that he had suffered personal injury as a result of exposure to asbestos fibres and dust while acting in the course of his duties during his service in the Royal Navy between 1955 and 1968. In due course the Secretary of State issued a
B certificate under section 10(1)(b) of the Crown Proceedings Act 1947 certifying that, in so far as Mr Matthews's injuries were due to anything suffered by him as a result of exposure to asbestos during his service in the Royal Navy, it would be treated as attributable to service for the purposes of an award of a service pension. The effect of the certificate was to deprive Mr Matthews of his claim to damages, and accordingly the Court of Appeal, reversing the decision of the trial judge and upholding the validity of the
C certificate, dismissed the action.

76 The question for your Lordships is whether section 10 of the 1947 Act is compatible with article 6(1) of the European Convention of Human Rights. Mr Matthews says that it is not, because it has the effect of depriving a serviceman, by the fiat of the executive, of his Convention right to have his civil claim determined by an independent and impartial tribunal.

D 77 Article 6(1) protects the individual's access to the courts for the determination of his civil rights; it does not affect the democratic power of the state to determine the scope of those rights. It is a constantly repeated principle of the case law of the Strasbourg court that article 6(1) applies only to the determination of "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under national law; it does not itself guarantee any particular content for such rights and obligations in the
E substantive law of a contracting state: see for example *Z v United Kingdom* (2001) 34 EHRR 97, 134–135, 137, paras 87, 98.

78 Whether a person has an actionable claim may, however, depend not only on the existence and content of the civil right in national law, but also on the existence of exclusionary rules or procedural bars which prevent or restrict his right to have his claim judicially determined. In *Fogarty v United*
F *Kingdom* (2001) 34 EHRR 302, 310, para 25 the Strasbourg court observed:

> "Certainly the Convention enforcement bodies may not create by way of interpretation of article 6(1) a substantive civil right which has no legal basis in the state concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying article 6(1)—namely that civil claims must be capable of being submitted to a judge for adjudication—if, for example, a state could, without
G restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons."

79 The distinction between limits to the substantive content of the law and procedural bars to a judicial remedy is not an easy one to draw. It cannot be made to depend upon the drafting technique employed in the
H domestic legislation of the state concerned without opening the door to evasion of the Convention rights. Nor can the problem be resolved by invoking the word "immunity", for the question is whether the national law creates immunity from liability or merely immunity from suit. It is best to avoid a formalistic approach and inquire whether the rule which bars the

claim is of general application and is independent of the facts which found the claim. Often the answer can be found by tracing the history of the domestic rule and examining the underlying policy to which it gives effect. It is, perhaps illogically, easier to treat restrictions on a newly created legal right as limitations of substantive law than to accord the same treatment to the withdrawal of existing legal rights. On the other hand the European Commission has had no problem with the substitution of a no-fault pension entitlement for a fault-based right to compensation for tort: see *Pinder v United Kingdom* (1984) 7 EHRR 464.

80 In the present case the solution can be found by examining the history of the Crown's liability in tort in English law and the function of the Secretary of State's certificate.

81 Before 1947 the scope of the English law of torts was significantly narrower than it is today. It was a long established principle of our constitutional law that the King could do no wrong. It followed that the Crown was not liable in tort. Even where the defendant was a private employer, the doctrine of common employment, which was a feature of our employment law, meant that an employee had no cause of action for injury sustained as a result of the negligence of a fellow employee of the same employer. Both principles seem archaic today. But neither was procedural in character. There was simply no legal liability in either case.

82 At the end of the First World War, therefore, the serviceman who suffered injury due to the fault of the Crown or of a servant of the Crown had no right to damages, but in this respect he was in no worse position than anyone else who suffered injury as a result of the negligence of the Crown or of a fellow employee of the same employer. Since 1919 the harshness of these rules has been progressively alleviated by piecemeal legislation.

83 The first step was to grant industrial injury benefit to civilian employees who were injured by the negligence of their fellow employees and war pensions to servicemen who were injured while on war service. Proof of fault was not required. Service pensions were later made available for disability attributable to military service whether or not it was war service. At the end of the Second World War, however, it was still the case that no action in tort lay against the Crown or for the negligence of a fellow employee; the law recognised no legal liability.

84 These were substantive rules of law. They were rules of general application and marked the limits of tortious liability in English law. The Committee on Ministers' Powers, which reported in 1932 (Cmd 4060), described, at p 112, three defects in the subject's remedies against the government. The first two were procedural. They were:

> "(a) That owing to the peculiar procedure in cases in which the Crown is litigant the subject is to some extent placed at a disadvantage"—he could not, for example, obtain discovery against the Crown and—"(b) That there is no effective remedy against the Crown in the county court."

But the third was unmistakably expressed in terms of substantive law: "(c) That the Crown is not liable to be sued in tort."

85 The 1947 Act introduced a radical change in the law. It was the subject of a monograph by Professor Glanville Williams in 1948, *Crown Proceedings: An Account of Civil Proceedings by and against the Crown as*

affected by the Crown Proceedings Act 1947. He wrote, at p 1: "The Crown Proceedings Act does not effect any considerable change in the liability of the Crown in contract; the principal change is one of procedure rather than of substantive rights." In relation to tort, however, and by way of justification for his discussion of the pre-Act law, which he was anxious should not be considered as antiquarianism, he wrote, at p 16: "The Crown Proceedings Act effects a radical change in the Crown's liability in tort, but it does not altogether dispense with a knowledge of the older principles."

