Case Number: 2203634/2002

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THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr C Shoebridge	AND	Commissioner of Police of the Metropolis

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT:	London Central	ON:	14-18 March 2005
CHAIRMAN:	Mr G P Sigsworth	MEMBERS:	Ms O Stennet Mrs L M Wingrove

Appearances

For Claimant:	In person
For Respondent:	Mr O Segal, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the Respondent unlawfully discriminated by way of victimisation against the Claimant.

CHAIRMAN

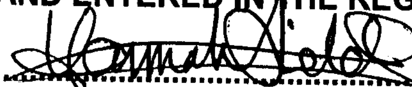
JUDGMENT SIGNED BY CHAIRMAN ON

June 2, 2005

JUDGMENT SENT TO THE PARTIES ON

24 JUNE 2005

AND ENTERED IN THE REGISTER



FOR SECRETARY OF THE TRIBUNALS

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BETWEEN

Claimant		*Respondent*
Mr C Shoebridge	**AND**	**Commissioner of Police of the Metropolis**

Date of Hearing **14 – 18 March 2005**

REASONS OF THE EMPLOYMENT TRIBUNAL

THE ISSUES AND THE LAW

1 The Claimant's claim is one of victimisation under the Sex Discrimination Act 1975. The protected acts that he replies upon are two Employment Tribunal claims for sex discrimination and victimisation. The first was presented to the Tribunal on 4 February 1998, with a successful outcome, so far as the Claimant was concerned, on 15 July 1999. The second on 1 July 1999, with a successful outcome for the Claimant on 12 April 2000. The claim that we are determining at this Hearing is brought under Section 4(1)(a) of the Act. The less favourable treatment alleged is the Respondent's contact with Sky News through his press officer or otherwise in about September or October 2001, such contact designed to persuade or request Sky News not to continue to use the Claimant as a guest, pundit or expert on crime/security/terrorism stories. The detriment that is alleged is that the Claimant's work for Sky News thereafter and from about mid-October 2001 suddenly ceased or reduced very substantially. It is not, of course, suggested by the Respondent that the allegations brought by the Claimant to the Tribunal were false or not made in good faith – see Section 4(2). Although the claim was not presented until 25 July 2002, when the less favourable treatment and detriment occurred in and from October 2001, a Tribunal in November 2002 has already ruled that it would be just and equitable to extend time beyond the three month limitation period, as the Claimant on his case did not become aware of the intervention of the Respondent until a discussion with a Sky News producer on 26 April 2002 and believed that the three month time limit ran from the date of this discovery. Further, that Tribunal in November 2002 also ruled that it had jurisdiction to hear the complaint of post-employment discrimination/victimisation – a decision now effectively endorsed by the House of Lords in the case of **Rhys-Harper -v- Relaxion Group plc [2003] IRLR 48**.

2 The Claimant brings his claim against the Metropolitan Police Service or the Metropolitan Police Commissioner. The less favourable treatment is alleged to have been carried out by a police officer or a civilian press officer. Questions as to the nature and extent of the Respondent's liability for the acts of his officers and civilian employees therefore arise. The allegations in this case predate the July 2003 amendments to the Sex Discrimination Act 1975, which clarify the extent of the liability of chief constables for acts of discrimination by police officers. We therefore have in mind cases such as **Chief Constable of Bedfordshire Police -v- Liversidge [2002] IRLR 651, CA**, **Chief Constable of Kent Constabulary v Baskerville (2003) (unreported), Chief Constable of Cumbria v McGlennon [2002] ICR 1156, EAT,** and **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96, CA.** The relevant provisions of the statute are at section 17(1) and section 41(1) and (2). Civilians in the press office are, of course, not police officers and therefore presumably their employer, the Metropolitan Police Commissioner or the MP Service, would be liable for any act of discrimination by them in the ordinary way that an employer is vicariously liable for acts of his employees done in the course of their employment. Further, as was properly and fairly recognised by the Respondent's representative, if we find that a press officer or police officer victimised the Claimant under the statute, we may be able to conclude that he acted with the apparent authority of the Respondent in his contact with Sky – see section 41(2). In other words, whether or not in fact the Respondent knew of or authorised the act or even if the press officer or police officer acted outside their remit may not be relevant, where it appeared to Sky that what they said was the view of the Respondent. In **Baskerville,** the Court of Appeal held that section 17(1) and section 41(2) require the principal to be treated as also having done that which the agent did with the principal's authority. If the relevant act is done by a police officer as agent of the chief constable with his authority, section 17(1) has to be read as applying to that act as done by the chief constable also. The result is that in relation to that act the chief constable is to be treated as the employer of the complaining constable (here Mr Shoebridge) by section 17(1), and, if what was done amounted to discrimination, then that was unlawful conduct by the chief constable, and that would entitle the complaining constable pursuant to section 63(1) to present a complaint to the Tribunal. It was also held in that case that it is for the Tribunal of fact in each case to determine whether the subject of complaint was the act of a police officer as agent for the chief constable and with his authority.

