IN THE HIGH COURT OF JUSTICE **Claim No: [ ]**
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

(1) Mr STEVEN STEWART
(2) Mr MARK SHEPHARD

Claimants

- and -

THE SECRETARY OF STATE FOR DEFENCE

Defendant

(1) FIGHTING WITH PRIDE
(2) ROYAL BRITISH LEGION

Interested Parties

STATEMENT OF FACTS AND GROUNDS

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*References to the permission bundle are in the form **[page]***
*References to paragraphs of witness statements in these judicial review proceedings are in the format **WS[initials]//§lparagraph**.*

A. INTRODUCTION & SUMMARY

1. Between 1967 and 2000, HM Armed Forces operated a policy whereby no person subject to service law who was lesbian, gay, bisexual, transgender or transitioning ("**LGBT**") or who was perceived to be any of those things, could remain a member of the armed forces (the "**Ban**").

2. The nature of the Ban's enforcement, and its consequences for those who were subjected to it, have been summarised as follows:

> *"[The testimony of those affected] gives evidence of a culture of homophobia, and of bullying, blackmail and sexual assaults, abusive investigations into sexual orientation and sexual preference, disgraceful medical examinations, including conversion therapy, peremptory discharges, and appalling consequences in terms of mental health and wellbeing, homelessness, employment, personal relationships and financial hardship."*[1]

3. The Claimants served in HM Armed Forces during the time of the Ban, and, under its auspices, were subjected to intrusive and humiliating interrogations of their sexuality. Following disciplinary investigation, each was effectively forced to resign by being put in a position of 'choosing' between resignation or, in Mr Stewart's case, court martial, and in Mr Shephard's case, summary dismissal (which would have required him to pay back his service bonus, which he could not have afforded to do). The Claimants' Witness Statements set out the devastating consequences this treatment had on their lives.

4. In 2025, the Defendant (the "**Secretary of State**"), while acknowledging that "*no amount of money [could] right the historic wrong faced by our veterans under the Ban",*[2] set up the LGBT Financial Recognition Scheme (the "**Scheme**"), to provide payments "*to recognise those who served under and suffered during their service as a consequence of the Ban*".[3]

5. The LGBT Financial Recognition Scheme Rules[4] (the "**Rules**") **[REF**] set out the requirements for eligibility under the Scheme, and the types of financial recognition payment available. The Rules provide for two types of payment:

   5.1. The 'LGBT Dismissed or Discharged Payment' ("**DD Payment**") is available to "*those who were dismissed or administratively discharged, including Officers who were ordered or instructed to resign or retire by their respective Service Board, solely on the basis of their actual or perceived sexual orientation or*

[1] The Etherton Report, Preface, p. 7 **[261-262**].

[2] Scheme Rules, p. 6, paragraph 9 **[200**].

[3] Scheme Rules, p. 6, paragraph 10 [**200].**

[4] Version 5, dated 28 November 2025 [**195-254].**

gender identity during the Ban".[5] A DD Payment is a 'flat-rate' payment of £50,000.

5.2. The 'LGBT Impact Payment' ("**Impact Payment**") is available to Veterans who suffered various types of harm as a result of the Ban. Three bands of payment are available, depending on the type of treatment suffered: Level One (£1,000-5,000), Level Two (£5,000 - £10,000) and Level Three (£10,000 to 20,000).

6. Under the Rules, those who were compelled to resign in the manner experienced by the Claimants (or 'constructively dismissed', to use the common law term), are eligible for an Impact Payment, but not the far larger flat-rate DD Payment.

7. The Claimants each applied for both types of financial recognition payment available under the Scheme.

7.1. Mr Stewart was awarded an Impact Payment of £7,000. By a letter dated 11 August 2025, the Secretary of State refused his application for a DD Payment on the basis that he "*does not meet the eligibility as detailed in the Scheme Rules*" [**110]**. Mr Stewart made two appeal requests, both of which were refused.