86 Since the Crown was beyond the reach of the English law of tort, a change in the substantive law was necessary to render the Crown liable. This was effected by section 2(1) of the Act, which provided:

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

87 For the first time in our history, the Crown was now liable in tort. But its liability was not unlimited. The proviso to section 2(1) preserved the common employment doctrine, though this limitation was short-lived, for the doctrine was abolished by the Law Reform (Personal Injuries) Act 1948. More significantly for present purposes section 2(1) was expressed to be "Subject to the provisions of this Act". This looked forward to sections 9 (postal packets) and 10 (the armed forces). These constituted exceptions to the Crown's new found tortious liability and thus, so far as they extended, operated to preserve the pre-existing law.

88 The opening words of section 10(1) were: "Nothing done or omitted to be done by a member of the armed forces of the Crown while on duty as such shall subject either him or the Crown to liability in tort . . ." This was the language of substantive law; it prevented any liability from arising in the circumstances mentioned. Section 10(2) was differently expressed, but was to the same effect: "No proceedings in tort shall lie against the Crown for death or personal injury due to anything suffered by a member of the armed forces of the Crown . . ." in the circumstances prescribed.

89 Neither subsection applied unless the Secretary of State certified that the claimant's suffering the thing which is alleged to have caused the death or personal injury "has been or will be treated as attributable to service for the purpose of entitlement" to a war pension.

90 This brings me to the function served by the certificate. As Glanville Williams explained, at pp 81–82, the underlying principle was that the Crown should continue to be immune from liability in tort to members of the armed forces who were injured or killed while on duty or while in any land, premises, ship, aircraft or vehicle used for forces purposes, in such circumstances that they qualified for a war pension.

91 Glanville Williams was opposed to the Crown's continued immunity from civil liability, but in *Pinder v United Kingdom* 7 EHRR 464, 466, para 8 the European Commission recognised that it was

> "legitimate for state authorities to consider that servicemen are, as a group, exposed to risks of death and injury by the very nature of their work and training and to be more at risk than other professional groups in society. Moreover the close relationship that exists between members of the armed forces, often taking the form of a special dependence and solidarity between the ranks, may operate in particular situations to reduce the choice of action or behaviour open to them. This element distinguishes them from civilians and represents a factor which can be legitimately taken into account by the state in regulating civil liability with respect to the armed forces."

92 As the concluding words of that passage show, the Commission did not regard section 10 as a procedural bar, but as a rule which regulated civil liability, a matter of substantive law. It also observed, at p 466, para 9, that the substitution of a no-fault pension scheme for tortious liability was by no means unfavourable to the serviceman:

> "The creation of a pension entitlement to provide certain coverage of the needs of injured servicemen without inquiry as to fault, in recognition of these professional risks, cannot be regarded as either arbitrary or unreasonable . . . such a system is common to many states parties to the Convention not only in respect of the armed forces but also in the field of workmen's compensation. Its principal advantage to the injured serviceman within the scheme is that he is relieved of the frequently difficult burden of establishing negligence and made the beneficiary of a pension right linked to the extent of disablement. The traditional action in negligence is frequently characterised as time-consuming, costly and uncertain. The pension scheme, on the other hand, provides immediate payment which can be adjusted to take account of inflation and changes in the degree of disablement."

93 Of course there is a trade off between the advantages and disadvantages of a statutory pension scheme, particularly if the entitlement is not particularly generous. Those who believed that they would have no difficulty in establishing negligence might well prefer to dispense with the pension and have a right to damages in tort instead; others would take the opposite view. Glanville Williams believed that they should have both. But this was a matter for Parliament; and Parliament decided otherwise.

94 A serviceman was not to be entitled to both a pension and damages in tort. He was to be entitled to a pension if he satisfied the statutory criteria. These did not include proof of fault but did include a requirement that his injury was due to something suffered by him which was attributable to service in the armed forces of the Crown. If its attribution was disputed, the issue was to be determined by a tribunal. The serviceman was given the benefit of a presumption in his favour; the burden was on the Crown to show that the subject matter of the serviceman's complaint was not attributable to service.

95 If the serviceman brought proceedings against the Crown for damages, the question at once arose whether his injury was sustained in

A circumstances which qualified him for a pension, for if it was the Crown was not liable in damages. Sometimes the Secretary of State had already conceded, or the tribunal had already found, that whatever the serviceman claimed to be the cause of his injury was attributable to service in the armed forces of the Crown. If so he would grant a certificate to that effect and the action would be struck out on the ground that it disclosed no cause of action.

B **96** In such circumstances the Secretary of State had no discretion whether to grant or withhold a certificate. He was called on to certify an existing state of facts which prevented the proceedings from having any chance of success. It was his duty as a public servant to ascertain the facts and certify or not accordingly.

97 The position was much the same where the question was still an open one. The Secretary of State had to decide whether he was content to C treat whatever the serviceman claimed to be cause of his injury as attributable to service. If the serviceman made a claim to a pension, the Secretary of State had to make up his mind whether to accept the burden of challenging the attribution to service or concede it. He had to make the same decision if the serviceman chose instead to bring proceedings for damages. It was his duty to ascertain the facts and decide, on departmental advice, whether he could properly dispute the attribution to service. If not, D he was bound to certify the fact. He had no discretion to withhold a certificate unless, of course, the circumstances made it unnecessary to issue one.

