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For use with Documents with Protective Markings up to and including
CONFIDENTIAL

Application Nos. 21825/93 and 23414/94

Kenneth McGinley and [redacted]

v.

the United Kingdom

there has been a violation of Art 6 para 1 and Art 8

PROPOSALS OF THE COMMISSION
(Article 31 paragraph 3 of the Convention)

The Commission has concluded that

[redacted], in the present case, there has been a violation of Article 6 para 1 and Article 8 of the Convention. It therefore proposes, pursuant to Article 31 paragraph 3 of the Convention, that just satisfaction be afforded to the applicants by the Government of the United Kingdom.

The Commission considers that, in the light of the case-law of the European Court of Human Rights as to the application of Article 50 of the Convention, and the practice developed by the Committee of Ministers under Rule 9 paragraph 2 of the Rules adopted by the Committee of Ministers for the application of Article 32 of the Convention, such satisfaction should consist of the payment of a sum of money to be fixed by the Committee of Ministers after the Government of the United Kingdom and the applicants have been consulted. The sum should cover compensation for material and non-material damage, if any, as well as for legal costs incurred by the applicants in the proceedings before the Commission. It is to be noted that the applicants had the benefit of legal aid before the Commission.

The Commission is not, at this stage, in a position to make any proposals as to the precise amount to be paid. However, the Commission is prepared to provide the Committee of Ministers with any further assistance it may require.

Such satisfaction should consist of the payment of a sum of money to be fixed by the Committee of Ministers

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EUROPEAN COMMISSION OF HUMAN RIGHTS

Application Nos. 21825/93 and 23414/94

Kenneth McGinley and E. E.

against

the United Kingdom.

REPORT OF THE COMMISSION

(adopted on 26 November 1996)

CONFIDENTIAL

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

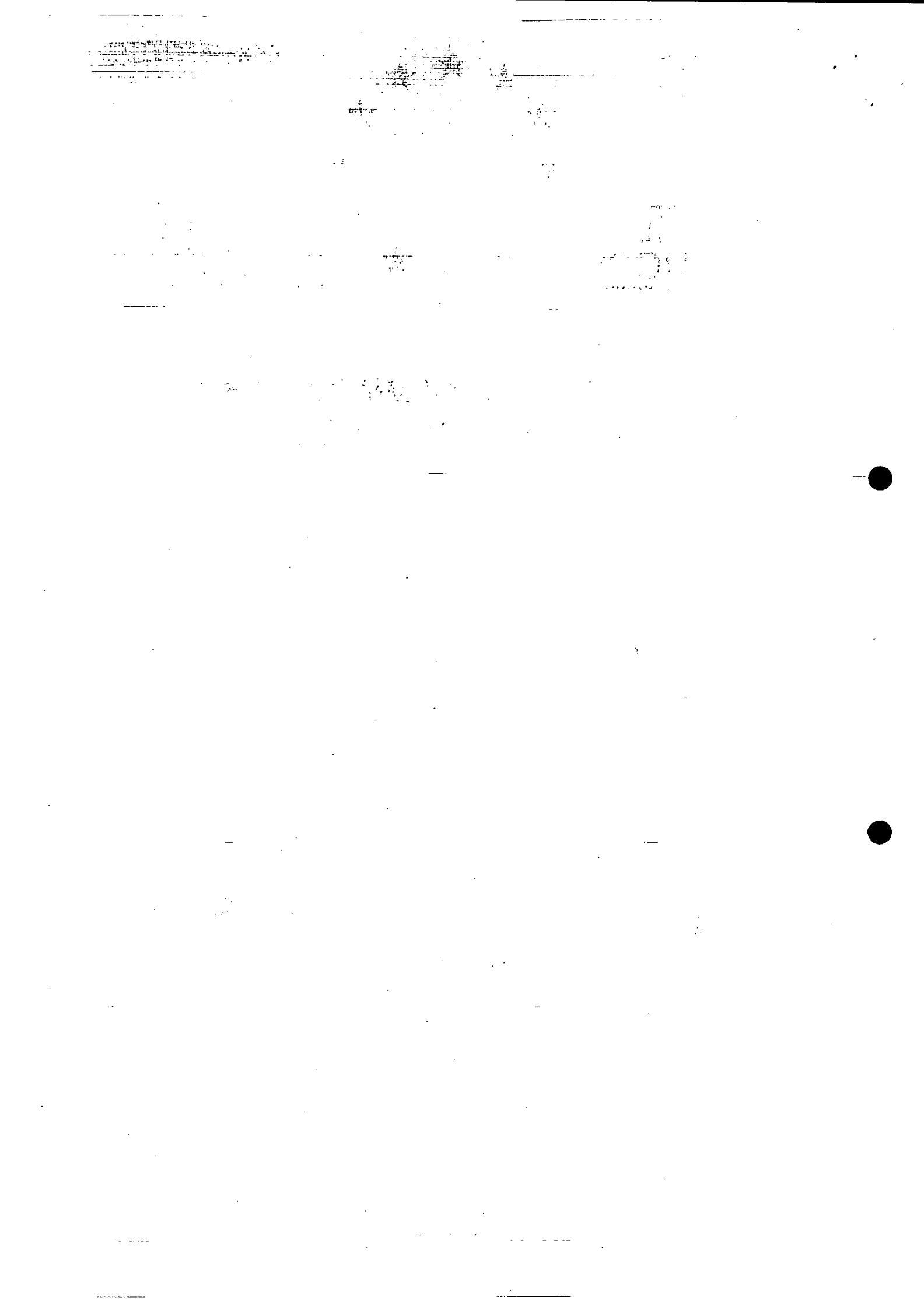
Application Nos. 21825/93 and 23414/94

Kenneth McGINLEY and E.E against the United Kingdom

Report of the Commission

(Adopted on 26 November 1996)

Strasbourg



I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights and of the procedure before the Commission.

A. The application

2. The applicants are British citizens, born in 1938 and 1939 and resident in Paisley and Glasgow, respectively. They were represented before the Commission by Mr. Ian Anderson, an advocate and attorney at law practising both in Scotland and the United States of America.

3. The application is directed against the United Kingdom. The respondent Government were represented by Ms. Susan Dickson, Agent, Foreign and Commonwealth Office.

4. The case concerns the applicants' allegations of non-disclosure of records concerning their participation in the United Kingdom's nuclear test programme at Christmas Island in 1958 and they invoke Articles 6, 8 and 13 of the Convention.

B. The proceedings

5. The applications were introduced on 20 April 1993 and 31 December 1993 and registered on 12 May 1993 and 7 February 1994, respectively. On 5 April 1994 the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the applications to the respondent Government and to invite the parties to submit written observations on the admissibility and merits of the applicants' complaints under Articles 6, 8 and 13 of the Convention.

6. The Government's observations were submitted by letter dated 7 September 1994 after two extensions of the time-limit fixed for this purpose. The applicants replied on 19 January 1995 after three extensions of the time-limit. Further observations of the Government were submitted on 10 and 11 May 1995. On 15 May 1995 the Commission decided to join the applications, request further observations from the parties and adjourn the application in the meantime. The Government submitted the further observations on 20 July 1995 after one extension of the time-limit and the applicants submitted their observations on 17 July and 29 August 1995 also after one extension of the time-limit. On 7 July 1995 the Commission granted the applicants legal aid. On 28 November 1995 the Commission declared the applicants' complaints under Articles 6, 8 and 13 of the Convention admissible, declared inadmissible the remainder of the application and requested further observations of the parties. The text of the admissibility decision was sent to the parties on 30 November 1995. The observations of the Government were received on 15 February, 12 June, 27 August and 24 October 1996. Observations of the applicants were received on 29 January, 12 February, 1 April, 10 April, 3 May, 17 June, 8 and 12 August and 24 September 1996.

7. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

8. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ

9. The text of this Report was adopted on 26 November 1996 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

10. The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

11. The Commission's decision on the admissibility of the application is annexed hereto.

12. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

13. The Commission has set out in this part of the report the facts that are not disputed by the parties and has set out its evaluation of the evidence on the disputed facts at part III below.

A. Relevant background

1. Atmospheric Nuclear testing programmes

14. Between 1952 and 1967 the United Kingdom Government carried out a number of atmospheric tests of nuclear weapons in the Pacific Ocean and Australia.

15. Over 20,000 servicemen participated in these tests. The tests included seven detonations at Maralinga, south Australia in 1956 and 1957 and six detonations at Christmas Island on 8 November 1957, 28 April 1958, 22 August 1958, 2 September 1958, 11 September 1958 and 23 September 1958. The weapons detonated in 1958 at Christmas Island were more powerful than those detonated at Maralinga and many times more powerful than those detonated at Hiroshima and Nagasaki. All devices in the megaton range (Operations Grapple X, Grapple Y and two in the Grapple Z series) were detonated over the sea off the south-eastern peninsula of Christmas Island and the two Grapple Z devices in the kiloton range were detonated over the south-eastern peninsula. Many of the servicemen who participated in the tests were lined-up in the open air in light clothing at the moment of the detonations, ordered to look away from the direction of the initial flash and then ordered to turn around in the direction of the blast.

16. The United States also ran a test programme in the Pacific which included the detonation of a hydrogen bomb at Bikini Island in 1954.

2. Documents submitted in support of the applicants' submission as to one of the reasons for the United Kingdom's nuclear test programme

17. A document headed "Atomic Weapon Trials", marked "Top Secret" and dated 20 May 1953, of the Defence Research Policy Sub-Committee of the Chiefs of Staff Committee states:

> "... Many of these tests are of the highest importance to Departments... The army must discover the detailed effects of various types of explosion on equipment, stores and men with and without various types of protection...".

18. On 12 March 1984 a debate took place in the House of Commons on the United Kingdom's nuclear test programme. The content of the above document was raised and the Minister for Defence Procurement responded by stating that what happened was that the blast and thermal and radiation consequences of a nuclear explosion on man were determined by taking measurements of the flux level of various protected and unprotected positions using instruments. The consequences of those flux

levels for man would then be calculated. The Minister also confirmed that, during the tests in Maralinga and in order to allow servicemen to experience the effects of nuclear explosions at ranges closer than previously allowed, 200 United Kingdom servicemen were stationed at about eight kilometres from the epicentres of the detonations.

19. A memorandum headed "Atomic Weapons Trials and Training" and dated 29 November 1955 noted that during the 1957 trials the Royal Air Force "will gain invaluable experience in handling the weapons and demonstrating at first hand the effects of nuclear explosions on personnel and equipment". On 22 December 1955 the Director of the Atomic Weapons Research Establishment wrote to the Ministry of Defence in relation to the supply to a similar Australian body of filter pieces which measured the fallout from the tests in Australia and he recommended, if Australia asked to examine the filters, that pieces of the filters be supplied but "that we wait a few days so that some of the key isotopes have decayed a good deal".

20. A War Office memorandum dated 19 November 1957 and headed "UK personnel for duty at Maralinga" began by stating that "All personnel selected for duty at Maralinga may be exposed to radiation in the course of their military duties". The memorandum continued by referring to initial medical examinations including detailed blood count analysis to determine suitability for duty prior to duty in Maralinga together with blood analysis on return from duty. It concluded that "A steady and progressive fall in successive blood counts or a fall below the warning level indicates that the individual must be removed from all contact with radioactivity until he has been found fit to return to duties involving exposure to radioactivity".

21. On 15 July 1958, during a meeting of the Atomic Weapons Research Establishment to discuss the issue of blood monitoring for leukaemia in 4500 servicemen about to depart for Christmas Island, it was agreed that only civilian personnel would be tested prior to departure since a serviceman found to be healthy before the test who contracted leukaemia afterwards "may have a case for arguing that the test was a cause".

22. A Ministry of Defence file, dealing with prospective blast effects of the Grapple Y detonation (at Christmas Island), gave details of the positions of certain categories of servicemen, blast effects, thermal radiation, radiation effects and radiation fallout and stated that personnel in the main camp should be paraded as during a previous detonation in late 1957 with the addition of protective clothing bearing in mind that "thermal radiation may be expected from all angles due to scatter". It was emphasised that in the event of the expected yield being obtained or increased there "will almost certainly be, in addition to considerable material damage, casualties to individuals and this should be taken into account."

3. Medical Research Council

23. A report headed "Genetic effects of radiation with reference to man" of the Medical Research Council ("MRC") dated 6 February 1947 stated that "all quantitative experiments show that even the smallest doses of radiation produce a genetic effect, there being no threshold dose below which no genetic effect is induced".

24. In March 1955 the then Prime Minister (Sir Anthony Eden) requested the MRC to appoint an independent committee to report to Parliament on the medical and genetic effects of radiation. In June 1956 the MRC committee so reported and commented that exposure to ionising radiation, however small, could increase the frequency risk of gene mutation in the reproductive cells, noting that from the film badges of employees of the Atomic Energy Authority it was possible to calculate accurately "the doses received by such employees in relation to their expectation of parenthood" and commenting that the changes in the sex ratio in the children of those exposed to radiation might be due to genetic damage. Subsequent to a progress report of the MRC committee being shown to the Prime Minister, a letter was sent from Downing Street dated 16 November 1955 reporting the Prime Minister as having commented on such consequences as being "a pity but we cannot help it".

25. A telex dated July 1956 discussed the brief of the Director of the Atomic Weapons Research Establishment on a recent MRC committee (see below) report pending his arrival on Christmas Island and stated as follows:

> "We do not want to release any statement on genetic effects or on radioactivity or strontium pending the arrival of <the Director>. If you have to, a safer interpretation of the MRC report in the last sentence of paragraph 4 would be, 'has not shown an increase' rather than 'shows an increase'." (emphasis added)

26. The MRC committee submitted an updated report in 1960 emphasising that the research conducted gave no grounds for believing that there was a threshold below which no increase in mutation occurs.

4. The Royal Commission into British Nuclear Testing in Australia

27. The Australian Royal Commission was appointed in July 1984 by the Queen to enquire into the conduct of the Australian tests. That Commission was furnished with documentation including statements, plans and reports covering the planning, execution and results of some of the test activity in Australia, which documents were also transferred at the same time (mid-1980's) to the United Kingdom Public Records Office under reference number DEFE16.

28. The Commission's report was published in 1985. It concluded that in many respects the information furnished by the United Kingdom Government to the Australian Government in relation to the test programme was inadequate. Various specific tests and projects were criticised as being carried out in an inappropriate and negligent manner causing danger to both civilian populations and military personnel. For example, the Royal Commission found that the safety

precautions against radiation exposure employed at Maralinga, south Australia, demonstrated, "ignorance, incompetence and cynicism" by the United Kingdom for the safety of persons in the vicinity of those tests. It was also concluded that there had been some serious departures from the contemporary radiation protection policies and standards during the test programme. It was accepted that exposure to radiation at certain dose levels is associated with increased risk of cancer and genetic effects. While increased frequency of genetic effect had not been demonstrated in any irradiated human population (and noting that such a study would not be practicable), it was accepted that such effects do occur. By reason of the major detonations and the deposition of fallout across Australia, it was thought probable that cancers, which would not otherwise have occurred, had been caused in the Australian population.

29. The Commission, accordingly, recommended, inter alia, that the benefits of certain compensation legislation be extended to include not only military personnel but also civilians who were at the test sites at the relevant time. By agreement dated 10 December 1993 the United Kingdom agreed to pay £20 million to the Government of Australia in settlement of all claims made by any persons (excluding United Kingdom test participants) for injuries connected with the test programme.

5. Marshall Islands Nuclear Claims Tribunal

30. This tribunal was set up in 1987 to consider claims from residents of the Marshall Islands about the United States trial detonations at Bikini Island. By 31 December 1993 the tribunal had admitted 676 claims in respect of cancer related illnesses suffered by the inhabitants of the Marshal Islands. The closest of the Marshal Islands was 120 miles (192 kilometres) from Bikini (Rongelap), four of the relevant islands were over 300 miles (580 kilometres) from Bikini and two were 500 miles or over (800 kilometres) from Bikini. The total gross compensation awarded by the tribunal as at 31 December 1993 was $25,225,500.00.