3 We have in mind a number of well known authorities. In **Chief Constable of West Yorkshire Police -v- Khan [2001] IRLR 830,** the House of Lords held that to show victimisation it is necessary for the Applicant to demonstrate, first, that he was treated less favourably than someone who had not made an allegation of race/sex discrimination and second, consciously or subconsciously, the discriminator treated him in that way because of his bringing complaints of discrimination. In **Nagarajan -v- London Regional Transport [1999] IRLR 572,** the House of Lords held that conscious motivation on the part of the discriminator is not a necessary ingredient of unlawful discrimination. It is sufficient for a Claimant under section 4(1) to establish that the principal or an important cause of the less favourable treatment was the fact that the victimised person had done a protected act. It was also said that discrimination may be on racial/gender grounds even though it is not the sole ground for the decision. If racial or protected acts had a significant influence on the outcome, discrimination is made out.

4 The burden of proof, and we refer to Section 63A(2) of the Act. Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could conclude in the absence of an adequate explanation that the Respondent has committed an unlawful act of discrimination, the Tribunal shall uphold the complaint unless the Respondent proves that he did not commit that act. We were referred to the case of a recent Court of Appeal authority of **Igen -v- Wong [2005] IRLR 258** which, in an Annex, revises the guidance given in the well-known case of **Barton -v- Investec Securities Ltd [2003] IRLR 772, EAT.** It is not necessary for the purposes of this decision to go through in detail the 13 points made in the Annex but we have them very much in mind in this case. We were substantially helped by the submissions of both sides. We adopt the submissions of Mr Segal in paragraphs 1, 2 and 3 of his written submissions as representing a good way of proceeding through the legal matters that we have to consider in this case. So far as the comparator point is concerned, Mr Shoebridge has put forward a Mr O'Connor as an actual comparator. If and in so far as he is not a proper comparator, then we would have to consider a hypothetical comparator and we note what Lord Nichols said in the leading case of **Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, HL.** He said that when discussing the question of the relevant comparator, Employment Tribunals may sometimes be able to avoid arid and confusing debates about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as he was and postponing the less favourable treatment issue until after they had decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? If the former, there will usually be no difficulty in deciding whether the treatment afforded to the Claimant on the proscribed ground was less favourable than was or would have been afforded to others.

5 The Claimant relies on two further matters in support of the allegation that we have to decide and rule upon. First, the contact with the Respondent's press office by a Mr Severin Carrell of the Independent on Sunday in late December 2001 and early January 2002 and the way that his queries were responded to by the press office. Second, the contact by the Respondent's press office – and it is alleged to have been Mr Bob Cox the chief press officer – with Ms Martha Collins, guest getter at ITN on 19 November 2003, and the allegation that she was offered an inducement not to use the Claimant on air again. These are not substantive complaints but matters of background and evidence we should have regard to when deciding what inferences to draw from our findings of fact.

FINDINGS OF FACT

6 The Tribunal made the following relevant findings of fact:

6.1 The Claimant was employed by the Respondent as a police officer between August 1988 and July 2000. Much of his time was spent as a detective constable, and later an acting detective sergeant, in the Special Branch, carrying out the sort of activities that Special Branch carry out in the UK. Before joining the Metropolitan Police, the Claimant was an army officer. In March 1996 he left the Special Branch on promotion and was posted as a uniformed sergeant to the London Borough of Hammersmith and Fulham.