98 If the Secretary of State issued a certificate, he concluded the question of attribution against himself before the tribunal. The civil proceedings brought by the serviceman also became unsustainable; but this E was the result of the facts certified, not of the exercise of any discretion on the part of the Secretary of State. The certificate did not deprive the serviceman of a pre-existing legal right. He had none, save in the narrow sense that he could issue a writ and formulate a claim; but the claim would be sustainable only by suppressing a relevant fact. If the cause of his injuries was something suffered by him which was attributable to service in the armed forces of the Crown, the Secretary of State was duty bound to certify F the fact. In those circumstances, as any competent lawyer would have to advise, the Crown was not liable.

99 The function of the certificate was the same in both cases. It avoided the waste of time and money involved in pursuing civil proceedings against the Crown where the Crown was not liable; and it protected the serviceman from the risk that the Secretary of State might adopt one stance to defeat his G claim to damages and another to defeat his claim to a pension. Once the function of the certificate is understood, it is plain that it did not operate as a procedural bar to prevent the serviceman from having his civil right judicially determined. The Secretary of State merely certified that he would treat whatever the serviceman claimed was the cause of his injury as attributable to service for the purpose of a pension, and the Act provided that, if he did so, the Crown was to retain its immunity from civil liability. H

100 Section 10 of the Act has since been repealed by the Crown Proceedings (Armed Forces) Act 1987, but for understandable and legitimate reasons the relevant provisions are not retrospective. The civil liability of the Crown in tort has thus been progressively enlarged, but not to such an extent that Mr Matthews has a civil right to damages.

101 This is sufficient to decide the case without reference to other case law of the Strasbourg court. I do, however, wish to refer briefly to the decision of the court in *Fogarty v United Kingdom* 34 EHRR 302, because the judge saw no relevant distinction between that case and the present.

102 The case concerned proceedings brought by a private individual against the United States. The plaintiff was advised that the United States was entitled to state immunity, and that once it was properly asserted there was no means by which the courts of the United Kingdom could accept jurisdiction to entertain her claim. The United States declined to waive its immunity. The Strasbourg court held that the immunity of the United States was a procedural bar, largely it seems because the plaintiff was entitled to issue a writ, and the proceedings could only be struck out if the United States subsequently confirmed, as it did, that it did not consent to the jurisdiction. Accordingly article 6(1) applied; but it was not infringed because the limitation on the plaintiff's access to the court was in accordance with customary international law and accordingly had a legitimate aim

103 I do not, with respect, find that reasoning convincing. It was obviously necessary for the Strasbourg court to satisfy itself that the immunity accorded to the United States was in conformity with international law; contracting states cannot be permitted to circumvent the requirements of article 6(1) by adopting idiosyncratic rules of state immunity. But once the court accepted that the immunity claimed by the United States was in conformity with generally accepted norms of international law, I consider that the better course would have been to hold that the case fell outside article 6(1) altogether.

104 This was the approach adopted by the House in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573. In that case I explained that article 6(1) requires contracting states to maintain fair and public judicial processes and forbids them to deny individuals access for the determination of their civil rights. It presupposes that the contracting states have the powers of adjudication necessary to determine the issues in dispute. But it does not confer on contracting states adjudicative powers which they do not possess. State immunity is a creature of customary international law; its existence was confirmed by the European Convention on State Immunity (1972) (Cmnd 5081). It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself. It derives from the equality of sovereign states, and from the fact that the adjudication of disputes is an exercise of sovereign power: par in parem non habet imperium.

105 The immunity in that case belonged to the United States, which had not waived it. The United States is not a party to the European Convention on Human Rights, which derives its binding force from the consent of the contracting states. The United Kingdom could not, by its own act of acceding to the European Convention, obtain a power of adjudication over the United States without its consent which international law denies it.

106 Although that case was cited to the Strasbourg court in *Fogarty,* and the United Kingdom presented an argument on these lines, there is no reference to it in the judgment of the Strasbourg court. It contented itself by rejecting the contention that state immunity is a rule of substantive law and not a procedural bar or exclusionary rule. For my part I do not think that

this distinction is helpful or even relevant when what falls to be decided is a prior question: whether the individual's inability to pursue his claim in the national courts derives from an absence of sovereign adjudicative power in the state itself.

107 For these reasons, and also for the reasons given by each of your Lordships, which I have had the advantage of reading in draft and with which I agree, I would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE

The facts

108 My Lords, the claimant, Mr Alan Matthews, was born in 1938. He served in the Royal Navy between 1955 and 1968. By the end of his service he held the rank of Leading Ordnance Electrical Mechanic. He served aboard several warships and his duties required him to carry out electrical maintenance and repairs throughout the ships, including their boiler rooms. He claims that in carrying out this work (both at sea and during refits in dock) he often came into contact with asbestos lagging of boilers and pipes, and he was exposed to asbestos fibres and dust in the air. He claims that he has, as a result of his exposure to asbestos, developed pleural plaques and bilateral diffuse pleural fibrosis. These conditions are troublesome but not in themselves life-threatening. They probably do not at present entitle Mr Matthews to a disability pension. Mr Matthews is apprehensive that he may in the future develop some much more serious condition. Although the armed forces of the Crown were involved, at different times between 1955 and 1968, in various conflicts and counter-insurgency operations, neither side has suggested that Mr Matthews's disabilities are in any way attributable to warlike operations.