6. Reports of the National Radiological Protection Board ("NRPB"), of personnel from the Atomic Weapons Establishment ("AWE") and of the British Nuclear Test Veterans Association ("BNTVA").

(a) The 1988 and 1993 NRPB reports

31. Due to increasing concern expressed in the media about early deaths of test veterans, the Ministry of Defence commissioned the NRPB (in conjunction with the Imperial Cancer Research Fund) to carry out a study into mortality and cancer rates amongst the test veterans. The NRPB compared the mortality and cancer rates of a body of test veterans (21,358 persons) with a control group (army personnel who passed similar medical tests on entry into service but who did not participate in the testing).

32. During the House of Commons debate on 12 March 1984 on the United Kingdom nuclear test programme, a Member of Parliament read a letter received that day from the Joint Committee on the Medical Effects of Nuclear Weapons which confirmed that the National Radiological Protection Board's expertise was in monitoring radiation exposure not in carrying out epidemiological health surveys and, furthermore,

expressing surprise that the Government entrusted the investigation into its own liability to a Government body when other bodies, whose impartiality could not be reasonably questioned, were available to do the work. The Minister for Defence Procurement responded by referring to a previous discussion in the House of Commons about the independence and suitability of the NRPB and indicating that he had hoped that the relevant Members of Parliament who had raised the questions would be prepared to accept a body with the experience of the NRPB as an acceptable assessment source.

33. The NRPB report concluded that participation in the nuclear test programme did not have a detectable effect on the test veterans' overall expectation of life nor on their total risk of developing cancer. However, the test veterans demonstrated a higher rate of leukaemia and multiple myeloma than the control group. As a result, the Department of Social security ("the DSS") subsequently awarded war pensions to those presenting these two conditions.

34. In order to clarify the situation, a follow up report was completed extending the period of review over seven more years so that almost double the number of deaths were available for analysis. The NRPB again concluded that there had been no detectable difference in the veterans' expectation of life nor as regards their risk of developing cancer or other fatal diseases. The suggestion from the previous report that participants may have experienced small hazards of leukaemia and multiple myeloma, was found not to be supported by the additional data used for the second report and the excesses observed in the first report were reported as being a chance finding, although the possibility that test participation may have caused an additional risk could not be completely ruled out.

(b) Report by personnel of the AWE

35. Personnel with the AWE produced a report which described the environmental monitoring programme at Christmas Island during the test detonations and the results obtained. The report, which is stated to not necessarily represent the official views of the AWE, is marked "unclassified" and is dated October 1993. It concluded that there was no detectable increase in radioactivity on land, in the sea or in the air pursuant to the Christmas Island testing. It also concluded that there was therefore no danger to personnel from external radiation nor from inhalation and ingestion of radioactivity.

(c) The BNTVA report

36. The BNTVA is a voluntary group founded in 1983 by the first applicant to campaign for recognition and compensation for those who participated in the United Kingdom's nuclear test programme and who as a consequence were allegedly exposed to radiation. Its members number approximately 3000 and include British ex-servicemen, who claim that they were deliberately exposed to ionising radiation, and their children who claim to be genetically impaired. Further to a request by an adviser of the Defence Select Committee, a statistical report entitled "Radiation Exposure and Subsequent Health History of Veterans and their Children" was published by the BNTVA in or about February 1992. It was based on a survey of the members of the BNTVA and it concluded that 1 in 5 of its members suffered from cancer and that 1

in 4 veterans had children who suffered from defects attributable to genetic origin. The BNTVA engaged a researcher in order to obtain available contemporaneous records in relation to the nuclear test programme in Australia and the Pacific.

B. The particular circumstances of the first applicant's case

37. On 23 October 1956 the applicant's medical examination for entrance into the army took place and the clinical examination was normal. The applicant was enlisted fit for full combat service in any part of the world. In December 1957 the applicant was posted to Christmas Island and was present on Christmas Island for the test detonations of 28 April 1958, 22 August 1958, 2 September 1958, 11 September 1958 and 23 September 1958. The applicant was lined-up in the open air in light clothing at the moment of certain detonations, ordered to look away from the direction of the initial flash and then ordered to turn around in the direction of the blast.

38. The only entry during the detonation period in the applicant's service medical records refers to medical treatment on Christmas Island between 15 September and 23 September 1958 for a throat infection. Those records continue on 28 October 1958 with treatment for tonsillitis and between 14 and 21 November 1958 with the provision of a splint for "facial palsy". The applicant was subsequently hospitalised at the military hospital in Honolulu for influenza. This latter treatment is also reflected in his service medical records.

39. On 10 November 1959 the applicant was given a medical discharge from service. His statement on discharge records that the applicant suffered a broken ankle on Christmas Island in May 1958 and that he had been treated for eight weeks for this as an out-patient of a service hospital on Christmas Island. His service medical records do not reflect this treatment. In April 1960 the applicant was awarded a 20% war pension in relation to a duodenal ulcer attributable to army service. In 1962 he had to undergo an operation to remove part of his stomach. In 1965 he broke out in boils all over his body and began to suffer constant pain. In 1967 he was diagnosed as being sterile and in 1973 he began to experience severe kidney problems. Because of his health problems, the applicant was unable to retain employment for prolonged periods. His disability was re-assessed at 30 % disability in respect of his ulcer in June 1980. On 8 June 1982 his disability was reduced again to 20% but restored to 30% on 13 December 1982 following the applicant's appeal to the Pensions Appeals Tribunal ("the PAT").

40. Following a series of articles in the press in 1982 about the potential effects of the Christmas Island explosions on those exposed to them, the applicant came to attribute his history of illness to his service on the island and sought an increase in his pension to reflect this. On 1 April 1984 the applicant made a claim for an increase in his pension in relation to his health problems which he alleged resulted from exposure to radiation on Christmas Island. On 16 May 1984 the DSS made a departmental inquiry to the Ministry of Defence. The DSS noted that the applicant was claiming a war pension for radiation related illnesses and that he was stationed in Christmas Island. The DSS asked for confirmation that the applicant was directly involved in the tests and that the applicant was in the vicinity of the tests either before or after the tests and further asked what the applicant's duties were,

whether the area in which he served was subject to any radiation and, if so, to how much radiation. The DSS also queried whether the applicant was wearing a film badge, what the readings from that badge were and what instructions about safety precautions and the wearing of film badges were recorded. It was finally noted that in the event of an appeal to the PAT the information would be made available to the claimant.

41. On 11 June 1984 the Ministry of Defence confirmed that, from the "information available and reviewed up to now", the applicant was on the island during the detonations. His duties were outlined and it was stated that he was no closer than 40 kilometres from the epicentres of the detonations, that the areas in which he served were not subject to fallout and that the initial ionising radiations from the detonations in the area in which he served were not "sensibly different from ZERO". Accordingly, the applicant was not exposed to such initial radiations at any level "sensibly differing from ZERO". It was also confirmed that no film badges were issued to the applicant, that there were general radiological safety regulations and specific unit orders issued including instructions on hazards, safety precautions and on the issue and wearing of film badges where necessary. The response repeated that the radiation exposure was zero and the radiation effective dose from the ever present background radiation was no more and probably less than he would have received had he remained in the United Kingdom. It concluded that therefore his medical condition would not have been caused by ionising radiations from the test programme.

42. On 30 November 1984 the applicant's claim, based on the conditions of reduced fertility, osteoarthritis, skin problems and renal colic arising out of radiation, was refused by the Secretary of State for Social Security pursuant to the deliberations of the war pensions branch of the DSS, as it was found that these conditions were not attributable to his military service. The applicant's parallel application, to re-assess his pension based on the duodenal ulcer, was also refused. On 21 January 1985 the applicant appealed to the PAT against both decisions of the DSS, claiming that his service medical records had been doctored.

43. On 11 February 1985 the DSS again initiated a departmental enquiry to obtain all available medical records of the applicant between December 1957 and December 1958 or to confirm, using if necessary Admission and Discharge Books, the applicant's hospital treatment on Christmas Island during that period relating to "Disablement rash on body and face". Two days later, on 13 February 1985, the Ministry of Defence responded by confirming that "No A <admission> & D <discharge> books held under particulars quoted. N/T <not traced> medical records."

44. The DSS obtained evidence including hospital case notes, together with reports from the applicant's own doctor, a DSS psychiatrist, a rheumatologist, a dermatologist and a urologist. The psychiatrist stated that he "would not consider that Mr. McGinley is suffering from a psychiatric condition". The rheumatologist concluded that the condition complained of related to normal wear and tear and added that he could "find nothing to connect it with radiation exposure".

45. On 3 March 1986 the dermatologist gave a detailed report of the applicant's skin problems, which had included the development of 12 to 14 painful and inflamed cutaneous crusts one of which required surgical excision and two of which were lanced by a medical practitioner. He noted scattered open comedones and multiple ice pick scars over the applicant's face and neck. The doctor indicated that he had no professional competence to determine whether this condition had been induced by radiation exposure and recommended that an expert opinion be sought from someone familiar with the effects of ionising radiation on the skin. The DSS declined to follow this recommendation for two reasons (noted in a report by the Chief Medical Officer dated 19 January 1987). The evidence from the military medical records showed no record of skin problems during the applicant's service and, on the basis of the report from the Ministry of Defence, the Secretary of State did not accept that the applicant was exposed to ionising radiation and therefore the point was irrelevant.

46. In his report of 24 June 1987 the urologist found that he could come to no conclusion regarding the effect of ionising radiation on the applicant's infertility and renal problems. The DSS had previously stated to the urologist that "We have been assured by the AWE that <the applicant> was too far away from the test sites to have been contaminated with any kind of ionising radiation". The applicant's own doctor reported on the applicant's illnesses and conditions and concluded that, though individually they might not have been significant, taken as a whole they could be consistent with radiation exposure.

47. Based on this information the DSS prepared a Statement of Case and sent an edited copy to the applicant (in accordance with Rule 22 of the Pension Appeals Tribunal Rules (Scotland) 1981) omitting information on the basis that it was "undesirable in the interests of the applicant to disclose to him". The applicant's representative received an unedited version. On 25 February 1988 the PAT disallowed the appeal.

48. On 9 July 1991 the applicant again requested a claim form in relation to exposure to nuclear radiation resulting in acne vulgaris, sterility and severe arthritis in his leg, arms and spine. The DSS again sought a report from the Ministry of Defence regarding the applicant's service related ionising radiation exposure. The reply confirmed zero exposure. The applicant did not pursue this claim after he was reminded by the DSS of the rejection of his previous claim in 1988. In 1992 the applicant applied for and received an added assessment of 1-5% for hearing loss.

C. The particular circumstances of the second applicant's case

49. In October 1956 the applicant enlisted in the Royal Navy at age 17. He was passed as fit with no medical problems and, in particular, his respiratory system was recorded as normal. He was enrolled fit for full combat duty in any part of the world. In April 1958 the applicant was serving on board HMS Ulysses which was positioned off Christmas Island at the time of the detonation on 28 April 1958. He was lined-up in the open air in light clothing at the moment of the detonations, ordered to look away from the direction of the initial flash and then ordered to turn around in the direction of the blast.

50. The applicant had a number of chest x-rays (mass miniature radiography on 70 mm film) on 8 March 1958, 30 April 1959, 30 May 1960 and 1 February 1961. He had follow-up full plate x-rays on 2 February 1961 in Portsmouth, England. The applicant's statement, made on 2 February 1961 in connection with his discharge from the navy, only referred to a fractured clavicle. On 8 February 1961 the applicant was discharged from the navy on compassionate grounds by purchase. The applicant continued to suffer from exhaustion and breathlessness. An x-ray taken in June 1965 indicated extensive modular infiltration of both lungs, which condition was diagnosed as sarcoidosis.

51. On 10 July 1970 the applicant applied for a disablement pension alleging that his condition was attributable to his exposure to the nuclear test off Christmas Island. On 14 July 1970 the DSS requested "all available medical records", including "extracts from the admission and discharge books if necessary" from the Medical Records Section of the naval archives registry. The reply, which was received on the same day, read "No trace medical records". On 28 July 1970 the DSS again raised a departmental enquiry with the Ministry of Defence stating that the applicant was claiming a pension for a chest condition which he attributed to his exposure to a detonation at Christmas Island and requesting the Ministry to confirm the applicant's service at Christmas Island and whether he was in close proximity to any explosions. The Ministry of Defence confirmed that the applicant was 70 miles (112 kilometres) from the detonation and supplied a trace of the applicant's service record.

52. On 12 August 1970 the DSS asked the Ministry of Defence for the applicant's x-ray of 2 February 1961. The response, dated 18 September 1970, noted that a thorough search of the large film records for 1961 had been made and that no trace of a large film for the applicant could be found. On 5 October 1970 the DSS made another enquiry of the Ministry of Defence noting that it appeared, from the case notes regarding the applicant's post-service treatment previously submitted to the DSS, that the applicant had been admitted to hospital for two weeks in 1958 and that the applicant claimed that his lung ailment had been caused by his exposure to radiation during the test programme in 1958. The DSS, accordingly, requested confirmation as to whether any type of atomic device exploded whilst the applicant's ship was stationed off Christmas Island and, if so, requesting confirmation of the distance of the ship from the epicentre of the blast. Confirmation was also requested as to whether the ship was stationed sufficiently close for any crew members to have accidentally sustained radiation burns, whether the applicant was likely to have cause to be in the open (given the type of ship on which he served) and thereby subjected to blast and, if so, what protective clothing was issued. The DSS also requested the medical records in relation to a particular entry in the service record previously sent to the DSS relating to, inter alia, the period between 24 May 1958 and 9 June 1958. The x-rays taken on 70 mm film of the applicant during service were also requested.

53. The response, dated 16 October and 17 November 1970, noted that no bed tickets were held for the applicant, that there was "no entry in the Civil Register nor is there any trace in the Medical Officer's Journal" and that "all available medical documents" had been sent to the DSS on 20 July 1970. It was also noted that the applicant served on the relevant ship from 30 April 1957 until 2 November 1958, that the

records of the detonation on 28 April 1958 were held by the War Historical Branch and that an examination of these and the logbook for the applicant's ship showed that the ship was approximately 70 miles from the explosion in April 1958. It was further noted that the Naval Plan for the ship required "precautions to be taken by ships in target areas". All exposed personnel were to be completely covered, anti-flash hats, gloves and goggles were to be worn and long trousers were to be tucked into socks.

54. On 12 January 1971 the DSS medical board found against the applicant. On 4 March 1971, further to representations received on the applicant's behalf, an enquiry was made by the DSS of the Ministry of Defence for any "service documents which the Ministry of Defence may have been holding including hospital records and x-rays report and films. The DSS indicated that the reason they were asking again was because of the applicant's recent representations and that the DSS wanted to confirm that no further in-service documents are available. The response from the Ministry of Defence was dated 12 March 1971 and was to the effect that the case had been thoroughly dealt with and that "to date" further service documents could not be provided.

55. On 5 April 1971 the applicant lodged an entitlement appeal to the Pensions Tribunal. A medical report, dated 2 August 1971 and completed by a senior chest physician retained by the DSS, concluded that it was virtually certain that the correct diagnosis was sarcoidosis and that the disease had no relationship of proximity to an atomic explosion in April 1958. However, that physician suggested that the applicant might be suffering from chronic berylliosis caused by exposure to beryllium, an alloy used in the nuclear tests. His report indicated that the clinical effects of berylliosis and sarcoidosis were similar and that it was important to ascertain the precise nature of the applicant's medical treatment from 24 May 1958 to 9 June 1958 in order to exclude this possibility. (The Ministry of Defence subsequently confirmed that the applicant was on loan to another ship during that time and that no sickness was documented during that period.)

56. Further to another DSS enquiry dated 26 August 1971 to the Ministry of Defence in relation to beryllium exposure, the Ministry of Defence expressed the opinion that the applicant's exposure to beryllium compounds was unlikely in the course of his work as a stoker. It was also noted that the log of the relevant ship had been "scrutinised in relation to the periods at Christmas Island in 1958 and there is certainly no record to substantiate the story of atomic bomb blast. Certainly had he been ashore there would have been no significant exposure".