6.2 The first Tribunal proceedings – begun in 1998 – were for sex discrimination and concerned the treatment of the Claimant by the Respondent following complaints about him by a female officer whom he had supervised. As a result of the complaint he was prosecuted, tried and acquitted at the Crown Court for an offence of indecent assault. His suspension at work did not end, and he was then subject to further allegations and investigated by a full disciplinary board where the charges were dismissed. Just before he received the reserved decision in his favour in the final case, he started further proceedings in the Tribunal alleging victimisation in respect of the continued suspension after his acquittal and the full board discipline. These proceedings were resolved in his favour in March or April 2000. Following this, he was medically retired from the police in July 2000, his remedy claim was eventually settled and he obtained compensation for loss of pay and pension. It was, apparently, the largest settlement at that time in sex discrimination proceedings involving the police and the first case finding sex discrimination in favour of a male officer.

6.3 In March 2001 the Claimant began his media career in a freelance capacity for the BBC, as an on-screen expert and commentator on crime and security issues including terrorism. His career has continued since that time and he has worked on a freelance basis for a large number of media and press organisations, as we have seen from the list he has provided us. In May 2001 he began such freelance work for Sky News, and between 1 May 2001 and October 2001 he made appearances on 21 days.

6.4 However, from about mid-October 2001, and we note that this is a period in the aftermath of the terrorist outrage in New York, his appearances for Sky dropped away, if not entirely then almost entirely, and so it has continued to date. In fact, he has been asked on just five occasions to do a presentation for Sky and on two of those occasions the interview was not used. Of the three interviews used, one was live at Windsor Castle on 23 June 2003 and two others were also live interviews in respect of President Bush's visit. The point being made here is that his interviews could not be stopped by Sky because they were live – he was on the spot doing them, having been asked to at very short notice. The Littlejohn Programme began in 2003 and the Claimant made a number of appearances on this. It was run by a separate unit in a different building by producers from outside the Sky organisation, although clearly still under the control of Sky News. We note from Mr Cole's evidence to us that the producers of Littlejohn reported to him and to Mr Nick Pollard and Mr John Riley – the three top managers at Sky News. The programme was a modest success but is no longer on air. The programme did not start until two years after other work for Sky had dropped away.

6.5 At the same time, from October 2001, the Claimant continued to work for other press and media organisations and has continued to be called by Sky News for advice or to attend an interview which has been cancelled a short time later. He has remained on Sky's database as a contact although the entry on that database reads: "Not very good." The Claimant's evidence was that when he saw the entry on the database some time ago it said: "Very Good", and it has obviously been amended since. We cannot make much of this entry, we

find. We do not know who amended it or when or why. Anybody at Sky had access to it, and anyone could have amended it. There has been no audit trail as to when or who modified it.

6.6 On 21 December 2001 Mr Carrell telephoned the Claimant, and the Claimant recorded the conversation without Mr Carrell knowing it and we have seen the transcript of the conversation. Mr Carrell, who is an investigative journalist for the Independent on Sunday, appeared to have spoken to the Respondent's press office and had been told something about the Claimant's career, as we have seen from the transcript. He was told only that the Claimant had been transferred to Fulham to run the vehicle crime unit in 1996, and Mr Carrell was questioning the Claimant's credentials for speaking on anti-terrorism and intelligence matters. He clearly had not been told by the press office about the Claimant's background with the police in Special Branch and this information came from the Claimant in the course of this telephone conversation. The transcript does not indicate to us that Mr Carrell knew that before he made the telephone call to Mr Shoebridge. Mr Carrell also found out that the Claimant had taken the Respondent to an Employment Tribunal in a discrimination case and won a substantial settlement. The press log that we have seen, which would have been available to the press officer who gave the information to Mr Carrell, is extensive and includes full details of the Claimant's work history and his Tribunal proceedings. Mr Cox told us in his evidence that if enquiries are received from the media the details of any response given are entered onto the press office log. In this case this did not happen. There are guidelines, Mr Cox said, in place within his office in relation to the provision of information to the media about serving or former members of personnel, and the guidelines indicate that such information is confidential and that in the absence of the consent of the individual concerned details should not be disclosed. Indeed, although these guidelines were not apparently formalised at the time, when Mr Cox, who was later contacted by Mr Shoebridge, took legal advice he declined to disclose any further information to Mr Carrell. It appears to us from this evidence that the information given to Mr Carrell should not have been disclosed to him, and that no entry was made on the log of that disclosure when it should have been, and that the information that was given was selective. We did not hear evidence that there were reasons for not mentioning the Claimant's Special Branch service, such as security implications or whatever – that version was not advanced on behalf of the Respondent. Mr Carrell also obtained information about Mr Shoebridge from others, apart from the press office, notably Commander Ramm who told Mr Carrell that he did not know of Mr Shoebridge. It appears that the reason that Commander Ramm did not know Mr Shoebridge was that he would generally only have known people in the Special Branch or Special Operations of superintendent level or above unless he had actually worked with them, and he had never worked with Mr Shoebridge.