109 Mr Matthews commenced proceedings against the Ministry of Defence on 22 March 2001. In his claim form he claimed damages not exceeding £50,000, but indicated that the claim should be dealt with in the High Court because it raised human rights issues. In its defence the Ministry of Defence stated that it had had only three days' notice of the claim, which related to matters going back more than 40 years, and had not yet been investigated. The defence contended that there were no reasonable grounds for bringing the claim and referred specifically to section 10 of the Crown Proceedings Act 1947 and the Ministry's intention to apply for a certificate from the Secretary of State.

110 On 11 March 2002 the Parliamentary Under-Secretary of State at the Ministry of Defence, on behalf of the Secretary of State, signed a certificate in the following form:

> "In so far as the personal injury of former Leading Ordnance Electrical Mechanic Alan Robert Matthews (service number D/M947091) is due to anything suffered by him as a result of exposure to asbestos during his service in the Royal Navy between 29 March 1955 to 15 March 1968, I hereby certify that his suffering that thing will be treated as attributable to service for the purposes of entitlement to an award under the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 1983 relating to the disablement or death of members of the service of which he was a member."

111 The certificate was given after some preliminary issues had been heard and decided by Keith J. The most important issue was whether section 10 of the 1947 Act prima facie infringed Mr Matthews's rights under article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). On 22 January 2002 Keith J held that article 6(1) was infringed. On 29 May 2002, the Court of Appeal (Lord Phillips of Worth Matravers MR, Mummery and Hale LJJ) [2002] 1 WLR 2621 allowed the Ministry's appeal from Keith J, with the result that Mr Matthews's action was dismissed. Mr Matthews appeals to your Lordships' House, with the permission of the Court of Appeal, on a single issue which was one of several issues before the courts below.

The 1947 Act and the 1987 Act

112 In order to explain the way in which the issue has arisen it is necessary to summarise the historical background to the 1947 Act, the relevant provisions of the 1947 Act, and the effect of the Crown Proceedings (Armed Forces) Act 1987. Before the coming into force of the 1947 Act it was not possible to sue the Crown in tort, nor could a senior official or officer be sued for wrongs committed by his subordinates. The actual wrongdoer (if identifiable) could be sued, and if an individual Crown servant was sued the Crown would in practice satisfy any judgment awarded against him. Indeed if the wrongdoer could not be identified the Treasury Solicitor would supply the name of a nominal defendant to be sued. But your Lordships' House disapproved of that practice in *Adams v Naylor* [1946] AC 543, and it was discontinued with the enactment of the 1947 Act (which Lord Simonds referred to in *Adams v Naylor,* at p 553, as long overdue). My noble and learned friend Lord Bingham of Cornhill, whose speech I have had the advantage of reading in draft, has given a full and illuminating account of the legislative history of the 1947 Act.

113 From 1919 a serviceman injured in the course of war service was entitled to a disability pension, and the widows of servicemen killed on war service were also entitled to pensions. Later the scope of these entitlements was widened to include disability or death caused by injury attributable to any service in the armed forces (whether or not it was war service). Very detailed provisions were made in a series of Royal Warrants and, later, Orders in Council. The instrument in force at the time when Mr Matthews's disability manifested itself was the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 1983 referred to in the official certificate. A general feature of the successive schemes was that entitlement to a pension did not depend on proof of fault against the Crown or any Crown servant, nor did a disabled serviceman or widow generally have to discharge any onus of proving the requisite causal connection with service (or war service). The apparent benevolence of this provision was no doubt called for because of the very different view which was formerly taken as to public interest immunity (then called Crown privilege) and the resulting difficulty in obtaining documentary evidence to support any claim against the Crown.

114 The 1947 Act made far-reaching changes, both substantive and procedural, in the Crown's liability to be sued. Part I (headed "Substantive Law") contained 12 sections (of which sections 5 to 9 inclusive have since been repealed). Section 1 provides for the Crown to be sued as of right

(rather than by a petition of right sanctioned by Royal fiat). Section 2(1) and (2) provides:

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

"(2) Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity."

Section 2(5) excludes Crown liability for the acts or omissions of any person discharging responsibilities of a judicial nature. Section 4 applies to the Crown the general statutory provisions as to indemnity, contribution and contributory negligence. Section 9 (repealed and replaced by the Post Office Act 1969) made special provision for postal and telephone services, consisting of a general exclusion of liability in tort subject to a limited and conditional liability in respect of registered inland post.

115 Section 10 of the 1947 Act (as amended by Orders made in 1953, 1964 and 1968 as to transfers of ministerial functions) must be set out in full:

"(1) Nothing done or omitted to be done by a member of the armed forces of the Crown while on duty as such shall subject either him or the Crown to liability in tort for causing the death of another person, or for causing personal injury to another person in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Crown if—(a) at the time when that thing is suffered by that other person, he is either on duty as a member of the armed forces of the Crown or is, though not on duty as such, on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the armed forces of the Crown; and (b) the Secretary of State certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant, Order in Council or Order of His Majesty relating to the disablement or death of members of the force of which he is a member: Provided that this subsection shall not exempt a member of the said forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties as a member of those forces.