57. On 7 December 1971 an edited Statement of Case was sent to the applicant, which statement excluded information on the basis of its "potential to distress or harm the applicant". An unedited version was sent to the applicant's representative. The applicant disputed the Statement of Case on the basis that it lacked full medical records in relation to his illness after the April 1958 detonation and his x-ray films. He also contended that he was 15 to 20 miles (24-32 kilometres) from the detonation and not 70 miles (112 kilometres) and he disputed that the log of his ship contained no evidence that the crew was exposed to an atomic blast.

58. Following a further enquiry by the DSS in relation to medical reports and x-rays in light of the applicant's mentioning of "missing records", the Archives section of Medical Records confirmed, in December 1971, that no further medical records had been traced. Two further enquiries to the Ministry of Defence were made by the DSS for a special trace for case notes, x-rays or any other details relating to the applicant's hospitalisation in April 1958 and for confirmation of the distance of the applicant's ship from the detonation of April 1958. The responses dated 12 January and 7 March 1972 noted, inter alia, that no further medical records could be traced, that no x-ray films were held by the Ministry of Defence before 1960 and that a recalculation of the position of the applicant's ship showed that he was 60 miles (96 kilometres) from the blast.

59. On 29 August 1972 the PAT rejected the applicant's appeal.

60. On 21 October 1982 the applicant submitted another claim for a war pension due to radiation related sarcoidosis of the lung. The DSS responded to the applicant by reminding him of the decision of the PAT taken in 1972 and informing him that it was legally binding unless set aside by the Court of Session in Scotland on a point of law.

61. On 11 July 1991 the DSS received another war pension claim (lodged by the BNTVA on the applicant's behalf) which was similar to that in respect of which the PAT issued its decision in 1972 and to the further war pension claim made in 1982. The applicant was again reminded of the PAT's decision of 1972 and the applicant responded, by letter dated 30 October 1991, stating that he was not happy with that decision. The DSS replied by referring the applicant to the fact that the PAT had sight of his service documents in considering his case. On 25 April 1992 the applicant made a further claim for a war pension due to deafness. The claim was rejected by the Secretary of State and the applicant did not appeal the decision to the PAT.

D. Relevant domestic law and practice

1. Civil action for compensation by servicemen against the Crown

62. The right to compensation under common law is enforceable through the civil courts once the plaintiff proves that, given the state of knowledge at the relevant time, the illness or injury was reasonably foreseeable and, on the balance of probability, was in fact caused by the action or inaction of the person against whom he is claiming.

63. However, armed forces personnel, whose cause of action arose on duty before 1987, are barred from taking civil proceedings for compensation against the Crown by section 10 of the Crown Proceedings Act 1947. It was specifically provided that the repeal of section 10 by legislation in 1987 was not applicable to those claiming in respect of pre-1987 occurrences. It is disputed between the parties as to whether the Crown's immunity from suit survived the judgment in the case of Pearce v. The Secretary of State for Defence and Ministry of Defence [1988] 2 WLR 145. However, it is not disputed that to date no one (including Mr. Pearce) has been able to successfully demonstrate in a civil action for compensation that an illness was, on the balance of probability, caused by radiation from the Christmas Island nuclear test programme.

2. War Pensions

64. Servicemen can, in relation to pre-1987 occurrences excluded under section 10 of the Crown Proceedings Act 1947, apply for a service disability pension pursuant to the Naval Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983 in relation to, inter alia, illnesses and injuries attributable to service.

65. Claims for such a pension are made to the Secretary of State for Social Security and he decides whether a claimant is entitled to benefit and the way the benefit should be paid depending on the claimant's assessed disability. An award of a pension is made where the claimant raises reliable evidence to demonstrate a reasonable doubt in his favour that the injury or disease is attributable to service after 2 September 1939.

66. On receipt of an application for a pension, the DSS, inter alia, obtain the claimant's service records (including service medical records) from the Ministry of Defence and establish certain basic factual matters. The DSS doctor may, in order to assist him in forming an opinion as to whether the claimant is suffering from the disability and whether the disability is attributable to service, obtain further medical evidence and reports including civilian medical records. Once this assessment is completed the Secretary of State for Social Security will give the final decision.

67. A claimant who is refused a war pension by the Secretary of State for Social Security can appeal to the PAT and the full entitlement appeal is governed by the Pensions Appeal Tribunal Acts 1943-1949. The PAT consists of a legally qualified chairperson, a medical member and normally a member of the armed services. In order to assist the PAT, the DSS provides the tribunal with a Statement of Case which is a typed version of the claimant's service records including service medical records, subsequent medical reports, medical reports obtained at the request of the DSS doctor, a statement outlining the reasons of the Secretary of State for Social Security for the decision and possibly a statement of the DSS doctor of the evidence considered, the conclusions reached and the reasons for the conclusions. A further appeal from the PAT lies on a point of law to the Court of Session in Scotland, either with the leave of the PAT or of the Court of Session itself. Such an appeal could be made on the basis that the PAT had erred in law by "acting upon an incorrect basis of fact" (Secretary of State for Education and Science v. Tameside MBC [1977] AC 1014).

3. Public Records

68. Public Records are defined by section 2 of the schedule to the Public Records Act 1958 as administrative and departmental records belonging to Her Majesty, whether in the United Kingdom or elsewhere, in right of Her Majesty's Government in the United Kingdom and, in particular, records of, or held in, any department of Her Majesty's Government in the United Kingdom or records of any office, commission or other body or establishment whatsoever under Her Majesty's Government in the United Kingdom. The direction of the Public Records Office and the execution of the Public Records Acts 1957 and 1968 is the responsibility of the Lord Chancellor. Pursuant to section 3 of the 1958 Act, records which have been selected for permanent preservation

are transferred not later than thirty years after their creation to the Public Records Office or other approved location (and thereby to the public domain) and those not so selected shall be destroyed or disposed of in another way.

69. Section 5 of the Public Records Act 1958, as amended by the Public Records Act 1967, provides that public records (other than those to which the members of the public had access before their transfer to the Public Records Office) shall not be available for public inspection until thirty years after the creation of the records or such longer or shorter period as the Lord Chancellor may, with the approval or at the request of the Minister or other person who appears to the Lord Chancellor to be primarily concerned, consider.

70. A letter dated 23 May 1994 from the Parliamentary Under-Secretary of State for Defence to a Member of Parliament, written in response to a complaint as regards access to public records in relation to the United Kingdom's nuclear test programme, referred, in particular, to 14 "closed files" identified by the applicants' researcher and confirmed after re-examination of those files that there were in fact 18 such files, that one file had been released, that four files would remain "closed", that five files could "not be traced" and that five had been destroyed due to an accounting process which was "looser" in the 1980s than it is today. The letter then explained that the Ministry of Defence found it convenient to fulfil its obligation under the Public Records Acts by conducting two reviews - one at the 5 year point and one at the 25 year point. It stated that records that survive the selection process of the 25 year review, but are deemed too sensitive to release at the normal 30 year point (like those identified by the applicants' researcher) remain closed under the provisions of either section 3(4) or 5(1) of the Public Records Acts and that the files in question were withheld under section 3(4) on the grounds of national security subject to review at least every ten years.

71. A letter dated 29 November 1994 from a Member of Parliament to the applicants' representative noted that documents relating to the health and safety of the participants who took part in the tests as well as recorded radiation levels on Christmas Island were withheld from public scrutiny beyond the thirty year period set out in the Public Records Acts for "national security and personal sensitivity reasons". It also noted that an attempt, by way of motion in the House of Commons in January 1993 to urge the Government to reconsider its decision to retain the said documents and for the appointment of an independent assessor to assess the national security reasons for the continued retention, was unsuccessful. It concluded that at that time the said documents were not in the public domain and were unavailable for national security reasons.

72. Under section 6 of the Pensions Appeal Tribunal (Scotland) Rules 1981 ("the 1981 Rules") a claimant for a war pension can request the President of the PAT to direct the Secretary of State to produce to the PAT official documents and information. If the President considers the documents and information relevant, he can issue the direction. The Secretary of State can issue the documents and information to the PAT on the basis, in the public interest, that they are not made public or he can refuse to disclose such documents at all in the interests of national security. Once the documents are refused on grounds of

national security, the PAT must decide if the absence of such records would prejudice the claimant's case - if not, the PAT must continue the examination of the claimant's case without the records and, if so, the PAT must adjourn their consideration of the claimant's case until the national security factor is no longer an issue.

73. In 1995 the President of the PAT, which was considering an application by a Christmas Island veteran (for a disability pension for radiation linked larynx and skin cancer), made an application under section 6 for certain public records which might support the claim. The response, from the Deputy Departmental Record Officer dated 4 May 1995, indicated that certain files would be released but that others entitled "Operation Grapple, personnel safety precautions" were declared temporarily lost and those entitled "Operation Grapple : consideration of results" could not be released due to the "very sensitive nature of the contents of the file that relates to the design details of the devices used in 1957. To release this file would assist a third party acquire a nuclear capability and its continued retention is part of <Her Majesty's Government's> commitment to prevent proliferation".

74. It is possible to apply under the Administration of Justice (Scotland) Act 1972 for an order requiring production of medical records in anticipation of civil litigation, to obtain an order for Specification (production) of Documents, in the context of Scottish court proceedings to recover damages, in order to require government departments to produce records and to apply for a Writ of Subpoena *Duces Tecum* in the context of an action for damages, which writ requires the production to court of documents held by a third party.

75. The Access to Health Records Act 1990, which sets down certain rights of persons to, inter alia, medical records, came into force on 1 November 1991. It relates only to records compiled after 1 November 1991.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

76. The Commission has declared admissible the applicants' complaints about non-disclosure of contemporaneous records in relation to the test detonations at Christmas Island in 1958.

B. Points at issue

77. The points at issue are whether there has been:

- a violation of Article 6 para. 1 of the Convention;
- a violation of Article 8 of the Convention; and
- a violation of Article 13 of the Convention.

C. The evaluation of the evidence

78. The Commission has, prior to dealing with the applicants' complaints under specific Articles of the Convention, evaluated the evidence on certain disputed facts relating to the creation and existence of relevant contemporaneous records and the results of the NRPB and AWE analyses. The Commission notes that it has taken into consideration in its evaluation the conduct of the parties in responding to questions raised by the Commission, and in particular, the clarity and completeness of those responses (mutatis mutandis, Eur. Court HR, Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 161).

1. Relevant contemporaneous records

(a) The purpose of the test detonations

79. In the first place, the applicants submit that one of the purposes of the test detonations was to test the effects of radiation on them and that, accordingly, relevant monitoring records must have been created. They refer in particular to the line-up procedure used and to various Government memoranda.

80. In particular, the first applicant claims that on 28 April 1958 he was lined up with other men on a beach on Christmas Island without protective clothing for the first megaton explosion. They were ordered to stand, with their eyes closed and hands over their eyes, with their backs to the air detonation, approximately eleven miles (18 kilometres) away, of a megaton nuclear bomb. Immediately after the detonation, the men were ordered to turn and face the explosion. He then describes in detail the immediate effects on him together with his subsequent illness and treatment including immediate searing heat and air blast, diarrhoea, nausea and sickness together with severe blistering of the skin on his face, arms and hands which required medical treatment at the military tent hospital for approximately 10 days consisting of various applications of medications to the skin and tablets for nausea.

Thereafter, his condition improved with the exception of numbness and paralysis of his right leg, which the applicant experienced 1-2 weeks after the detonation and for which the applicant was re-admitted to the tent hospital for approximately two weeks where he received a plaster cast for his leg.

81. Again, on 2 and 11 September 1958, the applicant claims that he and other men were ordered onto the beach to line up for two further detonations. On 2 September he was wearing only a shirt and shorts. Subsequently, tablets were administered to him by the tent hospital personnel over a seven day period for his diarrhoea and nausea and he was also ordered to take a series of decontamination showers following each of which he was passed through a radiation monitoring machine. After the second detonation the applicant submits that he received further treatment at the tent hospital for nausea and fever and required a daily administration of tablets over a four to five day period. On 22 August 1958 and 23 September 1958 the applicant was ordered to continue operating a bulldozer during the explosion in the vicinity of two detonations. The applicant recalls that the relevant service orderlies who administered the treatment he described above made notes and that, while he was in hospital for the numbness in his leg, he remembers entries being made on his medical chart.

82. The second applicant claims that on 28 April 1958 he and other members of the crew were ordered on deck to witness a megaton nuclear detonation in the atmosphere which detonation was at a distance of 12 to 20 miles (19-32 kilometres). He alleges that the men were ordered to turn their backs to the initial detonation and to face the ensuing blast. The applicant claims that he suffered from skin burns, nausea, exhaustion and breathlessness for which he received medical treatment.

83. The applicants also refer to certain official documents arguing that they clearly indicate that the Government had meant to expose them to radiation and to discover the effects of radiation on them with and without various types of protection (see paragraphs 17-22 above).

84. The Government deny, in their observations of 14 June 1995, that the purpose of the detonations was to test the effects of radiation on servicemen. The Government deal for the first time with the line-up procedure in observations dated 25 May 1995 in a related application (No. 23413/94, Dec. 28.11.95). In those observations the Government referred to a "mustering" procedure by which men were ordered to line up on the beach, to face away from the detonations and then to immediately face the detonation site thereafter. The Government explained that this procedure was for the servicemen's benefit namely, to ensure that they did not look at the initial flash as that would injure their eyes.

85. In the present application, the Commission posed a question by letter dated 19 May 1995 as to whether it was disputed that the applicants were ordered as indicated by them (including references to a line-up procedure) to participate in the nuclear testing in 1958. The Government responded by confirming that the applicants were serving in the armed forces in 1958, that this required them to undertake duties in support of the nuclear test programme (by, for example, driving a bulldozer), that it was denied that the devices were tested on the applicants and that the purpose of the tests was to test the devices

themselves (Government's observations dated 14 June 1995). It was only in the Government's later observations (dated 1 February 1996) that the Government accepted that the applicants were lined-up along with other service personnel in the open air in light clothing at the moment of the nuclear detonations, ordered to look away from the direction of the initial flash and then ordered to turn around in the direction of the blast. However, this procedure was, according to the Government, for the applicants' benefit, namely to ensure that they did not look at the initial flash as that would injure their eyes.

86. As regards the various memoranda referred to by the applicants, an extract from the 1953 memorandum (see para. 17 above) was included in the Statement of Facts sent to the Government with the initial communication of the applications. No comment was made by the Government in relation to the terms of the memorandum until its observations in the above-mentioned related application dated 25 May 1995. Following a direct question posed in that respect in the present applications, the Government stated, in its observations dated 1 February 1996, that the 1953 memorandum does not indicate that the effects of radiation on servicemen were to be established by exposing those persons to radiation but to establish, through the use of, for example, dummies and radiation level recordings, the likely effects on servicemen. As to the other memoranda the Government deny that they support the applicants' allegations and submit that those memoranda have been taken out of context by the applicants.

87. The Commission notes that the applicants raise the motivation behind the test detonations as a basis for arguing that the purpose of the tests detonations was to discover the effects of radiation on servicemen, that it would be logical that contemporaneous records monitoring the physical effects on the applicants (including necessary medical treatment) must have been created and that these have not been disclosed. However, the Commission considers that even if the reason for the test programme was, inter alia, to test the effects of radiation on servicemen leading to the consequent creation of such monitoring records, this gives no indication of how long such records were preserved. Accordingly, the Commission cannot establish in this way if such records existed on the acceptance of the right of individual petition by the United Kingdom (14 January 1966) or for any period thereafter.

88. However, the Commission notes the apparent reluctance on the part of the Government to accept expressly that the applicants were ordered to line up in the open air at the time of the detonations and considers the explanations of the Government as to the purpose, as submitted by the applicants, of the test detonations and as to the meaning of the memoranda to be unconvincing. It notes, in particular in this latter respect, that the Government have not given any details of any dummies used or of how testing on inanimate objects could amount to a test of the physical effect and impact of radiation on human beings. Accordingly, the use of the line-up procedure and the texts of the Government memoranda constitute, in the Commission's opinion, a basis for a reasonable anxiety and concern in the minds of the applicants as to the nature and impact of their participation in the nuclear test detonations.