7.2. Mr Shephard was awarded an Impact Payment of £5,000. By a letter dated 11 August 2025 the Secretary of State refused his application for a DD Payment on the basis that he "*resigned or completed [his] contracted service / commission"* and therefore "*was not eligible for a DD Payment*". Mr Shephard made two appeal requests, both of which were refused.

8. The Secretary of State refused each Claimant's second appeal on 9 January 2026 (the "**Decisions**"). In doing so, the Secretary of State applied the Scheme to the Claimants, and treated each of the Claimants as ineligible for a DD Payment.

9. . The Claimants challenge the Scheme, as it was applied to them by way of the Decisions, as being inherently irrational, and structurally unfair, on the following grounds:

9.1. **Ground 1: Failure to take into account a mandatory consideration and/or process irrationality**. In designing the Scheme, the Secretary of State failed to

[5] Scheme Rules, Rule 20(a) **[202]**.

consider the position of those who were compelled to resign on the basis of their actual or perceived sexuality by way of an ultimatum (i.e. constructively dismissed), the severity of their mistreatment. and the fact that their position was relevantly analogous to those who were in fact dismissed or discharged. Alternatively, to the extent that the Secretary of State did consider those matters, he gave such little weight to them as to have acted irrationally.

9.2. **Ground 2: Substantive irrationality.** Under the Scheme, those who were compelled to resign on the basis of their actual or perceived sexuality by way of an ultimatum (i.e. constructively dismissed) will receive **tens of thousands** of pounds less than those who were discharged by way of an administrative process for the same reason. The size of this disparity is unjustifiable and irrational.

B. BACKGROUND

B1. The ban on homosexuality in the armed forces

10. In 1967, same-sex sexual acts in private were decriminalised for the majority of consenting adults (at that time, 21 years of age or older), pursuant to section 1 of the Sexual Offences Act (the "**1967 Act**"). However, section 1(5) of the 1967 Act provided that nothing in section 1 prevented an act from being an offence (other than a civil offence) under any provision of the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.

11. Same -sex activity remained an offence under military disciplinary law prior to 1994.[6] In 1991, a Select Committee examining the Armed Forces Bill recommended that homosexual activity of the kind that was legal under civilian law should not constitute an offence under service laws. That recommendation was accepted by the Government and given effect in the Criminal Justice and Public Order Act 1994 (the "**1994 Act**"). However, section 146(4) of the 1994 Act provided that nothing therein prevented a homosexual act (without or without other acts or circumstances) from constituting

[6] Pursuant to the Army Act 1955, sections 64, 66 and 69; the Air Force Act 1955, sections 64, 66 and 69; and the Naval Discipline Act 1957, section 36, 37 and 39.

grounds for discharging military personnel. It was pursuant to this 'saving' provision that the Ban was operated.

12. The following justification was given in the Armed Forces' Policy and Guidelines on Homosexuality of December 1994[7]:

> *"Homosexuality, whether male or female, is considered incompatible with service in the armed forces. This is not only because of the close physical conditions in which personnel often have to live and work, but also because homosexual behaviour can cause offence, polarise relationships, induce ill-discipline and, as a consequence, damage morale and unit effectiveness."*

13. The Ban was ultimately challenged before the European Court of Human Rights by four servicepersons who had been investigated and discharged because of their sexuality (in *Smith v UK* (2000) 29 EHRR 49). The Government defended the Ban in those proceedings on the basis that "*the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces"* (see §95 of the ECtHR's judgment). That submission was not accepted by the court (§§97-105), and judgment was given in favour of the applicants. As a result of the ECtHR's judgment in *Smith v UK*, the Ban was abandoned in the United Kingdom in 2000.