"(2) No proceedings in tort shall lie against the Crown for death or personal injury due to anything suffered by a member of the armed forces of the Crown if—(a) that thing is suffered by him in consequence of the

nature or condition of any such land, premises, ship, aircraft or vehicle as aforesaid, or in consequence of the nature or condition of any equipment or supplies used for the purposes of those forces; and (b) the Secretary of State certifies as mentioned in the preceding subsection; nor shall any act or omission of an officer of the Crown subject him to liability in tort for death or personal injury, in so far as the death or personal injury is due to anything suffered by a member of the armed forces of the Crown being a thing as to which the conditions aforesaid are satisfied.

"(3) A Secretary of State, if satisfied that it is the fact:—(a) that a person was or was not on any particular occasion on duty as a member of the armed forces of the Crown; or (b) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not, or were or were not, used for the purposes of the said forces; may issue a certificate certifying that to be the fact; and any such certificate shall, for the purposes of this section, be conclusive as to the fact which it certifies."

116 It will be necessary to come back to sections 2 and 10 which are considered in detail in the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead. But it is important to note at once that the sections as a whole have the effect of removing, to a large extent but not to an unlimited extent, a general pre-existing immunity expressed in the ancient maxim that the King can do no wrong. The 1947 Act did not (in any way that is now material) spell out the content of the Crown's duties in the field of tort law. In particular, it left untouched the principle that in battlefield conditions (and because of the exigencies of battle) the common law does not impose on any soldier a duty of care towards his fellow soldiers: see *Mulcahy v Ministry of Defence* [1996] QB 732. That principle had ancient origins (partly shared with the origins of the doctrine of common employment) but was largely overshadowed, until the 1987 Act, by the wider protection which the Crown enjoyed, first under the common law immunity and then under section 10 of the 1947 Act.

117 *Mulcahy v Ministry of Defence* concerned a claim arising out of injuries suffered in 1991 during the Gulf Conflict (that is, after the repeal of section 10 of the 1947 Act by the 1987 Act) by a gunner manning a heavy howitzer at a location in Saudi Arabia. The case shows that the practical effect of section 10 (in terms of how far it protected the Crown from claims by injured servicemen which might otherwise have been permitted by section 2) was in relation to events occurring otherwise than in battle conditions. It has been suggested (by Chadwick LJ in *Derry v Ministry of Defence* [1999] PIQR P204, 213) that the legislative aim of section 10 was to be found in the need for servicemen to be exposed, even in peacetime, to stressful and sometimes dangerous training in order to prepare them for the demands of active service. But plainly section 10 is expressed in much wider terms than those.

118 In practice, the Secretary of State issues a certificate under section 10 in any case in which he is satisfied that the statutory conditions are met, and in which a certificate would serve a useful purpose. By that last expression I do not mean to suggest that the Secretary of State has any wide discretion. In some cases a certificate is not issued, although the conditions are obviously met, simply because there is no need to. That will be the case where an injured serviceman is not seeking to make a claim for damages, and his entitlement to a pension is not in dispute.

A **119** The 1987 Act repealed section 10 of the 1947 Act except in relation to anything suffered by a person in consequence of an act or omission before the passing of the 1987 Act (which was on 15 May 1987). The exception (that is, the non-retrospective nature of the repeal) is of crucial importance to Mr Matthews since his exposure to asbestos ended in 1968 at the latest. Section 2 of the 1987 Act empowers the Secretary of State by Order to revive the effect of section 10 of the 1947 Act (either generally or for specified B purposes) but only in the circumstances described in section 2(2) (that is if it is necessary or expedient because of imminent national danger, any great emergency, or for the purposes of warlike operations overseas).

The judgments below

120 The issues between the parties have progressively narrowed in the C course of the litigation. Before Keith J there was an issue on retrospectivity of the Human Rights Act 1998 which the Ministry conceded. There was an issue on article 2 of the Convention (the right to life) on which Keith J found it unnecessary to rule, and which Mr Matthews did not pursue before the Court of Appeal. He did in the Court of Appeal raise a point on article 1 of the First Protocol (protection of property) but that has not been pursued in D your Lordships' House. In both lower courts there was an issue (referred to as the state service issue, and involving consideration of the decision of the European Court of Human Rights in *Pellegrin v France* (1999) 31 EHRR 651) but that too has not been pursued in your Lordships' House. That leaves the only issue argued before your Lordships, which has been referred to as the procedural bar issue. It is common ground that if Mr Matthews succeeds on that issue, section 3 of the Human Rights Act 1998 cannot assist E the Ministry and a declaration of incompatibility must follow.

121 The procedural bar issue is most easily identified by referring to two very well known principles of the Strasbourg jurisprudence on article 6(1) of the Convention, the relevant part of which is in the following terms:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public F hearing within a reasonable time by an independent and impartial tribunal established by law."

On the one hand the composite rights conferred by article 6(1) necessarily involve a right of access to a court. The right of access to a court is not however absolute. It may be made subject to procedural restrictions, but these must not so restrict or reduce the litigant's right of access as to impair G the essence of the right (in other words, the restrictions must satisfy the test of proportionality): *Golder v United Kingdom* (1975) 1 EHRR 524, 535–537, paras 35–38; *Stubbings v United Kingdom* (1996) 23 EHRR 213, 233, para 48. On the other hand a litigant's right of access to the court for the determination of his civil rights does not guarantee any particular content of those rights: *James v United Kingdom* (1986) 8 EHRR 123, 157–158, H para 81; *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355, 366, para 36. These citations could be multiplied but it is unnecessary to do so.