(b) Medical records

89. Secondly, the applicants submit that there are coincidental gaps in their service medical records disclosed to them which gaps should contain detailed notes of their medical treatment after the explosions and which gaps correspond with their exposure to the test detonations. In addition, the first applicant compares the detailed and frequent entries both before his transfer to Christmas Island and after the detonation period with the detailed medical treatment he received during the detonation period and the lack of entries reflecting such treatment. He has also submitted a photograph of himself taken in 1958 on Christmas Island wearing a cast on his leg. He claims that the cast was applied due to paralysis after a detonation whereas his statement on discharge refers to his breaking his ankle in May 1958 and to eight weeks medical treatment in this respect. However, none of the service medical records for Christmas Island disclosed to him to date contain any record of treatment for a leg injury or of the application of a plaster cast. He also refers to the failure to disclose records of his treatment, in the United Kingdom, in Otterburn hospital for spasms and internal haemorrhaging. The second applicant refers to the alleged disappearance of the x-ray films of 2 February 1961 which related to his lung illness. He claims that the x-rays were required because of his complaints of exhaustion and breathlessness and that the full plate x-rays were taken on 2 February 1961 because of a "pick up" found after the x-ray on 1 February 1961. Both applicants state that they did not mention diarrhoea, nausea, skin blistering or leg paralysis in their service discharge statements of 2 September 1959 and 2 February 1961, respectively because the question posed related to injuries then suffered and they were not suffering from those particular injuries on discharge.

90. The Government refer to various safeguards (including the line-up procedures) in place on Christmas Island to avoid exposure of personnel. They dispute that the applicants were ill as they claim since there are no medical notes reflecting this and they point out that the applicants did not refer at all, during their invaliding examination on discharge from the army, to their having been ill as they allege. As regards the first applicant's photograph, the Government submit that this would be consistent with the applicant's statement on discharge but the Government do not comment on the absence of any records in relation to the application of the plaster cast and the relevant treatment. As to the second applicant's x-rays, the Government submit that the x-rays of 2 February 1991 were part of a routine screening operation, that the results were all negative and that the reports on the x-rays of 2 February 1991 have been supplied. The Government also submit that it would have been impossible to give persons such significant doses of radiation (to produce the immediate after effects the applicants allege) without killing them with the blast and heat from the weapons and they refer to a publication in this respect ("The effects of Nuclear Weapons" by Glasstone and Dolan, Third Edition published in 1977).

91. However, the Commission notes that, even if it could be concluded from the applicants' submissions that medical records were created treating the applicants after each detonation, the evidence submitted by the parties gives no indication of how long such records were preserved. Accordingly and as the Commission found at paragraph 87

above, the Commission considers that it is not established by the above submissions that such medical records existed on the acceptance of the right of individual petition by the United Kingdom (14 January 1966) or for any period thereafter.

(c) Other relevant contemporaneous documents

92. The Commission notes that, in their observations dated 1 February 1996, the Government have acknowledged that the records of the explosive yields of the Christmas Island tests were placed in the public domain in 1993 and that the AWE report (provided with the Government's observations dated 14 June 1995) came into the public domain in 1993 when it was placed in the House of Commons library.

93. As to the original contemporaneous radiation level records on Christmas Island, the Commission raised a question of the Government as to whether contemporaneous radiation level records are classified and, if so, for what reason they are withheld from the applicants as distinct from public scrutiny. The Government responded that classified documents do not contain those records, that environmental radiation monitoring at Christmas Island is not "currently" classified, that "no information was withheld from the applicants as there was, and is, no reason to do so" and the Government referred to the AWE report as "a copy summary of such information".

94. Further to the Commission's question subsequently put to the Government as to the whereabouts of the documents containing the original contemporaneous recordings of radiation levels on Christmas Island in 1958 and as to when these documents were made available to the public, the Government responded (observations of 1 February 1996) that records relating to the "atmospheric nuclear test programme" have been stored at the AWE Aldermaston. They stated that "information from such records" has been summarised in the AWE report which was placed in the House of Commons in late 1993. The Government went on to point out that the explosive yield figures now available can be used to calculate radiation levels at any specified distance from the point of detonation.

95. The applicants point out that the AWE report was not available until 1993, is not even an official report, is erroneous in itself and that, in any event, it does not contain the original contemporaneous radiation level records. They also submit that it is scientifically erroneous to submit that radiation levels can be deduced from the yield records, the former depending on a number of external factors apart from the yields from the devices.

96. The Commission considers the observations of the Government (in particular those of 1 February 1996) in response to a clear question in relation to the whereabouts and date of release of the radiation level records to be reluctant and lacking in candour. The question as to when the records were released into the public domain was effectively responded to by noting that the AWE report was released in late 1993. However, the AWE report is a summary report and does not constitute or contain the original radiation level records. In light of this conclusion as to the Government's conduct in the context of this application and in view of the matters outlined above under the heading "Relevant Background" (see, for example, paragraphs 28, 35 and

70), the Commission considers that there is a "co-existence of sufficiently strong, clear and concordant inferences" allowing it to establish that radiation level records were created, are stored at the AWE Aldermaston and have not been released as yet into the public domain (see Eur. Court HR, Ireland v. the United Kingdom judgment, loc. cit.). Those yield and radiation level records are hereinafter referred to as the "relevant records".

97. The Commission further notes that the Government have not at any time indicated to the Commission the reasons for the extension of the period (beyond the initial thirty year period) during which the relevant records were withheld from the public domain. By the same token the Government have not disputed the national security aim proffered by the applicants (the Member of Parliament's letter of 29 November 1994, the letters of the Deputy Departmental Record Officer dated 4 May 1995 and of the Parliamentary Under-Secretary of State for Defence dated 23 May 1994). Accordingly and bearing in mind the nature of the documents in question, the Commission considers that it must proceed on the basis that the relevant records were withheld from the public domain due to national security concerns on the part of the Government.

2. The NRPB and AWE reports

98. The applicants maintain that they have been adversely affected by their exposure to radiation. They challenge in some detail the NRPB and AWE reports. They note that, while the 1985 NRPB results demonstrated that levels of leukaemia and multiple myeloma were three times higher in the veterans' grouping and that leukaemia was a "cancer most closely associated with ionising radiation", the study concluded that this difference was due to the extraordinarily low incidence of those diseases in the control group, which conclusion would seem to undermine the very rationale of using a control group. In addition, the NRPB did not have access to the classified documents and all the necessary information in terms of the veterans and the control group was supplied to the NRPB by the Ministry of Defence.

99. In relation to the 1993 survey, the applicants question in detail the basis for the inclusion and exclusion of certain servicemen in and from the study. They also challenge the sufficiency of the information on participants with cancer and the conclusion of the report in relation to the incidence of leukaemia in veterans. The applicants submit that the report's conclusions contain inferences which contravene the comparison hypotheses upon which the studies were based. The applicants also argue that they have not been able to challenge the evidentiary quality of the conclusions in the NRPB reports in a domestic court precisely because of the non-disclosure of contemporaneous records. They challenge the AWE report on the basis that it is merely descriptive and a summary, that the report expressly states that it does not necessarily represent the official views of the AWE and that its conclusions defy the basic statistical references.

100. The Government submit that the statistical surveys and analyses completed by the NRPB and the AWE clearly demonstrate that the radiation levels were insignificant and not dangerous and that there is no increased mortality or cancer rate in the test participants.

101. The Commission does not consider that it is necessary to comment on the quality or the results of what are technical documents analysing a complex and specialised area. It can conclude, however, that the applicants have raised detailed and substantive grounds to challenge those reports and it accepts the applicants' contention that the primary data upon which those reports were based (including the relevant records) are required before they would be in a position to usefully challenge the results reported.

102. Having established the above, the Commission has considered below the applicants' complaints under specific Articles of the Convention in relation only to the relevant records. In view of the contents of the parties' observations since admissibility, the Commission observes that it has considered the effectiveness of any avenues open to the applicants to obtain the relevant records with the merits of the application (Eur. Court HR, Kremzow v. Austria judgment of 21 September 1993, Series A no. 176-A).

D. As regards Article 6 para. 1 of the Convention

103. Article 6 para. 1 of the Convention, insofar as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

104. The applicants complain under Article 6 para. 1 of the Convention that they did not have effective access to the PAT due to non-disclosure of records.

1. Applicability of Article 6 para. 1 of the Convention

105. The Commission considers that Article 6 of the Convention applies to the applicants' complaint since the determination of their right to a disability pension constitutes a determination of their "civil rights" within the meaning of Article 6 para. 1 of the Convention (Eur. Court HR, Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263).

2. Compliance with Article 6 para. 1 of the Convention

106. The applicants argue that without the relevant records they cannot raise, by way of reliable evidence, a reasonable doubt in their favour that their illnesses are attributable to service and that they are, accordingly, denied effective access to the PAT without those records. The Government essentially argue that the applicants were not denied access to any documents, that the applicants had therefore effective access to the PAT and to the civil courts and that the PAT had all of the applicants' medical records before it. In any event, the Government point out, inter alia, that the applicants were not test subjects but rather participated in support activities in relation to the tests, dispute the applicants' account of their illnesses and note that the NRPB and AWE reports indicate that there were no adverse effects on the applicants by reason of that participation.

107. The Commission recalls that Article 6 of the Convention guarantees a right of effective access to court which right can be subject to certain limitations. While the States enjoy a certain margin of appreciation in this respect, any limitations on access 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, the limitation must have a legitimate aim and the means employed must be proportionate to that aim (Eur. Court HR, Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294, pp 49-50, para. 65). While all rights guaranteed by the Convention are intended to be practical and real rather than theoretical or illusory, this is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial (Eur. Court HR, Airey v. Ireland judgment of 9 October 1979, Series A no. 32, pp. 12-13, para. 24).

108. The Commission also recalls that it has established above, that the relevant records were not (in the case of the yield records) and are not (in the case of the radiation level records) in the public domain for national security reasons (see paragraphs 92 and 96-97) and that, accordingly, the applicants did not have access to the yield records until at least 1993 and have not had access to the radiation level records to the present date. It further recalls that the first applicant's initial claim for a pension commenced on 1 April 1984 and the second applicant's on 10 July 1970. The Commission must therefore consider whether the limitations on the applicants' access to the relevant records constitutes, in the particular circumstances of their cases, a proportionate limitation on their right of access to the PAT bearing in mind the legitimate aim of national security.

109. On the one hand, the Commission accepts that a certain control of access to public records raising national security issues could in principle be compatible with the obligations under Article 6 of the Convention taking into account the particular sensitivity of national security issues and the State's margin of appreciation. However, the Commission would note, in this respect, that security concerns can vary (for example, security concerns about design details of devices used could be different from any security concerns about records relating to radiation levels) and that such concerns can also change with the passage of time. Moreover, the Commission considers that the mere assertion of security concerns, or the recognition by it of possible security concerns, does not dispense the Commission from making an appropriate assessment of the weight and relevance of such concerns.

110. On the other hand, the Commission considers, in the first place, that the applicants have a strong and legitimate interest in obtaining access to the relevant records for the following reasons. The Commission notes its findings, in the context of the motivation for the test programme, as to the reasonableness of the applicants' concerns about the nature and impact of their participation in the test programme in Christmas Island (paragraph 88).

111. It would also add, in this respect, the relative strength of the devices detonated at Christmas Island as opposed to those detonated at Nagasaki, Hiroshima and Maralinga, the relative proximity of the applicants to the epicentre of the detonations as opposed to those persons accepted as negatively affected by and, accordingly,

compensated for the Bikini Island detonations. The Commission would further note, in this respect, the results reported by the MRC and the MRC committee in 1947, 1957 and 1960 together with the Prime Minister's reported reaction, upon which reaction the Government have not commented. The criticisms of the Australian Royal Commission in relation to the manner in which the test detonations had been conducted by the United Kingdom in Australia in 1957 (a year before the Christmas Island detonations), that Commission's recommendations and the agreement by the United Kingdom Government to pay monies in settlement of claims in connection with the test programme are also noted. The Commission also recalls the number of admitted claims before the Marshall Islands Nuclear Claims Tribunal and the total compensation awarded by that tribunal. Furthermore, the Commission agrees with the applicants that the relevant records would constitute an objective starting point as regards the precise nature and impact of their participation in the test programme and, consequently, as regards their claim for a disability pension based on alleged radiation related illnesses.

112. Secondly, the Commission has had regard to the means available to the applicants to obtain the relevant records and has found that those means were not feasible for the present applicants for the following reasons.

113. In this context, the Commission notes that the first step for an individual seeking access to public records is to ascertain, via the public records office, what documents are and are not in the public domain. However, the Commission considers it relevant to highlight a number of difficulties particular to the applicants' cases surrounding the public records system. The United Kingdom's nuclear test programme was, by any standards, an extremely complex and technical matter. Consequently, even the general nature and ambit of the programme would be difficult to clarify. In addition, it was also an enormous undertaking (there were over 20,000 servicemen involved) and, accordingly, the volume of documents created would reflect the size and complexity of the operation. Moreover, the records relating to the test programme in the Pacific have been released into the public domain on a piecemeal basis - such records would constitute, by definition, public records and they would therefore have to be withheld from the public domain for a certain period of time or destroyed. Certain of those records appear to have been reviewed, initially withheld, further reviewed and then released (the yield records). Certain records cannot now be traced by the relevant records office. Certain records, classed as documents to be withheld on grounds of national security, have been accidentally destroyed and certain of such records have not been yet released (the radiation level records). Furthermore, the test programme took place many years ago (beginning in 1952 and ending in 1967) ensuring, in light of the above-described process, some difficulty in tracing records which continue to exist, are in the public domain or remain withheld from the public domain. Finally, any person in the process of tracking down public records relies on the replies of public authorities as to the whereabouts, contents and nature of such records.

114. For these reasons, the Commission considers that it was difficult in the extreme for the applicants to determine what contemporaneous records would have been created and withheld, what records had been destroyed or could not be traced, how such records had been labelled

or categorised and, accordingly, to what type or category of record they should attempt to obtain access. In such circumstances, the Commission considers it justifiable to view the public records system as, for all practical purposes, inaccessible to the present applicants.

115. The Commission notes that the Government point out that civil proceedings for compensation mean that ancillary discovery processes could be commenced by the applicants to obtain the records they seek. The Government submit that the Crown immunity contained in section 10 of the Crown Proceedings Act 1947 was set aside by the Pearce judgment in 1988 (loc. cit.). The applicants strongly contest this assertion. The Commission recalls its comments as regards the effectiveness of such a civil remedy in its admissibility decision in the present applications (Nos. 21825/93 and 23414/94, Dec. 28.11.95) and in the above-mentioned related application (No. 23413/94, Dec. 28.11.95). In any event, the Commission does not consider that it is an answer to a complaint about a failing in relation to the PAT system that the applicants should seek access to records and compensation elsewhere. In the same way as the Court concluded that Article 5 para. 4 of the Convention presupposed the existence of a procedure in conformity with its requirements without the necessity of instituting separate legal proceedings in order to bring it about (Eur. Court HR, Singh v. the United Kingdom judgment of 21 February 1996, to be published), the Commission considers that Article 6 para. 1, insofar as it guarantees effective access to court, presupposes such effective access without the necessity of instituting separate legal proceedings.

116. The applicants applied for disability pensions on the grounds that they suffered from radiation related illnesses and, in this context, the Commission notes section 6 of the 1981 Rules which deals with access to official documents and information in the context of pensions proceedings. However, where documents are covered by national security, the Secretary of State can refuse to produce such documents and the applicants have provided evidence that requests by the President of the PAT for records in relation to the Christmas Island detonations are refused on the grounds of national security. Furthermore, on receipt of such a refusal from the Secretary of State, the PAT must decide if the absence of such records would prejudice the claimant's case - if not, the PAT has no choice but to continue the examination of the claimant's case without the records and, if so, the PAT must adjourn its consideration of the case for an indefinite period namely, until the national security factor is no longer an issue. In the case of the yield records the adjournment would have been approximately eight years after the first applicant's first application to the PAT and almost twenty-three years after the second applicant's first application to the PAT. In the case of the radiation level records, the Commission has established that the national security objection to disclosure continues to the present day.