B2. The Etherton Report

14. In January 2022, the Government published the Veterans' Strategy Action Plan 2022 to 2024 (the "**Veterans' Strategy**"): a UK-wide document, which set out the intent for the delivery of public services to Veterans across the UK. The Veterans' Strategy included a commitment to commission an independent review "*into the historic treatment of LGBT veterans (pre 2000)"* (the "**Independent Review**"), in order "*to better understand historic hurt and the experience of underrepresented groups within the whole veterans community".*[8]

[7] Cited in the Etherton Report, p. 28-29 [**282-283].**

[8] Veterans' Strategy, p. 51.

15. In 2022, Rt Hon. Lord Etherton KC was commissioned by the UK Government to conduct the Independent Review.

16. The Final Report of the Independent Review (the "**Etherton Report**") was published in May 2023. It is based in part on the evidence provided by more than 1,120 veterans who responded to the Independent Review's 'Call for Evidence'[9]. It provides *"a unique record of what, to the modern eye, is an incomprehensible policy of homophobic bigotry in our armed forces."*[10]

17. The Etherton Report variously described the Ban as an *"overt homophobic policy*",[11] the *"product of a deeply ingrained homophobic policy sanctioned and enforced by the [Ministry of Defence (**"MoD**")] and the most senior ranks within the service",*[12] and as a *"stain on the illustrious history of the UK's armed forces".*[13] The Etherton Report recorded:

> *"The institutionalised homophobia of the policy of the MoD and the senior ranks of the armed forces in effect gave a free hand to obsessive and usually abusive, brutal and bullying investigations by the Special Investigation Branch (SIB) for each of the three services throughout the period covered by this Review."*[14]

18. The Etherton Report includes the testimony of veterans who, like the Claimants were forced to leave on account of their sexuality (or presumed sexuality) through methods other than a formal discharge or dismissal. The Etherton Report noted that **44%** of the LGBT veterans who responded to the Call for Evidence "*indicated that they were forced or compelled to leave the services through unofficial methods or actions or due to general hostility towards LGBT personnel*."[15]

19. The Etherton Report made 49 recommendations. In his preface to the Etherton Report, Lord Etherton described those as *"recommendations as to what might be done now by*

[9] The Etherton Report, p. 21 **[275].**

[10] The Etherton Report, Preface, p. 8 [**262]**.

[11] The Etherton Report, Preface, p. 7 [**261**].

[12] The Etherton Report, p. 31 **[285**].

[13] The Etherton Report, Preface, p. 7 [**261**

[14] The Etherton Report, p. 31 **[285].**

[15] The Etherton Report, p. 21 [**275].**

the government to acknowledge that the policy was wrong and unjust and in many cases has had life-long adverse consequences for those affected, and also to demonstrate that the service of veterans who suffered under the Ban is appreciated just as much as that of any other veterans who have served the interests of the nation."[16] He went on to say:

> *"My hope is that, if the government accepts all of my recommendations […] a line may finally be drawn under this unjust aspect of the history of the UK's armed forces that persisted prior to 2000 but whose damaging consequences are still experienced by many LGBT veterans today."*[17]

20. The Etherton Report's recommendations included: (a) a recommendation that an appropriate financial award should be made to affected veterans notwithstanding the expiry of litigation time limits, with a cap on Government exposure of £50 million (**Recommendation 28**); and (b) a recommendation that there should be a time limit for making a claim for a financial award of 24 months from the time the Government publicises the financial award (**Recommendation 29**).

21. By way of background to his recommendations on a scheme for financial payments Lord Etherton recorded that, because of the nature of his Terms of Reference, "*I have little option but to leave it to the government to decide on essential features of the scheme, such as who can apply and how much they should receive*".[18] However, Lord Etherton considered that it was "*within [his] remit to draw the attention of the government to* ***relevant information which has been gathered in the course of conducting the Review, and the government should undoubtedly take into account when formulating the essential terms of the financial arrangements***."[19] (emphasis added)

22. In this context, Lord Etherton recorded:

> *"It is plain that those entitled to apply should include all those who were in fact dismissed or administratively discharged pursuant to the Ban for their homosexual orientation (actual or perceived) or consensual same sex activity with a person over 16 otherwise than in a public lavatory, whatever the wording on their*

[16] The Etherton Report, Preface, p. 8 [**262].**

[17] The Etherton Report, Preface, p. 8 [**262].**

[18] The Etherton Report, p. 8 [**262].**

[19] The Etherton Report, p. 160 **[414].**

discharge papers, unless they were not of good conduct and could have been dismissed or discharged on other grounds.