122 It is the tension between these two general principles (and apparently conflicting views expressed at Strasbourg as to how the tension should be resolved) which have shaped the arguments presented to the lower courts and to your Lordships' House. Should section 10 be classified as a

substantive element of the national law of tort, and so beyond the reach of article 6(1)? Or should it be classified as a procedural bar, which if it is to be upheld must satisfy the test of proportionality (as explained by Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, and Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547, para 27)?

123 At first instance Keith J saw the issue as turning on whether the section 10 certificate when issued had the effect of extinguishing, not only the claimant's right to sue for damages, but also what the judge called the claimant's primary right arising from the Crown's duty of care. Keith J said, at para 21:

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

124 Keith J held that that was the correct analysis. He relied particularly on two judgments of the European Court of Human Rights, in *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249 and *Fogarty v United Kingdom* (2001) 34 EHRR 302. The former case was concerned with contractors in Northern Ireland who complained that their tenders had been rejected on discriminatory grounds, in breach of the Fair Employment (Northern Ireland) Act 1976. Section 42 of that Act disapplied the Act in relation to anything done for the purpose of safeguarding national security or protecting public safety or public order, and it provided for a certificate of the Secretary of State to be conclusive as to that matter. The latter case concerned a claim under the Sex Discrimination Act 1975 made by an employee at the United States embassy in London, in respect of which the United States Government successfully claimed state immunity. In each case the European Court of Human Rights held that article 6(1) was engaged. In *Fogarty*, but not in *Tinnelly*, the procedural bar was held to meet the requirements of proportionality and to be justified. The judge saw no relevant distinction between *Fogarty* and the present case.

125 Keith J also referred to three earlier cases directly concerned with section 10 of the 1947 Act, in which the European Commission of Human Rights had held that claims were inadmissible. These are *Ketterick v United Kingdom* (1982) 5 EHRR 465, *Pinder v United Kingdom* (1984) 7 EHRR 464 and *Dyer v United Kingdom* (1984) 39 DR 246. He found those cases unhelpful since the Commission had not addressed what he saw as the essential distinction between the claimant's primary (substantive) right arising from the Crown's duty of care, and his secondary (procedural) disability as to bringing an action ("disability" here being used as the jural correlative of the Ministry's immunity from suit).

126 The Court of Appeal [2002] 1 WLR 2621 did not accept the judge's reasoning in the passage quoted above. It concluded that the effect of section 10 was substantive and not procedural. It regarded the judge's reliance on *Fogarty* as mistaken, stating (in the judgment of the court handed down by Lord Phillips of Worth Matravers MR [2002] 1 WLR 2621, 2639, para 61):

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

Mr Gordon (for Mr Matthews) has vigorously criticised this conclusion as
B ignoring a clear principle established by *Fogarty* and applicable to this case.

Substantive and procedural bars

127 The distinction between substantive and procedural bars to a judicial remedy has often been referred to in the Strasbourg jurisprudence on article 6(1), but the cases do not speak with a single clear voice. That is
C hardly surprising. The distinction, although easy to grasp in extreme cases, becomes much more debatable close to the borderline, especially as different legal systems draw the line in different places see *Dicey & Morris, The Conflict of Laws*, 13th ed (2000), pp 157–158, paras 7-002 to 7-004.

128 The most obvious examples of purely procedural bars are those which have no connection with the substance of a would-be litigant's claim
D (in other words, his cause of action). Exceptionally a claimant may have to provide security for costs (even at first instance) in order to be able to pursue his claim. Still more exceptionally he may have to obtain the court's permission to commence or continue proceedings, because he is a vexatious litigant, or is in contempt of court through disobedience to an earlier order, or is subject to some comparable disability. Such restrictions on the
E prosecution of a claim have nothing to do with the material facts which together constitute the claimant's cause of action. Bars arising from statutes of limitation are also generally regarded as procedural, especially as they have to be pleaded, but there are many exceptions and qualifications to that general principle (see *Dicey & Morris,* p 172, para 7-040). Bars arising from a defendant's right to invoke state or diplomatic immunity are procedural in
F the sense that the immunity may be waived (and is sometimes waived inadvertently). But a claimant such as the ex-employee in *Fogarty* 34 EHRR 302 must be taken to be aware from the outset that she is making a claim against a sovereign state which may decide not to waive its immunity. Unless her cause of action is described at a high level of abstraction the material facts will include the fact that her claim for victimisation is brought
G against a former employer which is (absent a waiver) entitled to state immunity.

129 Conversely there are some substantive rules of law which, because they can be described as conferring immunity on a particular class of potential defendants, may be perceived as objectionable restrictions on a claimant's access to the court, even though they cannot fairly be described as procedural bars. The word "immunity" is by itself enough to suggest some
H more or less arbitrary limitation on a claimant's rights. That was most strikingly demonstrated by the controversial decision of the European Court of Human Rights in *Osman v United Kingdom* (1998) 29 EHRR 245, from which the court has significantly withdrawn in *Z v United Kingdom* (2001) 34 EHRR 97.