117. Moreover, the Commission considers that in such a specialised field (a nuclear test programme), the task of the assessment of any causal link between the detonations and the applicants' illnesses called for an equally specialised enquiry and decision-making procedure which procedure would take account of the unusual nature of the matter at issue, the enormity of the test programme, the consequent limited range of independent qualified expertise together with any compelling security considerations. It notes, in this respect, that any expertise

in this field would be highly specialised and would involve close scrutiny of, inter alia, relevant contemporaneous records as regards the detonation programme at Christmas Island, the 1988 and 1993 NRPB reports, the AWE report, the BNTVA report, any relevant studies concerning the detonations at Nagasaki and Hiroshima together with such reports concerning the United Kingdom and United States test programmes in the Pacific and Australia. The Commission notes, in contrast, the relatively bald assertions of the Ministry of Defence in response to the DSS's enquiries during the pensions proceedings (see paragraphs 41 and 56) that the first applicant's exposure to radiation was not sensibly different from zero and that there was no record to substantiate the second applicant's story of an atomic bomb blast.

118. However, there is nothing to indicate that the DSS and the PAT, as constituted, were equipped with the necessary powers, experience or scientific qualifications to undertake the above-described task or that these bodies had any possibility of dealing with cases other than on an individual basis. It notes, in this respect, that the Governments of Australia and the United States considered it necessary to set up special bodies of enquiry and decision to deal with claims from persons alleging injuries caused by nuclear test detonations.

119. The Commission has commented above (paragraph 109) on any national security concerns relating to the relevant records and on its role in that respect. However, the Commission recalls its findings that the applicants had a strong interest in obtaining access to the relevant records and that they had no feasible means to obtain those records. In such circumstances, the Commission considers that the applicants' access to the relevant records and, thereby, to the PAT to obtain disability pensions was more theoretical than real (within the meaning of the above-mentioned Airey judgment) and, as such, a disproportionate limitation on their right of access to the PAT. Accordingly, the Commission finds that the applicants did not have effective access to court within the meaning Article 6 para. 1 of the Convention.

CONCLUSION

120. The Commission concludes, unanimously, that there has been a violation of Article 6 para. 1 of the Convention.

E. <u>As regards Article 8 of the Convention</u>

121. The applicants complain under Article 8 of the Convention that the non-disclosure of records constituted an unjustifiable interference with their private lives. That Article, insofar as relevant, reads as follows:

> "1. Everyone has the right to respect for his private ... life, ..."
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, ..."

122. The applicants contend, inter alia, that their participation in the test programme constituted a significant event in their young lives and that the relevant records are essential for their understanding of the nature and impact on them of that participation. They refer to the Gaskin case (Eur. Court HR, Gaskin v. the United Kingdom judgment of 7 July 1989, Series A no. 160, p. 15, paras. 35-37) and submit they are in an equivalent position to that applicant who wanted unimpeded access to his medical file in order to establish his medical condition. They argue that the release of the records in the Gaskin case was complicated by a confidentiality problem which does not exist in this case in relation to the detonation related medical records. The applicants dispute that current medical examinations could establish the contemporaneous facts in relation to the nature and impact of their exposure to radiation which took place approximately 38 years ago. It is necessary, rather, to establish these facts from contemporaneous records before medical conclusions can now be drawn as to their current medical conditions.

123. The Government submit that the Gaskin case did not establish that an individual has an "unfettered right of access" to information held about him by the State and that the Gaskin case can be distinguished on its facts as the nature of the information withheld from Mr. Gaskin was fundamentally different from that which the applicants allege is being withheld from them. In this latter regard, the Government point out that the information sought in the Gaskin case was of a highly personal nature which could not otherwise be found by that applicant. In the present case the Government argue that the information sought does not purport to provide insight into the applicants' identities as human beings and, furthermore, can be pieced together from the applicants' memories or be acquired from other sources (for example, from their own doctors).

124. The Commission is satisfied that the relevant records constitute the only source of certain primary data from which the applicants can begin to construct the actual nature and physical impact of their participation in the test programme, which participation can be reasonably said to amount to a highly significant event in their young lives. Accordingly, in the same way in which the applicant's file in the Gaskin case related to his private and family life, the Commission considers that the relevant records relate to the applicants' private lives.

125. The Commission considers that the substance of the applicants' complaints under Article 8 is that the State has "failed to act" (see, for example the Airey v. Ireland judgment, loc. cit., p. 17, para. 32) in that it failed to disclose the relevant yield records prior to 1993 and that it has failed to disclose the radiation level records to date. The Commission recalls that, although the essential object of Article 8 of the Convention is to protect the individual against arbitrary interference by the public authorities, there may, in addition, be positive obligations inherent in the respect for private life which would address a "failure to act" complaint. In determining whether or not such an obligation exists, regard will be had to the fair balance that has to be struck between the general interests of the community and the interests of the individual and in striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance (see, for example, Eur. Court HR, Rees judgment v. the United

Kingdom judgment of 17 october 1986, Series A no. 106, p. 15, para. 37). Accordingly, the matter at issue is, in the opinion of the Commission, whether a positive obligation arose under Article 8 of the Convention as regards the United Kingdom Government's provision of access to the relevant records to the applicants.

126. The Commission also recalls that the essential complaint of the applicant in the Gaskin case was of a failure of the Government to act and, in establishing whether such a positive obligation on the Government existed, the Court balanced that applicant's interest in reconstructing part of his care and treatment over a significant period of his young life and the wish to maintain the confidentiality of contributors to the records in question. It concluded that the lack of an independent authority finally deciding on access to the records where a contributor fails to answer or withholds consent did not constitute a proportionate response to the applicant's interests even bearing in mind the importance of the legitimate aim of the confidentiality of the relevant public records.

127. The Commission accepts the Government's argument that the Gaskin case did not establish that an individual has an "unfettered right of access" to information held about him by the State and indeed notes that the Court specifically pointed out that they were not establishing such a right in general but commenting on the particular circumstances presented. It is, accordingly, the Commission's task to determine the "fair balance" of the competing interests involved in the particular circumstances of the present cases and consequently, the existence of a positive obligation as regards the disclosure of the relevant records to the applicants.

128. As in relation to Article 6 para. 1 of the Convention, the Commission accepts the national security issues involved in relation to the relevant records and the particular sensitivity of such issues. It also notes that, in accordance with Article 8 para. 2 of the Convention, a certain control of public records raising national security issues could in principle be considered to be compatible with the Government's obligations under Article 8 of the Convention, taking into account the State's margin of appreciation.

129. On the other hand, the Commission considers, for the reasons outlined above in relation to the complaint under Article 6 para. 1, that it was reasonable for the applicants to be concerned about the nature and impact of their participation in the test programme and that they had a strong and legitimate interest in obtaining access to the relevant records. The Government argue that the applicants could have sought the relevant records by instituting certain proceedings. Despite the Pearce judgment (loc. cit.) to which the Government refer, the Commission considers that taking a civil action for damages, with its ancillary discovery processes, to be an onerous task due to the Crown's immunity which has been statutorily enshrined since 1947 and recently statutorily confirmed in 1987 in relation to matters which arose prior to 1987. The Commission has commented above (paragraph 116) on section 6 of the 1981 Rules which can be invoked in the context of proceedings before the PAT. The Commission further notes its comments and findings in such respects in its decisions as to the admissibility of the above-mentioned related application (No. 23413/94, loc. cit.) and of the present applications (Nos. 21825/93 and 23414/94, loc. cit.). Moreover,

such proceedings would be rendered an even more unlikely route to the relevant records by the practical inaccessibility of the public records system to the present applicants.

130. Moreover, the Commission is also satisfied that a separate issue arises for its consideration under Article 8 of the Convention because, quite apart from any award of a pension, the Commission notes the lack of any provision to date of any individual information or explanations to the test participants as to the nature and impact on them of their participation in the tests despite what the Commission accepts as reasonable concerns in this respect on their part and the increasing concern about early deaths of test veterans which led to the commissioning of the first NRPB report. The Commission notes the publication of the NRPB and AWE reports but this took place in 1988 and 1993, the applicants raised substantive and detailed challenges to those reports and to the independence of those bodies and those reports cannot be objectively scrutinised without the primary data upon which they are based.

131. Accordingly for the particular reasons outlined above, the Commission considers that the domestic system has not responded in a proportionate manner to the applicants' strong and legitimate interest in obtaining access to the relevant records and, accordingly, there has been failure to fulfil the positive obligation on the United Kingdom inherent in the applicants' right to respect for their private lives.

CONCLUSION

132. The Commission concludes, by 23 votes to 3, that there has been a violation of Article 8 of the Convention.

F. As regards Article 13 of the Convention

133. The applicants also complain under Article 13 of the Convention that they do not have an effective remedy in relation to the non-disclosure of relevant records, which Article reads as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

134. The applicants submit that they have, at the very least, arguable claims of a violation of Articles 6 and 8 of the Convention and maintain their argument that they have no effective domestic remedy in that regard. The Government argue, inter alia, that the applicants have no arguable claim in relation to the complaints raised and thus no question arises to be considered under Article 13 of the Convention.

135. The Commission recalls the constant case-law of the Convention organs that, where questions of civil rights and Article 6 para. 1 arise, it is not necessary to make a separate examination of the case under Article 13 of the Convention because its requirements are less strict than, and are absorbed by, those of Article 6 para. 1 of the Convention (see, for example, Eur. Court HR, R v. the United Kingdom judgment of 8 July 1987, Series A no. 121, p. 126, para. 90). In addition and in light of the Commission's conclusion under Article 8

above, it does not find that it is necessary to consider the applicants' complaints under Article 13 in conjunction with Article 8 of the Convention.

CONCLUSION

136. The Commission concludes, unanimously, that it is not necessary to consider the applicants' complaints under Article 13 of the Convention.

G. Recapitulation

137. The Commission concludes, unanimously, that there has been a violation of Article 6 para. 1 of the Convention (para. 120).

138. The Commission concludes, by 23 votes to 3, that there has been a violation of Article 8 of the Convention (para. 132).

139. The Commission concludes, unanimously, that it is not necessary to consider the applicants' complaint under Article 13 of the Convention (para. 136).

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

**PARTLY DISSENTING OPINION OF
MM. S. TRECHSEL, F. MARTINEZ AND N. BRATZA
AS REGARDS ARTICLE 8 OF THE CONVENTION**

While we have voted in favour of a violation of Article 6 in the present cases for the reasons given in the Commission's report, we are unable to share the view of the majority of the Commission that there has been a separate breach of Article 8 of the Convention.

The essential complaint of the applicants concerns the non-disclosure of relevant records and the consequent impact on their ability to establish their claims for disability pensions.

The only relevant records which it has been established existed and continue to exist are not medical records or documents containing data or information of a personal nature concerning the applicants or their involvement in the test programme, but records of a more general character concerning levels of radiation during and following the nuclear detonations. There is nothing to indicate that the relevant records make any specific reference to the applicants or to their participation in the test programme.

As the Commission has found, the failure to disclose the records amounts to a denial of effective access to court within the meaning of Article 6 para. 1 of the Convention. Having regard to this conclusion, even assuming that the records may be said to relate to the private life of the applicants, we have not found it necessary to reach a finding on the question whether the non-disclosure of the same records also amounts to a breach of the applicants' rights under Article 8 of the Convention.

APPENDIX

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY OF

Application No. 21825/93
by Kenneth McGINLEY
against the United Kingdom

Application No. 23414/94
by E. E.
against the United Kingdom

The European Commission of Human Rights sitting in private on 28 November 1995, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
P. LORENZEN
K. HERNDL

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

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 20 April 1993 by Kenneth McGINLEY against the United Kingdom and registered on 12 May 1993 under file No. 21825/93 and the application introduced on 31 December 1993 by E. E. against the United Kingdom and registered on 7 February 1994 under file No. 23414/94;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the joint observations submitted by the respondent Government on 7 September 1994, the joint observations in reply submitted on behalf of both applicants on 19 January 1995 and the further joint observations of the Government received on 10 and 11 May 1995;

- the Commission's decision of 15 May 1995 to join the applications, to request further information and observations and to adjourn further consideration of the applications;

- the joint observations received from the Government on 20 July 1995 and those of the applicants received on 26 July and 26 August 1995.

Having deliberated;

Decides as follows:

THE FACTS

The facts as submitted by the parties may be summarised as follows.

The applicants are United Kingdom citizens. The first applicant was born in 1938 and he resides in Paisley. The second applicant was born in 1939 and he resides in Glasgow. Both applicants are represented before the Commission by Mr. Ian Anderson, an advocate and attorney at law practising both in Scotland and the United States of America.

A. Particular circumstances of the case : the first applicant

On 23 October 1956 the applicant's medical examination for entrance into the army took place and the clinical examination was normal. The applicant was enlisted fit for full combat service in any part of the world.

In December 1957 the applicant was posted to Christmas Island.

The **applicant** claims that in 1958, pursuant to an identified need for testing the effects of nuclear detonations on, inter alia, men, he together with other troops were deliberately exposed to five separate nuclear detonations as outlined below:

1. On 28 April 1958, the applicant was lined up with other men on the beach of Christmas Island without protective clothing. They were ordered to stand, with their eyes closed and hands over their eyes, with their backs to the air detonation, approximately eleven miles (18 kilometres) away, of a megaton nuclear bomb. After the detonation, the men were ordered to turn and face the explosion. On doing so, the applicant experienced searing heat and air blast.

2. On 22 August 1958, the applicant who was stripped to the waist operating a bulldozer, was ordered to continue working while another device was detonated in the vicinity.

3. On 2 September 1958, the applicant and other men were ordered onto the beach to line up for exposure to a third air detonation of a megaton nuclear device. He was wearing only a shirt and shorts.

4. On 11 September 1958 the applicant and other men were lined up again and exposed, on the beach of Christmas Island, to a fourth air detonation.

5. On 23 September 1958, the applicant was ordered to continue operating a bulldozer during the explosion in the vicinity of a fifth air detonation device.

The applicant also submits that, three days after the detonation on 28 April 1958, he suffered from diarrhoea, nausea and sickness together with severe blistering of the skin on his face, arms and hands. His face was so badly blistered that his eyes were closed.

The applicant claims that he received medical treatment at the military tent hospital for approximately 10 days consisting of various applications of medications to the skin and tablets for the nausea.

Thereafter his condition improved with the exception of numbness and paralysis of his right leg, which the applicant experienced 1-2 weeks after the detonation and for which the applicant was re-admitted to the tent hospital for approximately two weeks where he received a plaster cast for his leg and a walking stick (the applicant has submitted a photograph of himself taken on Christmas Island with a plaster cast on his leg and a walking aid).

After the detonation on 2 September 1958 the applicant specifies that tablets were administered to him by the tent hospital personnel over a seven day period for his diarrhoea and nausea. He was also ordered to take a series of decontamination showers following each of which he was passed through a radiation monitoring machine.

After the detonation on 11 September 1958 the applicant received further treatment at the tent hospital for nausea and fever and required a daily administration of tablets over a four to five day period.

The applicant recalls the relevant orderlies who administered his treatment completing medical notes for the above-described treatment and while the applicant was in hospital for the numbness in his leg he remembers entries being made on his medical chart.

The **Government** do not dispute that the applicant was posted on Christmas Island nor the fact that test detonations took place. However, it is denied that the applicant was the subject of the tests - rather the applicant participated in the testing of nuclear devices by way of support activities. Furthermore, the Government dispute that the applicant was ill as he claims.

The applicant was subsequently treated on Christmas Island between 15 September and 23 September 1958 for a throat infection, on 28 October 1958 for tonsillitis and between 14 and 21 November 1958 with a splint for "facial palsy". The applicant was subsequently hospitalised at the military hospital in Honolulu for influenza. This treatment is reflected in his service medical records. The applicant also claims that he was hospitalised, on his return home, in Otterburn for spasms and internal haemorrhaging. However, this latter treatment is not reflected in the service medical records which have been disclosed to the applicant (though a coinciding hospitalisation for influenza is).