6.7 At some point after May 2001, senior management at Sky News issued a memo saying that the relationship with the Claimant was on hold – in other words, he was not to be used for the time being. The memo was issued through the internal I-mail which would automatically have been deleted 60 days later. There is no evidence that it was sent out again. We accept the evidence of

Mr Wilson, who reported to Mr Cole, about this. That memo gave no reason as to why the Claimant should not be used or why the relationship should be put on hold, and Mr Wilson did not ask because apparently they get memos like that from time to time. We stress that we place really no weight on Mr Lee Hannon's evidence, for three reasons. First, we only saw and heard a partial and edited version of what was a fairly lengthy telephone conversation between him and Mr Shoebridge. Second, Mr Hannon is not a witness in this case and did not come to give evidence or be cross-examined on that evidence. Third, he was regarded by Mr Cole – who did come and give evidence and was cross-examined – as not being reliable. However, on the other hand we accept the live evidence to us of Mr Brunt, and he told us that he had a vague recollection of negative comments being made about Mr Shoebridge in 2001 by somebody from Scotland Yard, and the sort of comments that were being made were that Mr Shoebridge was not qualified to talk about the subject and as a former police officer, he had not been in the job for the previous 3, 5 or 15 years, as Mr Brunt put it, and was therefore out of touch. Mr Brunt mentioned this to Mr Cole, but he did not make a big thing of it and nor did Mr Cole. Mr Cole also recalls this conversation. He told us that Mr Brunt said that the Met Police had concerns about Mr Shoebridge sometime after May 2001 – he mentions no names. Mr Brunt also mentioned a Mr John O'Connor, another pundit/expert and ex-police officer, and told us that he had also been spoken of in unfavourable terms by Scotland Yard (or the Met). Apparently, a lot of people at Scotland Yard do not like Mr O'Connor because he has a reputation of being critical of the Met although he also sometimes speaks highly of them. However, although Mr O'Connor was not liked by the Met, there has not been any evidence that his competence as a pundit or expert has been challenged by the Respondent.

6.8 The Claimant rang Mr Cole on 2 August 2002, and this was an important telephone conversation. Mr Cole said to the Claimant that he did not think any memo had been put out saying that the Claimant should not be used, and that they would not put it on record anyway because it is not right. He then went on to say to the Claimant in that conversation that he thought it was fair to say that some elements within Scotland Yard suggested that there was perhaps a slight question mark against the Claimant and that he did not represent the semi-official view of the Yard. These elements then went on to talk about people who had left the police sometimes putting themselves up as experts. Mr Cole said to the Claimant that obviously if there is a major doubt then people are banned, but he also said that the Claimant was not by any means banned from Sky. He said that he thought that what had happened in Mr Shoebridge's case was that, without anybody being specific, somebody had said that 'you want to be a bit careful about him'. Mr Cole said that the whispering campaign, if there was one, was not anything through him. It appears that Mr O'Connor was still being used by Sky News at a time when the Claimant was not. It is notable that in this telephone call, although Mr Cole spoke of the word from the Scotland Yard and the question mark against the Claimant as a reason for his not being used, no reference was made at all to the Claimant not being liked by producers at Sky, or being too pushy and persistent about getting a contract or retainer, or being a bit of creep, as was alleged later to be the case. It was only after this conversation that