The Strasbourg jurisprudence

130 I have already referred to several of the most important Strasbourg cases, but it is useful to see how two contrasting themes have developed since the seminal *Golder* decision (1 EHRR 524) in 1975. Some cases emphasise the importance of avoiding any arbitrary or disproportionate restriction on a litigant's access to the court, whether or not the restriction should be classified as procedural in nature. Others attach importance to the distinction between substance and procedure.

131 The first case to note is *Ashingdane v United Kingdom* (1983) 6 EHRR 69 (the Commission) and (1985) 7 EHRR 528 (the court). The applicant complained of his detention in a secure special hospital. His access to court had been restricted by section 141 of the Mental Health Act 1959 (now replaced, with significant amendments, by section 139 of the Mental Health Act 1983). Section 141(1) imposed substantive restrictions on his rights of action (requiring bad faith or negligence) and subsection (2) imposed a procedural restriction (the need for the court's permission for the commencement of proceedings). The Commission, at p 74, para 93, agreed with the parties that "it is immaterial whether the measure is of a substantive or procedural character. It suffices to say that section 141 acted as an unwaivable bar, which effectively restricted the applicant's claim in tort." But the Commission considered that the restrictions were not arbitrary or unreasonable, being intended to protect hospital staff from ill-founded or vexatious litigation. The court, at pp 547–548, paras 58–59, took a similar view.

132 In *Pinder v United Kingdom* 7 EHRR 464 (from which *Ketterick* 5 EHRR 465 and *Dyer* 39 DR 246 are not significantly different) the Commission took the view, 7 EHRR 464, 465, para 5, that section 10 of the 1947 Act brought about the substitution of a no-fault system of pension entitlement for the right to sue for damages, and that that removed the claimant's civil right:

> "It follows, therefore, that the state does not bear the burden of justifying an immunity from liability which forms part of its civil law with reference to 'a pressing social need' as contended by the applicant."

However the Commission then referred to its report in *Ashingdane* and stated, at p 466, para 7:

> "These principles apply not only in respect of procedural limitations such as the removal of the jurisdiction of the court, as in the *Ashingdane* case, but also in respect of a substantive immunity from liability as in the present case. The question, therefore, arises in the present context, whether section 10 of the 1947 Act constitutes an arbitrary limitation of the applicant's substantive civil claims."

133 The Commission held that section 10 was not arbitrary or disproportionate, at p 466, para 9:

> "The creation of a pension entitlement to provide certain coverage of the needs of injured servicemen without inquiry as to fault, in recognition of these professional risks, cannot be regarded as either arbitrary or unreasonable. As the Commission remarked in the *Ketterick* case, such a system is common to many states parties to the Convention not only in

A respect of the armed forces but also in the field of workmen's compensation. Its principal advantage to the injured serviceman within the scheme is that he is relieved of the frequently difficult burden of establishing negligence and made the beneficiary of a pension right linked to the extent of disablement. The traditional action in negligence is frequently characterised as time-consuming, costly and uncertain. The B pension scheme, on the other hand, provides immediate payment which can be adjusted to take account of inflation and changes in the degree of disablement."

The Commission's report also contains, at p 468, paras 18–20, a passage on the "levelling-down" implications of no-fault schemes which has been relied on by Mr Pannick (for the Ministry).

C **134** *Powell and Rayner v United Kingdom* 12 EHRR 355 was concerned with the effect of section 76(1) of the Civil Aviation Act 1982 on persons complaining of noise from aircraft travelling to and from Heathrow Airport. Section 76(1) excludes liability for any action in trespass or nuisance so long as the height of the aircraft was reasonable in all the circumstances, and its flight was not in breach of the provisions of the Act or D any order made under it. In unanimously rejecting the claimants' claim under article 6(1) of the Convention the European Court of Human Rights simply relied on the fact that the claimants had no substantive right to relief under English law. It rejected a subsidiary argument that the claimants' residuary entitlement to sue (in cases not excluded by section 76(1)) was illusory.

135 The court's approach in *Fayed v United Kingdom* (1994) 18 EHRR E 393 was much less straightforward. The Fayed brothers complained that a report by company inspectors had determined their civil rights to reputation and that they had been denied access to the court. They complained particularly of the defence of qualified privilege in relation to a libel action which they had commenced, but not pursued, against a newspaper. The inspectors themselves were also entitled to (at least) qualified privilege. F The court's discussion of the relevant principles contained the following passage, at p 429, para 65, which has been relied on by Mr Gordon:

> "Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to G court. In the latter kind of case article 6(1) may have a degree of applicability. Certainly the Convention enforcement bodies may not create by way of interpretation of article 6(1) a substantive civil right which has no legal basis in the state concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying article 6(1)—namely that civil claims must be H capable of being submitted to a judge for adjudication—if, for example, a state could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons."

136 It is hard to tell how far the last sentence of this passage goes. The court then referred to the distinction between substantive and procedural restrictions, at p 430, para 67:

> "It is not always an easy matter to trace the dividing line between procedural and substantive limitations of a given entitlement under domestic law. It may sometimes be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy."

The court did not go any further in attempting to resolve this problem on the ground that it might in any case have had to consider issues of legitimate aim and proportionality for the purposes of article 8 (respect for private life), even though there was in fact no complaint under article 8.