On 10 November 1959 the applicant was given a medical discharge from service. In his statement on discharge the applicant confirmed that he had suffered a broken ankle on Christmas Island in May 1958 and that he had been treated for eight weeks for this as an out-patient of a hospital on Christmas Island. No contemporary medical record of this treatment has been submitted.

In April 1960 the applicant was awarded a 20% war pension in relation to a duodenal ulcer attributable to army service.

In 1962 he had to undergo an operation to remove part of his stomach. In 1965 he broke out in boils all over his body and began to suffer constant pain. In 1967 he was diagnosed as being sterile and in 1973 he began to experience severe kidney problems. Because of his health problems, the applicant was unable to retain employment for prolonged periods.

The applicant's disability was re-assessed at 30 % disability in respect of his ulcer in June 1980. On 8 June 1982, his disability was reduced again to 20% but restored to 30% on 13 December 1982 following the applicant's appeal to the Pensions Appeals Tribunal ("the Pensions Tribunal"). In seeking to substantiate his claim he obtained copies of his military records.

Following a series of articles in the press in 1982 about the potential effects of the Christmas Island explosions on those exposed to them, the applicant came to attribute his history of illness to his service on the island and sought an increase in his pension to reflect this.

On 1 April 1984, the applicant made a claim for an increase in his pension in relation to the health problems which he alleged resulted from exposure to radiation during his army service. Following the applicant's claim that his medical records from the Military Hospital on Christmas Island were missing from the military medical file supplied to him, on 16 May 1984 the Department of Social Security ("DSS") made a departmental inquiry to the Ministry of Defence to ascertain whether the applicant had been exposed to ionizing radiation and whether or not he had been issued with a "film badge" on Christmas Island to record radiation levels.

On 11 June 1984, the Ministry of Defence replied that from their records the applicant had been 40 kilometres from the epicentre, was therefore exposed to zero radiation and therefore it would not have been necessary to issue him with a film badge.

On 30 November 1984, the applicant's claimed increase, based on the conditions of reduced fertility, osteoarthritis, skin problems and renal colic arising out of radiation, was refused by the Secretary of State for Social Security pursuant to the deliberations of the war pensions branch of the DSS, as it was found that these conditions were not attributable to his military service. The applicant's parallel application, to reassess his pension based on the duodenal ulcer, was also refused.

On 21 January 1985 the applicant appealed to the Pensions Tribunal against both these decisions of the DSS, claiming that his service medical records had been doctored.

On 11 February 1985 the DSS initiated a departmental enquiry to obtain all available medical records of the applicant between December 1957 and December 1958 together with extracts from the admission and discharge books or, in the alternative, a declaration confirming the medical treatment described by the applicant during that period.

Two days later, on 13 February 1985, the Ministry of Defence responded by confirming that "No A <admission> & D <discharge> books held under particulars quoted. N/T <not traced> medical records."

The DSS obtained evidence including hospital case notes, together with reports from the applicant's own doctor, a DSS psychiatrist, a rheumatologist, a dermatologist and a urologist.

The psychiatrist stated that he "would not consider that Mr. McGinley is suffering from a psychiatric condition". The rheumatologist concluded that the condition complained of related to normal wear and tear and added that he could "find nothing to connect it with radiation exposure".

On 3 March 1986, the dermatologist gave a detailed report of the applicant's skin problems, which had included the development of 12 to 14 painful and inflamed cutaneous crusts one of which required surgical excision and two of which were lanced by a medical practitioner. He noted scattered open comedones and multiple ice pick scars over the applicant's face and neck. The doctor indicated that he had no professional competence to determine whether this condition had been induced by radiation exposure and recommended that an expert opinion be sought from someone familiar with the effects of ionizing radiation on the skin. The DSS declined to follow this recommendation. In a report by the Chief Medical Officer on 19 January 1987, two reasons were given. Firstly, the evidence from the military medical records showed no record of skin problems during the applicant's service. Secondly, on the basis of the report from the Ministry of Defence, the Secretary of State did not accept that the applicant was exposed to ionizing radiation and therefore the point was irrelevant.

In his report of 24 June 1987, the urologist found that he could come to no conclusion regarding the effect of ionizing radiation on the applicant's infertility and renal problems. The DSS had previously stated to the urologist that "We have been assured by the Atomic Weapons Establishment that <the applicant> was too far away from the test sites to have been contaminated with any kind of ionizing radiation".

The applicant's own doctor reported on the applicant's illnesses and conditions and concluded that, though individually they might not have been significant, taken as a whole they could be consistent with radiation exposure.

Based on this information the DSS prepared a Statement of Case and sent an edited copy to the applicant (in accordance with Rule 22 of the Pension Appeals Tribunal Rules (Scotland) 1981), omitting information on the basis that it was "undesirable in the interests of the applicant to disclose to him". The **applicant** initially argued that an unedited version of his Statement of Case was not sent to his then legal representatives but those representatives have now confirmed that this unedited version has been found in the applicant's old files. The **Government** confirm that the dispatch of the applicant's unedited Statement of Case to his representatives (complete with a standard explanatory form) was noted in a Pensions Tribunal Action Sheet as having taken place on 5 May 1987.

The applicant's appeal to the Pensions Tribunal was rejected on 25 February 1988.

Subsequently the applicant's previous assessment in relation to his duodenal ulcer was again reduced to 20 % and the applicant's subsequent appeal against this assessment was rejected.

On 9 July 1991 the applicant again requested a claim form in relation to exposure to nuclear radiation resulting in acne vulgaris, sterility and severe arthritis in his leg, arms and spine. The Ministry of Defence were again consulted by the DSS and confirmed zero exposure. It does not appear that the applicant has pursued this claim after he was reminded by the DSS of the rejection of his previous claim in 1988.

In 1992 the applicant applied for and received an added assessment of 1-5% for hearing loss.

The applicant contacted other veterans who had similar experiences and together they formed the British Nuclear Test Veterans Association ("BNTVA") in 1983. He alleges that since the formation of the BNTVA he has been subjected to a campaign of surveillance and harassment by the United Kingdom authorities. He complains in particular of two incidents of sabotage to his car in 1985, during his involvement in co-ordinating witnesses to appear before an Australian Royal Commission on nuclear testing, of being watched and followed, of interference with correspondence between him and third parties (one of whom has apparently received an admission of such interference from the Ministry of Defence) and of tapping of his telephone.

In support of these allegations the applicant relies, inter alia, on evidence that letters and parcels have been opened and re-sealed, on a series of unexplained noises and problems with his telephone line, on a warning from a British Telecom engineer not to use his telephone for confidential calls and on one specific incident where a Ministry of Defence official attending the said Australian Royal Commission hearings appeared to have specific knowledge of a confidential telephone conversation which the applicant had with a third party. He also refers to a number of instances of individuals seeking his telephone number in connection with the BNTVA being told, incorrectly, that he is ex-directory.

B. Particular circumstances of the case : the second applicant

In October 1956, the applicant enlisted in the Royal Navy at age 17. He was passed as fit with no medical problems and, in particular, his respiratory system was recorded as normal. He was enrolled fit for full combat duty in any part of the world.

In April 1958 the applicant was serving on board HMS Ulysses which was positioned off Christmas Island.

The **applicant** claims that, on 23 April 1958, he and other members of the crew were ordered on deck to witness a megaton nuclear detonation in the atmosphere which detonation was at a distance of 12 to 20 miles (19-32 kilometres). The men were ordered to turn their backs to the initial detonation and to face the ensuing blast. The applicant suffered from skin burns, nausea, exhaustion and breathlessness, for which he was treated in April, May and June 1958.

The **Government** submit that the detonation was at a distance of 60 to 70 miles (96-112 kilometres) and that subsequently the applicant did not complain of any symptoms.

However, it is not disputed that the applicant had a number of chest x-rays (mass miniature radiography on 70 mm film) on 8 March 1958, 30 April 1959, 30 May 1960 and 1 February 1961. He had a follow-up full plate x-ray on 2 February 1961 in Portsmouth, England.

The **Government** claim that the x-rays were part of a routine screening operation and that the results were all negative. The **applicant** claims that the reason the x-rays were taken was because of his complaints of exhaustion and breathlessness and that the full plate x-ray was taken on 2 February 1961 because of a "pick up" found after the x-ray on 1 February 1961.

On 8 February 1961 the applicant was discharged from the navy on compassionate grounds by purchase.

The applicant continued to suffer from exhaustion and breathlessness. An x-ray taken in June 1965 indicated extensive modular infiltration of both lungs, which condition was diagnosed as sarcoidosis.

On 10 July 1970 the applicant applied for a disablement pension alleging that his condition was attributable to his exposure to the nuclear test off Christmas Island.

On 14 July 1970 the DSS requested "all available medical records", including "extracts from the admission and discharge books if necessary" from the Medical Records Section of the naval archives registry. The reply, which was received on the same day, stated that there was "no trace" of the medical records.

On 28 July 1970 DSS requested the Ministry of Defence to confirm the applicant's service and his proximity to the detonation. The Ministry of Defence confirmed that the applicant was 70 miles (112 kilometres) from the detonation and supplied a trace of the applicant's service showing no period of sick leave on or subsequent to the detonation date, until 30 November 1958.

On 12 August 1970 the DSS requested the applicant's x-ray of 2 February 1961. The response, dated 18 September 1970, was as follows:

> "A thorough search of our large film records for 1961 has been made and no trace of a large film for <the applicant> can be found."

On 5 October 1970 the DSS made another enquiry of the Ministry of Defence requesting details as to the proximity of the applicant's ship to any detonation and querying whether the applicant was likely to have been in the open at the time of the blast, whether there were any bed tickets in relation to the applicant's sick leave and whether there were any relevant entries in the Medical Officer's Journal. The x-rays taken on 70 mm film were also requested.

The response, dated 16 October and 17 November 1970, read as follows:

> "It is regretted that no bed tickets are held for <the applicant>; there is no entry in the Civil Register nor is there any trace in the Medical Officer's Journal... All available medical documents were sent to you on 20th July 1970. ... The records of operation Grapple are held by war historical branch and an examination of these and the logbook for <the applicant's ship> show that the ship was approximately 70 miles from the explosion on 23 April 1958. ... The Naval plan contains the following instruction:
>
> > 'Precautions to be taken by ships in target areas - all exposed personnel are to be completely covered, anti-flash hats, gloves and goggles are to be worn, and long trousers tucked into socks'."

On 1 January 1971 the applicant's pension claim was refused.

On 4 March 1971, further to representations received on the applicant's behalf, an enquiry was made by the DSS of the Ministry of Defence for any service records including hospital records and x-rays. The response, dated 17 March 1971, stated that "this enquiry has already been thoroughly dealt with and to date we cannot provide further service documents".

On 5 April 1971 the applicant lodged an entitlement appeal to the Pensions Tribunal.

A medical report, dated 2 August 1971 and completed by a senior chest physician retained by the DSS, concluded that:

> "In summary, it is, in my opinion, virtually certain that the correct diagnosis in this case is sarcoidosis and that the disease had no relationship to proximity to an atomic explosion in April 1958."

However, that physician suggested that the applicant might be suffering from chronic berylliosis caused by exposure to beryllium, an alloy used in the nuclear tests. His report indicated that the clinical effects of berylliosis and sarcoidosis were similar and that it was important to ascertain the precise nature of the applicant's medical treatment from 24 May 1958 to 9 June 1958 in order to exclude this possibility. The Ministry of Defence subsequently confirmed that the applicant was on loan to another ship during that time and that no sickness was documented during that period. The opinion was expressed that the applicant's exposure to beryllium compounds was unlikely in the course of his work as a stoker.

On 7 December 1971 an edited Statement of Case was sent to the applicant, which statement excluded information on the basis of its "potential to distress or harm the applicant". The **applicant** initially argued that an unedited version of his Statement of Case was not sent to his then legal representatives but those representatives have now confirmed that they are not sure whether this unedited version was received by them at the time. The **Government** confirm that the dispatch of the applicant's unedited Statement of Case to his representatives (complete with a standard explanatory form) was noted in a Pensions Tribunal Action Sheet as having taken place on 7 December 1971.

The applicant disputed the Statement of Case on the basis that it lacked full medical records and his x-ray films. He also contended that he was 15 to 20 miles (24-32 kilometres) from the detonation and not 70 miles (112 kilometres). Following further enquiries, the Ministry of Defence confirmed that no further medical records existed, that no x-ray films were held by the Ministry of Defence before 1960, and that a recalculation of the position of the applicant's ship showed that he was 60 miles (96 kilometres) from the blast.

The DSS therefore issued the supplementary opinion that the applicant's hospitalisation (in April 1958) predated the blast, that the results of the x-rays were normal and that there was no evidence that exposure to radiation could have caused the applicant's condition.

On 29 August 1972 the Pensions Tribunal rejected the applicant's appeal confirming that:

> "The Tribunal have carefully considered all the evidence. They feel obliged to accept the opinion of the Medical Division of the DSS and for the reasons stated therein regret that they must disallow the appeal."

On 21 October 1982 the applicant submitted another claim for a war pension due to radiation related sarcoidosis of the lung. The DSS responded to the applicant by reminding him of the decision of the Pensions Tribunal taken in 1972 and informing him that it was legally binding unless set aside by the Court of Session in Scotland on a point of law.

On 11 July 1991 the DSS received another war pension claim (lodged by the BNTVA on the applicant's behalf), which was similar to that in respect of which the Pensions Tribunal issued its decision in 1972 and to the further war pension claim made in 1982. The applicant was again reminded of the Pensions Tribunal's decision of 1972 and the applicant responded, by letter dated 30 October 1991, stating that he was not happy with that decision. The DSS replied by referring the applicant to the fact that the Pensions Tribunal had sight of his service records in considering the applicant's case.

On 25 April 1992 the applicant made a further claim for a war pension due to deafness. The claim was rejected by the Secretary of State and the applicant did not appeal the decision to the Pensions Tribunal.

C. Relevant background

1. Atmospheric Nuclear testing

A document headed "Atomic Weapon Trials", marked "Top Secret" and dated 20 May 1953, of the Defence Research Policy Sub-Committee of the Chiefs of Staff Committee states:

> "... Many of these tests are of the highest importance to Departments... The army must discover the detailed effects of various types of explosion on equipment, stores and men with and without various types of protection...".

Although it had been established as early as 1947 that such exposure would inevitably have genetic effects on the relevant individuals, this did not deter the Government from pursuing the testing, and in 1955 Sir Anthony Eden, the then Prime Minister, is quoted as referring to such a consequence as being "a pity but we cannot help it".

For twelve years commencing in 1952 the United Kingdom Government carried out a number of atmospheric nuclear weapon tests in Australia. In 1958 tests were also carried out, with weapons having a greater yield, off-shore and over the south-eastern peninsula of Christmas Island. Approximately 20,000 servicemen participated in the Christmas Island tests ("the test veterans").

2. Classified Documents

Certain documents have been classified and thus withheld from public scrutiny for a 30 year period under the Public Records Acts and this period has been recently extended for another 20 years for "national security and personal sensitivity reasons". The Government confirm that these documents do not contain any contemporaneously recorded radiation levels, personal monitoring or personal medical

records. An attempt by way of motion in the House of Commons in January 1993, to urge the Government to, inter alia, appoint an independent assessor to assess the national security reasons for the continued retention of the documents, failed.

3. The Royal Commission into British Nuclear Testing in Australia

The Australian Royal Commission was appointed in July 1984 by the Queen to enquire into the conduct of the Australian tests. That Commission was furnished with documentation including statements, plans and reports covering the planning, execution and results of some of the test activity in Australia, which documents were also transferred at the same time (mid-1980s) to the United Kingdom Public Records Office under reference number DEFE16. The report of the Australian Royal Commission published in 1985 noted, inter alia, the following:

(a) The United Kingdom was misleading in supplying information to the Australian Government about the tests.

(b) Various specific tests and projects were criticised as being carried out in an inappropriate and negligent manner causing danger to both civilian populations and military personnel. For example, the Royal Commission found that the safety precautions against radiation exposure employed at Maralinga, South Australia, demonstrated, "ignorance, incompetence and cynicism" by the United Kingdom for the safety of persons in the vicinity of those tests.