The government will have to decide in principle whether eligible claimants for a financial award should additionally include those of good conduct who felt compelled, as a result of the Ban, to resign or buy out their contract or not extend their contract. This is not a homogeneous group.

Some were investigated by the SIB and that experience played a significant part in their decision to leave the armed forces. Others, who were not investigated by the SIB, felt that they could no longer bear the homophobia and the need every day to hide their sexuality, with some resorting to having an intimate relationship with a person of the opposite sex and even marrying to bolster the image that they were heterosexual. ***Others left voluntarily because they were warned by command or others that, if they did not do so, they would be investigated and face dismissal or discharge. The government will have to decide whether it is practical or fair to make a distinction between those different categories of veterans in terms of which suffered the most and should be entitled to a financial award.***

As is shown by the quotations from the statements of these veterans, veterans within each of those sub-categories suffered mentally and emotionally from their experience. It is also clear that they feel that their experience when serving in the armed forces and the toll it has taken on their subsequent lives give them a strong case for a financial award.

Apart from the overriding constraints of my Terms of Reference, one important reason for leaving it to the government to decide (possibly after appropriate consultation) on the eligibility of these veterans for any financial payment arrangements is that, in contrast to those who were dismissed or discharged pursuant to the Ban, there is no legal or factual precedent giving guidance on either eligibility or amount. The Lustig-Prean, Beckett, Smith and Grady cases only concerned those who were administratively discharged.

While the absence of such a precedent need not prevent a fair solution being devised, there are issues of policy and practicality in extending any financial award scheme to those veterans who felt compelled to leave because of the impact of the Ban on their lives but who were not dismissed or discharged. In principle, however, if a veteran can show that they left the armed forces earlier than they would have done, but for the Ban, and that there is a clear connection between the existence of the Ban and subsequent mental ill health or other adverse life consequences, it would be consistent with the purpose of the Review to acknowledge those matters with a financial payment. It is important that any such arrangements do not slow down payment to those who were dismissed or discharged, including any payment

on account, but I am not aware of any cogent reason why that cannot be achieved."[20] (emphasis added)

B3. The Scheme and the Rules

23. Part 1 of the Rules sets out the background to the Scheme, including the findings of the Etherton Report (at §6). The Rules go on to set out **(at §7-8),** that the Scheme is intended to implement Recommendation 28 and 29 of the Independent Review (see §20 above).

24. The objective of the Scheme is stated as follows (**at §§9-12**):

> *"9. The MOD understand that no amount of money can right the historic wrong faced by our veterans under the Ban; the intention of the [Scheme] is to provide an acknowledgement of the applicant's personal experiences during their Service as a result of the Ban.*
>
> *10. The objective of the [Scheme] is a payment to recognise those who served under and suffered during their service as a consequence of the Ban. The [Scheme] is not a compensation scheme which seeks to compensate for pecuniary losses or provide restitutio in integrum.*
>
> *11. The [Scheme] is paid voluntarily after the acceptance by the Government of the [Independent Review's] recommendations.* ***The recommendations for the financial payments in the [Etherton Report] are not legally binding on the MOD, and the department has discretion about how to deliver the financial payments provided that the delivery of the financial payments rationally and sensibly achieves the objective.***
>
> *12. The [Scheme] recognises that the experiences of every individual affected may differ. The [Scheme] has been designed to consider each application against a number of criteria as detailed within the Scheme Rules.*" (emphasis added)