137 In *Stubbings v United Kingdom* 23 EHRR 213 and *Tinnelly & Sons Ltd v United Kingdom* 27 EHRR 249, the court considered whether restrictions on access to the court (in section 2 of the Limitation Act 1980 and section 42 of the Fair Employment (Northern Ireland) Act 1976 respectively) were justifiable without adverting expressly to the distinction between substantive and procedural bars. In *Waite and Kennedy v Germany* (1999) 30 EHRR 261, a case concerned with the immunity of the European Space Agency from an action under German employment law, the Commission, at p 272, para 55, described the immunity as merely a procedural bar, and as such requiring justification. The court took the same view, regarding, at pp 287–288, paras 68–69, the claimants' access to some unspecified procedures for alternative dispute resolution as being a material factor.

138 The two most recent cases are of particular importance. In *Z v United Kingdom* 34 EHRR 97, the court (by 12 votes to 5) held that there had been no breach of article 6(1) in your Lordships' decision in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 as to the responsibility of a local authority for children who had suffered neglect and abuse over a period of five years while their suffering was known to the local authority (but they were not the subject of any care order). The court did unanimously find violations of article 3. The whole of the court's judgment on article 6(1), 34 EHRR 97, 132–139, paras 78–104, merits careful study, but its essence appears from the following passages, at pp 136, 137, 138:

> "96. The court is not persuaded that the House of Lords' decision that as a matter of law there was no duty of care in the applicants' case may be characterised as either an exclusionary rule or an immunity which deprived them of access to court."
>
> "98. Nor is the court persuaded by the suggestion that, irrespective of the position in domestic law, the decision disclosed an immunity in fact or practical effect due to its allegedly sweeping or blanket nature. That decision concerned only one aspect of the exercise of local authorities' powers and duties and cannot be regarded as an arbitrary removal of the courts' jurisdiction to determine a whole range of civil claims . . . It is not enough to bring article 6(1) into play that the non-existence of a cause of action under domestic law may be described as having the same effect as an immunity, in the sense of not enabling the applicant to sue for a given category of harm."

A "100. The court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. There was no restriction on access to court of the kind contemplated in the *Ashingdane* judgment."

In reaching these conclusions the majority of the court stated in plain terms B that its decision in *Osman* had been based on a misunderstanding of the English law of negligence.

139 Finally there is *Fogarty v United Kingdom* 34 EHRR 302. That case was decided about six months after *Z* and by a constitution of the court several of whose members had sat (and some of whom had dissented) in *Z*. In *Fogarty* the court repeated verbatim, at p 310, para 25, the passage from *Fayed* which I have already quoted. It rejected, at pp 310–311, para 26, the C United Kingdom's argument that because of the operation of state immunity the claimant did not have a substantive right under domestic law. The court attached importance to the United States' ability to waive (in fact the judgment said "not choose to claim") immunity as indicating that the bar was procedural. Nevertheless the court concluded, at p 314, para 36:

D "measures taken by a high contracting party which reflect generally recognised rules of public international law on state immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in article 6(1). Just as the right of access to court is an inherent part of the fair trial guarantee in that article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of E nations as part of the doctrine of state immunity".

Conclusions

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

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

142 In my view Mr Gordon's concession was rightly made. Although there are difficulties in defining the borderline between substance and procedure, the general nature of the distinction is clear in principle, and it is

also clear that article 6 is in principle concerned with the procedural fairness and integrity of a state's judicial system, not with the substantive content of its national law. The notion that a state should decide to substitute a no-fault system of compensation for some injuries which might otherwise lead to claims in tort is not inimical to article 6(1), as the Commission said in *Dyer* 39 DR 246 (in a report, specifically dealing with section 10 of the 1947 Act, which has been referred to with approval by the court in several later cases).

143 In the circumstances the appellant's argument clings ever more closely to the bare fact that Mr Matthews had a cause of action when he issued his claim form, and that his claim could not be struck out as hopeless unless and until the Secretary of State issued a certificate under section 10. But European human rights law is concerned, not with superficial appearances or verbal formulae, but with the realities of the situation: *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, 456, para 38; see also *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 876, para 13. The appellant's argument does, with respect, ignore the realities of the situation. It is common ground that the Secretary of State does in practice issue a certificate whenever it is (in legal and practical terms) appropriate to do so. He does not have a wide discretion comparable to that of a foreign government in deciding whether or not to waive state immunity (which may be by no means a foregone conclusion, especially in politically sensitive employment cases). The decision whether or not to waive immunity in *Fogarty* really was a decision about a procedural bar, but I am quite unpersuaded that it provides a parallel with this case. The fact is that section 10 of the 1947 Act did in very many cases before 1987, and still does in cases of latent injury sustained before 1987, substitute a no-fault system of compensation for a claim for damages. This was and is a matter of substantive law and the provision for an official certificate (in order to avoid or at least minimise the risk of inconsistent decisions on causation) does not alter that. Section 10(1)(b), taken on its own, is a provision for the protection of persons with claims against the Ministry. I respectfully agree with Lord Bingham's analysis of the legislative history of the 1947 Act and with the conclusions which he draws from it.

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

145 For these reasons and for the further reasons given by your Lordships, with which I agree, I would dismiss this appeal.

Appeal dismissed.
No order for costs.

Solicitors: Bond Pearce, Exeter; Treasury Solicitor.

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