(c) There were some serious departures from the contemporary radiation protection policies and standards during the test programme.

(d) Exposure to radiation at certain dose levels is associated with increased risk of cancer and genetic effects. While increased frequency of genetic effect has not been demonstrated in any irradiated human population (and noting that such a study would not be practicable), it is accepted that such effects do occur. By reason of the major detonations and the deposition of fallout across Australia, it is probable that cancers, which would not otherwise have occurred, have been caused in the Australian population.

The Royal Commission recommended that the United Kingdom Government clean up certain test areas and that the benefits of certain compensation legislation be extended to include not only military personnel but also civilians who were at the test sites at the relevant time. By agreement dated 10 December 1993 the United Kingdom agreed to pay £20 million to the Government of Australia in settlement of all claims made by any persons (excluding United Kingdom test participants) for injuries connected with the test programme.

4. Reports of the National Radiological Protection Board ("NRPB"), the British Nuclear Test Veterans Association ("BNTVA") and personnel from the Atomic Weapons Establishment ("AWE")

(a) The 1988 NRPB report

Due to increasing concern expressed in the media about early deaths of test veterans, the Ministry of Defence commissioned the NRPB (in conjunction with the Imperial Cancer Research Fund) to carry out

a study into mortality and cancer rates amongst the test veterans. The NRPB compared the mortality and cancer rates of a body of test veterans (22,247 persons) with a control group (army personnel who passed similar medical tests on entry into service but who did not participate in the testing).

The NRPB report concluded that participation in the nuclear weapon testing programme did not have a detectable effect on the test veterans' overall expectation of life, nor on their total risk of developing cancer. However, the test veterans demonstrated a higher rate of leukaemia and multiple myeloma than the control group.

As a result, the DSS, which administers the war pensions legislation, subsequently awarded war pensions to those presenting these two conditions.

(b) The 1993 NRPB report

In order to clarify the situation, a follow up report was completed extending the period of review over seven more years so that almost double the number of deaths were available for analysis.

The NRPB again concluded that there had been no detectable difference in the veterans' expectation of life nor as regards their risk of developing cancer or other fatal diseases. The suggestion from the previous report that participants may have experienced small hazards of leukaemia and multiple myeloma, was found not to be supported by the additional data used for the second report and the excesses observed in the first report were reported as being a chance finding, although the possibility that test participation may have caused an additional risk could not be completely ruled out.

(c) The BNTVA report

In 1992 the British Nuclear Test Veterans Association ("BNTVA"), a group founded by the first applicant to campaign for recognition and compensation for those exposed to the same or similar explosions, conducted its own survey of its members and this report concluded that 1 in 5 of its members suffered from cancer and that 1 in 4 veterans had children who suffered from defects attributable to genetic origin.

(d) The AWE report

In 1993 personnel with the AWE produced a report which described and summarised the environmental monitoring undertaken at Christmas Island during the series of test detonations in 1958. It concluded that there was no detectable increase in radioactivity on land, in the sea or in the air pursuant to the Christmas Island testing. It also concluded that there was therefore no danger to personnel from external radiation nor from inhalation and ingestion of radioactivity. The report is stated not to necessarily represent the official views of the AWE. The Government claim that the records of environmental radiation monitoring are contained in this report and the applicant submits that this report is merely descriptive and a summary of such information.

D. Relevant domestic law and practice

1. Civil action for compensation

It was accepted by the Secretary of State for Defence in the House of Commons on 12 April 1994 that the Ministry of Defence "would consider compensation for any British test veteran whose death or illness had been caused by radiation from the atmospheric tests".

The right to compensation under common law is enforceable through the civil courts once the applicant proves that, given the state of knowledge at the relevant time, his illness or injury was reasonably foreseeable and, on the balance of probability, was in fact caused by the action or inaction of the person against whom he is claiming.

However, armed forces personnel whose cause of action arose on duty before 1987, are barred from suing the Crown from compensation by section 10 of the Crown Proceedings Act 1947. (The repeal of section 10 in 1987 was not applicable to those claiming in respect of pre-1987 actions.)

It is disputed between the parties whether that immunity from suit is applicable in relation to veterans such as the applicant.

The **Government** claim that the case of Pearce v. The Secretary of State for Defence and Ministry of Defence [1988] 2 WLR 145 allows veterans such as the applicant to take a case against the Secretary of State despite the immunity from prosecution set down in section 10 of the 1947 Act.

The **applicant** disputes the availability of such a civil action, submitting that the above-mentioned Pearce case arose out of very particular and different facts.

To date no one has been able to successfully demonstrate in a civil action for damages that an illness was, on the balance of probability, caused by radiation from the nuclear tests.

2. War Pensions

Claims for an award of a pension are made to the Secretary of State for Social Security ("the Secretary of State"), and The Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983 ("the Order") provides for the payment of a benefit in respect of disablement or death arising from service. The Secretary of State decides whether a claimant is entitled to benefit and the way the benefit should be paid depending on the claimant's assessed disability. An award of a pension is made where the claimant raises reliable evidence to demonstrate a reasonable doubt in his favour that the injury or disease is attributable to service after 2 September 1939.

The level of pensions awarded is governed by the Naval Military and Air Forces, etc. (Disablement and Death) Service Pensions Order 1983 as amended.

The procedure for claiming a war pension commences with the receipt of a claim by the DSS and the obtaining of the claimant's service records (including service medical records) from the Ministry of Defence. Once the factual questions as to, for example, dates of service are established, the claim is passed to the DSS doctor who forms a view as to whether the claimant is suffering from the disability and whether the disability is attributable to service. In order to assist in the decision, that doctor may obtain further medical evidence and reports including civilian medical records. Once this assessment is completed the Secretary of State will give the final decision.

A claimant who is refused a war pension can appeal to the Pensions Tribunal and this entitlement appeal is governed by the Appeal Tribunals Acts 1943-1949. The Pensions Tribunal consists of a legally qualified chairperson, a medical member and a lay member (a member of the service in an entitlement claim). In order to assist the Pensions Tribunal, the DSS provides the Pensions Tribunal with a Statement of Case which is a typed version of the claimant's service records including:

- service medical records;
- subsequent medical reports and medical reports obtained at the request of the DSS doctor;
- a statement outlining the reasons of the Secretary of State for the decision to refuse a pension; and
- possibly a statement of the DSS doctor of the evidence considered, the conclusions reached and the reasons for the conclusions.

The Statement of Case is sent to the claimant's representative for comment and, in light of the claimant's representative's comments, further enquiries may be made by the Ministry of Defence, specialist consultants and the DSS doctor. The evidence thus gathered is incorporated into a supplemental Statement of Case which is sent to the claimant's representatives and to the Pensions Tribunal office for hearing.

Rule 22(1) of the Pensions Appeal Tribunal (Scotland) Rules 1981 permits the Secretary of State to omit from the claimant's copy of the Statement of Case medical evidence which, in the opinion of the Secretary of State, "would be undesirable in the interests of the appellant to disclose". However, where this rule applies, the claimant's representative must be sent an unedited version of the Statement of Case, which version is also before the members of the Pensions Tribunal. If information is omitted under Rule 22(1), the Pensions Tribunal when hearing the case may disclose the information to the claimant or may, in his interests, hear the appeal without disclosing this information.

A further appeal lies on a point of law to the Court of Session in Scotland, either with the leave of the Pensions Tribunal or of the Court of Session itself. Such an appeal could be made on the basis that the Pensions Tribunal had erred in law by "acting upon an incorrect basis of fact" (Secretary of State for Education and Science v. Tameside MBC [1977] AC 1014).

3. Provision of records

Pursuant to Rule 6(1) of the Pensions Appeal Tribunal (Scotland) Rules 1981, a claimant may apply to the Pensions Tribunal to give a direction to a government department for disclosure of official documents and information. It is also possible to apply under the Administration of Justice (Scotland) Act 1972 for an order requiring production of medical records in anticipation of litigation. In addition, it is possible to obtain an order for Specification (production) of Documents, in the context of Scottish court proceedings to recover damages, in order to require government departments to produce records.

A Writ of Subpoena *Duces Tecum* can also be applied for, in the context of an action for damages, which writ requires the production to court of documents held by a third party.

4. Interceptions of communications and surveillance

The Interception of Communications Act 1985 and the Security Services Act 1989 regulate and supervise such interceptions and surveillance. Both statutes provide for complaints tribunals.

The jurisdiction of the Interception of Communications Tribunal is limited to investigating whether there has been a relevant warrant for interception and, where there is or has been, whether the reason for and manner of issuing the warrant was in accordance with the 1985 Act. Where the Tribunal finds that there has been a contravention of the provisions of the 1985 Act, it can, inter alia, order the quashing of the warrant, the destruction of material intercepted and direct the Secretary of State to pay compensation.

The Securities Services Tribunal can investigate whether a complainant has been the subject of enquiries by the Security Services. If so, it can investigate whether the Security Services had reasonable grounds for instituting and continuing such enquiries and if not it indicates to the complainant that no determination has been made in his favour. In the event of a decision in favour of the complainant, the Tribunal can order, inter alia, the cessation of surveillance, the destruction of records and it can also order the Secretary of State to pay compensation.

COMPLAINTS OF THE APPLICANTS

The applicants complain about certain matters arising out of their allegedly deliberate exposure to atmospheric nuclear testing conducted by the United Kingdom in 1958 over Christmas Island and its surrounding waters. It is acknowledged by the applicants that their exposure to the nuclear detonations in 1958 is outside the scope of the Commission's examination since the United Kingdom had not, at that stage, accepted the right of individual petition.

They complain that contemporaneous records were compiled of their medical treatment and of radiation levels immediately after their deliberate exposure to the detonations, and that they are being denied access to those records held by the United Kingdom Government.

They contend that the failure, to warn of the effects of their exposure to radiation or to release the aforementioned contemporaneous records, has prevented early monitoring and the effective early diagnosis and treatment of their problems. Together with prolonging and exacerbating their physical suffering, it has caused mental stress to themselves and their families. The applicants also complain that the denial of access to such contemporaneous records effectively denies them access to, and a fair hearing before, the Pensions Tribunal.

The applicants further contend that, in addition to the above matters, the harassment and surveillance to which they have allegedly been subjected, as well as amounting to inhuman and degrading treatment, has infringed their right to respect for their private lives and their correspondence, their freedom of expression and their freedom of association. The applicants also complain that the assessment of disability pensions is discriminatory.

The applicants invoke Articles 2, 3, 6 para. 1, 8, 10, 11, 12 (first applicant only), 13 and 14 of the Convention in relation to these matters. In their observations submitted on 19 January 1995, the applicants also invoke Articles 6 para. 1 (in relation to the editing of their Statements of Case) and 14 (in relation to the level of pensions awarded to ex-servicemen) of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The applications were introduced on 20 April and 31 December 1993 and were registered on 12 May 1993 and 7 February 1994, respectively.

On 5 April 1994 the Commission decided to communicate the applications to the respondent Government and to request them to submit observations on the admissibility and merits of the applicants' complaints under Articles 6, 8 and 13 of the Convention.

The joint observations of the Government were received on 7 September 1994 after two extensions in the time-limit fixed for this purpose. The observations of the applicants were received on 19 January 1995 after one extension of the time-limit fixed for this purpose. The Government subsequently submitted further observations, prior to the Commission's further consideration of the matter, on 10 and 11 May 1995.

On 15 May 1995 the Commission joined the applications, requested further information and observations from the parties on the admissibility and merits of the applications and adjourned further consideration of the applications.

The response of the Government was received on 20 July 1995 after one extension of the time-limit fixed for this purpose. The applicants submitted their response (including comments on the Government's observations submitted in May 1995) on 26 July 1995 after one extension of the time-limit fixed in this respect and further comments on the Government's response of July 1995 on 26 August 1995.

THE LAW

The applicants have numerous complaints stemming from their alleged deliberate exposure to atmospheric nuclear testing conducted by the United Kingdom on Christmas Island in 1958. It is acknowledged by the applicants that their exposure to the nuclear detonations in 1958 is outside the scope of the Commission's examination since the United Kingdom had not, at that stage, accepted the right of individual petition.

The applicants invoke Articles 2, 3, 6 para. 1, 8, 10, 11, 13 and 14 of the Convention and the first applicant also invokes Article 12 of the Convention.

A. Articles 2 and 3 of the Convention

The applicants complain under these Articles that their lives have been endangered because of their deliberate exposure to nuclear detonations and because of the Government's subsequent failure to warn them of the possible consequences of their exposure, to advise in relation to long-term health care or to disclose contemporaneous records which meant that the applicants were not in a position to obtain sufficient medical monitoring. The applicants also submit that they have suffered inhuman and degrading treatment as a result of a train of events begun by their deliberate exposure to the detonations and continued by the ongoing failure of the Government to acknowledge responsibility for this, to inform the applicants of the effects of their exposure or to take any steps to mitigate the effects of their exposure.

However, the Commission is not required to decide whether or not these complaints disclose a violation of the Convention in view of the six-month time limit set down by Article 26 of the Convention.

The Commission notes that both applicants have confirmed that they became aware of the alleged connection between their illnesses and their exposure to the nuclear detonations as early as 1982 and 1971, respectively, and considers that the applicants were therefore in a position from those dates to obtain advice on appropriate monitoring. The Commission therefore considers that the time-limits for these complaints began to run from those dates and further notes that the present applications were not introduced until April and December 1993 respectively. Furthermore, an examination of the case does not disclose the existence of any special circumstances which might have interrupted

or suspended the running of the time-limit. Therefore, the Commission considers that this part of the application has been introduced out of time and the Commission must declare these complaints inadmissible pursuant to Article 27 para. 3 of the Convention.

Insofar as the applicants complain under Article 3 of the Convention that the inhuman and degrading treatment derives from non-disclosure of contemporaneous records and from interceptions of communications, surveillance and harassment, the Commission considers that these complaints fall to be dealt with under Articles 6 and 8 of the Convention.

B. Articles 6 para. 1, 8 and 13 of the Convention and non-disclosure of contemporaneous records

The applicants complain under Articles 6 para. 1 and 8 of the Convention that the failure of the United Kingdom Government to disclose contemporaneous records effectively deprived them of their right of access to, and of a fair hearing before, the Pensions Tribunal for the purposes of obtaining a pension based on their radiation related illnesses and constituted a failure to respect their private lives. The applicants also complain under Article 13 of the Convention that they have no effective domestic remedy in this regard.

1. Article 25 of the Convention

The Government deny that the applicants can claim to be victims of a violation of the Convention, submitting that the applicants have already received all their service and civilian medical records and that such records were before the Pensions Tribunal when their cases were considered. However, the Commission notes that none of the original records disclosed to the applicants to date contain the contemporaneous medical or radiation records to which the applicants seek access and therefore finds that the applicants can, pursuant to Article 25 of the Convention, claim to be victims of a violation of Articles 6 para. 1, 8 and 13 of the Convention as regards the alleged non-disclosure of those records.

2. Article 26 and exhaustion of domestic remedies

The Government submit that the applicants have not exhausted a number of available domestic remedies as required by Article 26 of the Convention.

In the first place, the Government argue that the applicants did not formally request the appropriate governmental department to supply them with their service medical records. The Government also point to the fact that had the applicants been refused such records, they could have compelled the Government to produce those medical records by applying to the President of the Pensions Tribunal who could have directed the Government to produce them. The Government further submit that, in order to obtain any such medical records, the applicants could have obtained an order for recovery of documents, in anticipation of litigation, under section 1 of the Administration of Justice (Scotland) Act 1972 or an order for Specification of Documents in the context of a civil action in the courts.

The applicants argue, inter alia, that the persistent pattern to date, in terms of their own cases and the cases of others (in respect of whom the applicants have submitted statements to the Commission), is one of non-disclosure despite requests and investigations. They further submit that the Pensions Tribunal and the DSS made a number of requests for their full service medical records to the Ministry of Defence, which requests did not yield any contemporaneous medical records.