Mr Cole apparently investigated the matter with Mr Phil Wardman and Miss M Richardson, as he told us, and Miss Richardson said that she did not like Mr Shoebridge very much, she thought he was a bit of a creep and that he producers did not like him and generally he had fallen out of favour. Miss Richardson like Ms Collins, was a guest getter and was therefore fairly influential in hiring guests and choosing which guests should appear. Mr Wardman apparently said that the Claimant was pushy, offering himself as an interviewee on various police matters and he had become an irritant. Mr Cole confirmed to us in his evidence that he spoke to them shortly after that telephone call in August 2002, in anticipation of a letter that he had asked the Claimant to write to him but which never arrived. If the letter had arrived he said he would have briefed the head of news about it. Apparently, Mr Wardman also felt that the Claimant was sometimes stretched on his brief as to the international scene after '9.11' and when Afghanistan had high-lighted the need for international experts on terrorism from all over the world.

6.9 On 19 November 2003, Ms Collins, the ITN guest getter, spoke to somebody from the Respondent's press office and on a balance of probabilities it was, we find, Mr Bob Cox. He telephoned her, and he does not deny doing so, and the contemporaneous record made by Ms Collins indicates that she spoke to somebody called Bob Cox that day. This call was made straight after the Claimant's appearance on the ITN lunchtime news, and the call was to the effect that the caller did not think much of Mr Shoebridge and he suggested that in future they should give him (Mr Cox, the caller) a ring as he could help out on security issues. It seems to us that the e-mails that we have been referred to in August 2004 – the e-mail exchange between the Claimant and Ms Collins - follow-on one from the other and we think it unlikely that there was a phone call in between. We do not think that if there had been Ms Collins would have written, "how are you?" at the bottom of her e-mail; it looks as if she is responding to an e-mail and she had not heard from the Claimant for some time. Ms Collins' evidence suggested that the caller did offer advance notice of PMQs, possibly as an inducement to Ms Collins not to use the Claimant. Generally, we accept that Ms Collins would not necessarily remember all this detail now and we prefer, in so far as it helps us to reach our findings, the documentary evidence that we have seen – the note that she made at the time and the exchange of e-mails, and so on. The fact that Mr Cox was later recommended by a Mr J Sewell and that his name meant nothing to Ms Collins at the time inclines us to the finding that on a balance of probabilities he rang her; she did not ring him for him to return her call.

CONCLUSIONS

7 On the basis of our findings of fact, and applying the appropriate law, the Tribunal has reached the following conclusions:

7.1 The Respondent, acting through his agent the chief press officer or someone either in the press office or in a senior police position, said something about Mr Shoebridge to Mr Brunt sometime between May and October 2001

which was relayed to Mr Cole and which led to an internal memo that was circulated either from Mr Cole personally or in his name or in the name of others in the senior management team, Mr Pollard or Mr Riley – it does not really matter which – saying that the relationship with Mr Shoebridge was to be put on hold; in other words that he was not to be used, for the time being anyway, as a pundit or guest or expert.

7.2 If what was said to Mr Brunt emanated from the press office, then the commissioner or service as employer were liable for it. Further or alternatively, we conclude that, per **Baskerville** and through section 17(1) and 41(2), then what was said to Mr Brunt about the Claimant, whether from the press office or from a police officer, fell within the scope of section 41(2) and falls to be treated as being said by the Respondent as well as by the press/police officer. It may not have been an express prohibition but whatever was said to Sky and whatever was put into the memo was because of a doubt or a negativity raised about Mr Shoebridge by the Respondent, whether as to the knowledge of what he was talking about or because of his lack of recent experience as a police officer or because of the fact that he had never been in a senior position, or otherwise. We do not conclude that Sky was coerced or bribed into issuing the memo, but undoubtedly the memo was issued and undoubtedly Mr Shoebridge was not used regularly thereafter as he had been before, and we link the two together and we conclude that this drastic reduction in his use was as a result of what was said to Sky News by the Respondent.