The Commission recalls that, according to the constant case-law of the Convention organs, the applicants are required to exhaust only domestic remedies that are likely to be effective and adequate (see, for example, No. 13156/87, Dec. 1.7.92, D.R. 73 p. 5).

The Commission notes that it does not appear to be disputed that the DSS made a number of general and specific requests, to the Ministry of Defence, on behalf of both applicants and in the context of their pension applications, for their service medical records. One of the enquiries of the DSS (11 February 1985) followed a claim by the first applicant that his service medical records, as disclosed to him, had been doctored. Another such enquiry (4 March 1971) was made pursuant to representations made on the second applicant's behalf.

The Commission does not consider that further requests or orders, made either by the applicants, by the President of the Pensions Tribunal (assuming the President would have agreed to make such a request) or by a court could have resulted in the production of records which the Ministry of Defence had already confirmed on a number of occasions could not be traced. Therefore the Commission considers that these further domestic remedies suggested by the Government would not, in the circumstances of the present cases, be effective or adequate as submitted by the Government.

Secondly, the Government also submit that the applicants have not brought a civil action for damages against the Government which action is now possible following the removal of the immunity from suit (in relation to claims from ex-servicemen such as the applicants) by the decision in the case of Pearce v. The Secretary of State for Defence and Ministry of Defence [1988] 2 WLR 145.

The availability of this remedy is disputed by the applicants who submit that the immunity from suit still exists and that such an action would not in any event provide an effective remedy. In this respect the applicants submit, inter alia, that there is a significant difference between their cases and Mr. Pearce's case as the applicants would be alleging negligence on the part of the armed forces rather than against private individuals. The applicants also contend that Mr. Pearce's case presented an extremely particular set of the facts and that the applicants would not, in any event, be in a position to discharge the required onus of proof without, inter alia, the undisclosed contemporaneous records. They point out, in relation to this latter submission, that no one has ever succeeded in any such action (not even Mr. Pearce) because of the lack of records available.

The Commission notes that the Pearce case did not involve an allegation that the armed forces had acted negligently. In addition, even assuming that this remedy is available to the applicants, the

Commission considers that such a remedy would not be effective. The medical documentation which was disclosed and which was before the Pensions Tribunal was found insufficient to establish a causal connection between the detonations and the applicants' ongoing illnesses. As noted above, the Ministry of Defence indicated to the DSS on a number of occasions that no additional contemporaneous medical records could be traced. Since, as submitted by the Government, the onus of proof is lower before the Pensions Tribunal, it is unlikely that the applicants would have succeeded in discharging the higher onus of proof applicable in a civil case using the same medical records as were before the Pensions Tribunal.

The Commission therefore finds that a civil action for damages against the armed forces cannot be considered, in the present applications, to be an effective and adequate domestic remedy.

Thirdly, the Government argue that the applicants could have appealed the Pensions Tribunal's decisions to the Court of Session in Scotland on a point of law. The applicants submit that on the facts available to the Pensions Tribunal the decisions against them were unappealable. Their complaints do not relate to the quality of the decisions but rather the lack of records made available to the Pensions Tribunal. The Commission is of the view that a further appeal to the Court of Session in Scotland, even on the grounds of "acting upon an incorrect basis of fact", would not have provided the applicants with an effective domestic remedy since the applicants would not have been able to produce any further information upon which to base an appeal.

The Commission therefore concludes that these complaints of the applicants should not be declared inadmissible on grounds of the requirement to exhaust domestic remedies set out in Article 26 of the Convention.

3. Article 26 of the Convention and six months

The Government submit that the second applicant's application is out of time in that the Secretary of State turned down his last pension appeal on 25 August 1992 and that his present application was not introduced within six months of that date.

The Commission recalls that according to the constant case-law of the Convention organs, although the six-month time limit set down by Article 26 of the Convention runs from the date of the final decision or, in the absence of a domestic remedy, from the date of the act of which the applicant complains, this rule applies only to cases where the complaint is about a specific decision or occurrence and not where the complaint is about a situation of some duration (see, for example, No. 11660/85, Dec. 19.1.89, D.R. 59 p. 85).

The Commission considers that a continuing failure to supply the applicants with certain records can constitute a continuing problem for the applicants in terms of establishing a causal link between the detonations and their illnesses and therefore a continuing problem of access to court in respect of their pension entitlements. In this respect, the Commission notes that it would be open to the applicants, on receipt of further relevant contemporaneous records in relation to their medical treatment or radiation levels, to re-apply to the DSS for

a re-assessment of their disability pensions. The alleged non-disclosure also constitutes a continuing difficulty for the applicants in piecing together a significant part of their medical and personal history.

The Commission therefore considers that the second applicant's complaints under Articles 6 para. 1 and 8 of the Convention cannot be declared inadmissible as outside of the six-month time limit set down in Article 26 of the Convention.

Furthermore, the Commission finds nothing in the observations of the parties to indicate that the submissions made by the Government at paragraphs B. 1, 2 and 3 above would affect the admissibility of the applicants' complaints as regards non-disclosure of the contemporaneous radiation records.

4. The complaints in relation to non-disclosure of records under Articles 6, 8 and 13 of the Convention.

Articles 6 para. 1, 8 and 13 of the Convention, insofar as relevant, read as follows:

Article 6

"1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 13

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

(a) As regards the complaint under Article 6 para. 1 of the Convention, the Commission notes that the Government do not dispute that the determinations of the level of the applicants' disability pensions could constitute determinations of civil rights within the meaning of Article 6 para. 1 of the Convention.

In the first place, the Government point out, inter alia, that the applicants were not test subjects but rather participated in support activities in relation to the tests. The Government also dispute the applicants' account of their illnesses submitting that there is no record of any such illnesses and that the applicants themselves failed to refer to any of their allegedly detonation related illnesses on discharge from the army. The Government also point out that, if the applicants were as ill as they describe, the sequelae of any such illnesses would have been referred to in their later medical records and that the Pensions Tribunal had all of the applicants' medical records before it when considering their applications.

The Government also point out that the applicants have received their entire service and civilian medical records held by the military authorities and that classified documents do not contain records of the radiation levels recorded after the relevant detonations or of any monitoring or treatment of the applicants after those detonations. Furthermore, records of environmental radiation monitoring at Christmas Island are not currently classified and are included in the Report published in 1993 by personnel of the Atomic Weapons Authority ("AWE").

The Government further submit that, in any event, the statistical surveys and analyses completed in 1985 and in 1993 by the National Radiological Protection Board ("NRPB") and the AWE clearly demonstrate that the radiation levels were insignificant and not dangerous and that there is no increased mortality or cancer rate in the test participants. The Government do not raise this expressly as a basis for arguing that these complaints are manifestly ill-founded but the Commission considers it appropriate to refer to these submissions of the Government in this context.

The applicants maintain their accounts of their experiences on Christmas Island and allege that the Government are not disclosing the medical records of their treatment after the detonations nor contemporaneous records of radiation levels after those detonations (which information the applicants allege has been, inter alia, classified on grounds of national security). In particular, the first applicant has produced a photograph of himself in 1958 on Christmas Island wearing a cast on his leg. The applicant claims that the cast was applied due to paralysis after a detonation whereas his discharge notes refer to his breaking his leg in May 1958 and to eight weeks medical treatment in this respect. However, none of the medical records disclosed to him to date contains any record of this treatment.

The applicants challenge in some detail the NRPB and AWE reports. The applicants note that, while the 1985 NRPB results demonstrated that levels of leukaemia and multiple myeloma were three times higher in the veterans' grouping and that leukaemia was a "cancer most closely associated with ionising radiation", the study concluded that this difference was due to the extraordinarily low incidence of those diseases in the control group, which conclusion would seem to undermine the very rationale of using a control group. In addition, the NRPB did not have access to the classified documents and all the necessary information in terms of the veterans and the control group was supplied to the NRPB by the Ministry of Defence.

In relation to the 1993 survey, the applicants question in detail the basis for the inclusion and exclusion of certain servicemen from the study. They also challenge the sufficiency of the information on participants with cancer and the conclusion of the report in relation to the incidence of leukaemia in veterans. The applicants submit that the report's conclusions contain inferences which contravene the comparison hypotheses upon which the studies were based. The applicants also argue that they have not been able to challenge the evidentiary quality of the conclusions in the NRPB reports in a domestic court precisely because of the non-disclosure of contemporaneous medical and radiation level records.

The applicants challenge the AWE report on the basis that it is merely descriptive and a summary and that the report expressly states that it does not necessarily represent the official views of the AWE. According to the applicants it does not, contrary to the Government's submission, contain the original radiation recordings and, furthermore, the applicants' own expert advises that its conclusions defy the basic statistical references.

Finally, the applicants refer in detail to the criticisms by the Australian Commission of the United Kingdom Government's conduct of the testing in Australia (which took place at the same time as the testing in Christmas Island) and to the consequent agreement by the United Kingdom Government to pay compensation to the Australian Government.

(b) As regards the complaint under Article 8 of the Convention in relation to non-disclosure of documents, the Government argue that the Gaskin case (Eur. Court H.R., Gaskin judgment of 7 July 1989, Series A no. 160) did not establish that an individual has an "unfettered right of access" to information held about him by the State and that the Gaskin case can be distinguished on its facts as the nature of the information withheld from Mr. Gaskin was fundamentally different from that which the applicants allege is being withheld from them. In this latter regard, the Government point out that the information sought in the Gaskin case was of a highly personal nature which could not otherwise be found by that applicant. In the present case the Government argue that the information sought does not purport to provide insight into the applicants' identities as human beings and, furthermore, can be pieced together from the applicants' memories or be acquired from other sources (for example, from their own doctors).

The applicants submit, inter alia, that Mr. Gaskin sought medical information in order to establish his medical condition to allow him to take an action in tort against a county council for negligence and that the release of the records in the Gaskin case was complicated by a confidentiality problem which does not exist in this case (at least not in relation to the detonation related medical records). The applicants dispute that current medical examinations could establish the contemporaneous facts in relation to, and immediate effects of, their exposure to radiation which took place approximately 35 years ago. It is necessary, according to the applicants, to establish these facts before medical conclusions can now be drawn as to their current medical condition. Finally, the applicants refer to their young ages at the time of the first detonation.

(c) As regards Article 13 of the Convention the Government argue, inter alia, that the applicants have no arguable claim in relation to the complaints raised and thus no question arises to be considered under Article 13 of the Convention. The applicants submit that they have, at the very least, arguable claims of a violation of Articles 6 and 8 of the Convention and maintain their argument that they have no effective domestic remedy in that regard.

The Commission finds, in light of the parties' submissions, that this part of the application raises complex and serious issues under Articles 6, 8 and 13 of the Convention which require determination on the merits. It follows that these complaints of the applicants cannot be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention. No other ground for declaring them inadmissible has been established.

C. Article 6 para. 1 of the Convention : Editing of the Statements of Case

The applicants initially complained that their representatives were not furnished with unedited copies of their Statements of Case as required by Rule 22 of the Pensions Appeal Tribunal (Scotland) Rules 1981. The Government contested this complaint pointing to their original records which indicated the precise dates (5 May 1987 and 7 December 1971) when the unedited versions of the Statements of Case were sent to the applicants' then representatives.

However, in light of the applicants' more recent submissions, as to the finding by those previous representatives of the first applicant's Statement of Case on an old file and as to those representatives' uncertainty whether they received the second applicant's Statement of Case or not, the Commission does not find the applicants' complaint substantiated and therefore this complaint is manifestly ill-founded pursuant to Article 27 para. 2 of the Convention.

The applicants continue to maintain that the Statements of Case were improperly edited by the Secretary of State and this point is disputed by the Government. However, the Commission is not required to decide whether or not this latter complaint of the applicants discloses a violation of Article 6 para. 1 of the Convention in view of the requirement to exhaust domestic remedies contained in Article 26 of the Convention. Since it has not been shown that the applicants' representatives did not receive the unedited Statements of Case during the proceedings before the Pensions Tribunal and since no question was raised before that Tribunal about the manner in which the Statements of Case were edited, this complaint must be declared inadmissible on grounds of non-exhaustion of domestic remedies pursuant to Article 27 para. 3 of the Convention.

D. Interception of communications, surveillance and harassment

The applicants complain under Articles 8, 10 and 11 of the Convention in relation to interception of communications (by correspondence and by telephone) and of surveillance as a result of their activities with the BNTVA. The first applicant also complains about harassment under these Articles.

The Commission recalls that the *lex specialis* as regards alleged interference with communication of information or ideas by correspondence is Article 8 of the Convention and it is further recalled that communication by telephone is included in that concept of "correspondence" (No. 8231/78, Dec. 12.10.83, D.R. 49 p. 5 and Eur. Court H.R., A v. France judgment of 23 November 1993, Series A no. 277-B). Therefore, the Commission finds that these complaints fall to be considered under Article 8 of the Convention.

The Government argue, inter alia, that since a complaint has not been made to the Interception of Communications Tribunal under section 7 of the Interception of Communications Act 1985, any complaint in respect of alleged interceptions of communications is, pursuant to Article 26 of the Convention, inadmissible on grounds of non-exhaustion. In this respect, the applicants submit that an administrative practice of, inter alia, interception of telecommunications and surveillance of ex-servicemen and members of the BNTVA exists. The applicants further argue that, in any event, the Tribunal provided for under the 1985 Act is insufficient and ineffective to protect the rights guaranteed by Article 8 of the Convention, particularly in light of the Government's submission that the alleged interference would not have been authorised by warrant under the 1985 Act.

The Commission recalls that it has previously found that these Tribunals together with the relevant Commissioners constitute sufficient safeguards for the purposes of Article 8 of the Convention (No. 21482/93, Dec. 27.6.94, D.R. 78-A p. 119), and despite the applicants' submissions to the contrary, finds no reason in the present case to depart from that conclusion. The Commission therefore considers that the failure of the applicant to complain to any of those Tribunals constitutes a failure to exhaust domestic remedies and therefore finds the complaints of the applicants, about interception of communications and about surveillance, inadmissible pursuant to Article 27 para. 3 of the Convention.

As regards the first applicant's complaint of harassment, the Commission notes that the incidents in respect of which the first applicant complains occurred in or about 1985. In view of the date of introduction of the first applicant's application, the Commission finds that this complaint was introduced outside of the time-limit set down by Article 26 of the Convention and therefore it must be declared inadmissible pursuant to Article 27 para. 3 of the Convention.

F. Article 12 of the Convention

The first applicant complains under Article 12 of the Convention that he is sterile because of his exposure to the nuclear detonations and therefore he has been unable to found a family. The Commission considers that the acts complained of are the detonations and the six-month time-limit, set down by Article 26 of the Convention, began to run on this complaint from the date of the first applicant becoming aware of the alleged connection between his condition and the detonations to which he was exposed, which was 1982. The Commission notes that no event of relevance to this complaint occurred either after his exposure or since the applicant's awareness of that alleged connection.

Since the first applicant introduced his application in 1993, the Commission must, pursuant to Article 27 para. 3 of the Convention, declare this complaint inadmissible as having being introduced outside the time-limit provided for in Article 26 of the Convention.

G. Article 14 of the Convention

The applicants complain, in their observations, that the level of disability pensions differs according to a claimant's rank on leaving service and argue that this difference in treatment is a violation of Article 14 of the Convention. The Commission notes that Article 14 of the Convention has no independent existence and for the purposes of this complaint considers it is raised with Article 1 of Protocol 1.

As regards the first applicant the Commission notes that this complaint was introduced to the Commission in the joint observations received on 19 January 1995 and that the Naval Military and Air Forces etc. (Disablement and Death) Service Pensions Order 1983 came into force in 1983 at which time the applicant was already in receipt of a pension. The Commission also recalls that the second applicant has not been awarded a pension. Therefore the Commission concludes that the first applicant's complaint in this respect has been introduced outside of the six month time-limit set down by Article 26 of the Convention and must be declared inadmissible pursuant to Article 27 para. 3 of the Convention. The second applicant cannot claim to be a victim of a violation of the Convention since he is not in receipt of a pension and as such his complaint must be declared manifestly ill-founded pursuant to Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicants' complaints under Articles 6, 8 and 13 in relation to non-disclosure of records;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (S. TRECHSEL)