7.3 In October 2001, when this reduction in work took place, Mr Cole had not investigated with Mr Wardman or Miss Richardson what they or others on the ground thought of Mr Shoebridge – or at least we have no evidence of that. Those enquiries were made only after his telephone call from Mr Shoebridge in August 2002, and up until October 2001 the Claimant had been used frequently by Sky, so the sudden reduction or cessation of his appearances for Sky cannot be explained except by reference to that memo. Although Miss Richardson and Mr Wardman did not like the Claimant, that was not the reason on the evidence of Mr Cole given to him until August 2002. We heard no evidence that Miss Richardson decided on her own not to use Mr Shoebridge, and it suggests to us that the only explanation for his fall out of favour was the Respondent's comments about him, whatever they were. The work that he continued to do for Sky – and we accept the Claimant's explanations as to why that continued – were live interviews where producers needed someone on the spot and they went out before they could be stopped. The Littlejohn team was to an extent separate from the mainstream Sky News, and although of course Mr Cole could have picked up the telephone and spoken to them about it, the fact is that the Littlejohn programme went out two years after the memo had gone out and the memo had long since expired, we assume. It may be that at some point after the memo went out, and after Miss Richardson and Mr Wardman had said something, that a general feeling went round that the Claimant had fallen out of vogue and that he was not liked, and that there would have come a time in any event when he would not have been used. Although we note that his name was not removed from the database, the endorsement, "Not very good", would have had the desired result of him not being used very often.

7.4 The question for us is: should we draw an inference from the facts we have found that a significant reason for the Respondent's action with regard to Sky News was that the Claimant had brought Employment Tribunal proceedings in the past against the Respondent? Certainly Mr Cox in the press office knew by September 2001, on his own evidence, that the Claimant was a former police officer who had brought successful Tribunal proceedings against the Respondent and it was on the press log in some detail. Mr O'Connor was more critical of the Met – according to Mr Brunt – yet not removed by Sky for use as an expert – and this suggests that his competence as an expert was not challenged in the same way. The difference, of course, between Mr O'Connor and Mr Shoebridge is that Mr O'Connor has not brought Tribunal proceedings. But, if Mr O'Connor is not an appropriate or proper comparator then we have to consider the hypothetical comparator and construct that comparator in the way that is suggested to us by the case of **Shamoon**; by focusing, as the House of Lords suggests, on why the complainant was treated as he was and then dealing with the less favourable treatment issue after that.

7.5 The case of **Igen -v- Wong** stresses that at stage 1, in deciding whether the Claimant has proved facts from which it could be concluded in the absence of an adequate explanation that the Respondent has committed an unlawful act of discrimination, it is important to remember that at this stage of our analysis the outcome will usually depend on what inferences it is proper to draw from the primary facts found by us and it is important to note the word "could". We do not have to reach at stage 1 a definitive determination that such facts could lead to our conclusion that there was an act of unlawful discrimination. At this stage we are looking at the primary facts which we find to see what inferences of secondary fact could be drawn from them, and when we are considering what inferences or conclusions can be drawn from the primary facts we have to assume at stage 1 that there is no adequate explanation for those facts. If we get that far and think that there are inferences that can be drawn from the primary facts that could lead without adequate explanation to a conclusion that there was an unlawful act of discrimination, then the burden of proof shifts to the Respondent. It is conceded by the Respondent in this case that they have no such explanation at stage 2 if the burden of proof shifts to them. That is not the way they have run their case. They have chosen not to – or perhaps not been able to – call evidence to contradict that or explain why the memo was sent round. We have reached the conclusion unanimously that the Claimant has indeed to got to stage 1 and that we have reached a point where explanations from the Respondent are necessary. We conclude that a hypothetical comparator, who had not brought a successful discrimination claim in the Tribunal, may not have been the subject of such negative comments by Mr Cox and others in the Respondent's press office or police officers. These comments were made to Mr Brunt, Ms Collins, and Mr Carrell. The comments to Mr Brunt, relayed to Mr Cole, led directly to a substantial reduction in the Claimant's work for Sky News from October 2001. We think that the facts give rise to an inference that without explanation could lead us on to make a finding of unlawful discrimination, and that, in the absence of any explanation, the burden of proof

having shifted to the Respondent, then we must find and conclude that the claim of victimisation succeeds. That is the unanimous decision of the Tribunal.

CHAIRMAN

REASONS SENT TO THE PARTIES ON

24 JUNE 2005

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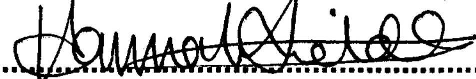
AND ENTERED IN THE REGISTER



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FOR SECRETARY OF THE TRIBUNALS