25. For the purpose of the Scheme, a "*Veteran*" is defined as "*an individual who served within HM Armed Forces for at least one day*", as long as the Veteran in question served within the period of the Ban (§13b). The Rules adopt a reverse burden of proof, meaning that the burden lies with the MoD rather than the applicant to determine whether a particular fact or matter occurred: "*Unless the MoD finds evidence to contradict the reported events or facts stated by the applicant, the MoD will accept that the facts or*

[20] The Etherton Report, pp. 161-2 [**415- 416**].

experiences reported took place if on a balance of probabilities, they are more likely than not to have occurred". **(§13a)**.

26. Part 2 of the Rules addresses eligibility for the Scheme. Rule 18 provides that the Scheme is open to "*any individual who served during the period of the Ban and who meets the eligibility criteria for a LGBT [Financial Recognition] payment*". Rule 20, in turn, explains that the Scheme is comprised of two different types of financial recognition payment, namely:

    26.1. DD Payments, which are said to be "*available to those who were dismissed or administratively discharged, including Officers who were ordered or instructed to resign or retire by their respective Service Board, solely on the basis of their actual or perceived sexual orientation or gender identity during the Ban*" (Rule 20a); and

    26.2. Impact Payments, which are said to be available to "*those who fulfil the criteria in one of the levels (Levels 1 to 3) as outlined in the LGBT Impact Payment eligibility criteria*" (Rule 20b).

27. Rules 22 to 27 contain further information on the eligibility requirements for DD Payments. Rule 22 provides that DD Payments will be made to "*anyone who was dismissed or administratively discharged based solely on the basis of their actual or perceived sexual orientation or gender identity, from 27 July 1967 to 11 January 2000*".

28. Rule 23 states as follows: "*LGBT DD Payments includes Officers who were ordered or instructed to resign or retire by their respective Service Board as a result of an administrative process, solely on the basis of their actual or perceived sexual orientation or gender identity during the Ban"*.

29. Rule 24 states as follows: "*Individuals who were dismissed for a discipline offence which is related directly to the Ban. The offence would not, if occurring in the same circumstances at the time of the application, constitute an offence*".

30. Rule 25 states as follows: "*Individuals who were administratively discharged for a reason which is related directly to the Ban. The grounds for discharge, if occurring at the time the application is made, would not be lawful grounds for discharge*".

31. Rule 26 seeks to clarify the eligibility requirements, stating as follows: "*For the avoidance of doubt, the DD Payment will include individuals who submitted their notice to terminate their contract but who were subsequently administratively discharged by their Service because of their sexual orientation or gender identity. Individuals who were medically discharged because of their sexual orientation or gender identity will also be eligible for the DD payment*".

32. Rule 27, in turn, provides as follows: "*Individuals who left at the end of their contract, or who purchased their discharge as of right, or who opted not to extend their contracts, or who left the Service at the end of their notice period having submitted their notice to terminate their contracts, would not qualify for the Dismissed or Discharged Payment but can apply for the LGBT Impact Payment*".

33. Rules 28 and 29 then provide further information on the eligibility requirements for an Impact Payment. In summary, in addition to serving in HM Armed Forces between 27 July 1967 and 11 January 2000 (i.e. during the period of the Ban), an applicant must submit an application which "*describes the impact which the Ban had on them personally during the period of their services in HM Armed Forces up to the point they left service*". Rule 29 makes clear that this includes anyone who: (a) suffered mental or physical harm; (b) was investigated by either the Service Police or their Chain of Command in relation to the Ban; (c) suffered because of the culture within the Service which was directly related to the Ban; (d) experienced any bullying / harassment, verbal or physical abuse which was related to the Ban; (e) felt pressured to leave HM Armed Forces because of the Ban; (f) was subject to invasive investigations by the Service Police, including off base surveillance, or the outing of their sexual or gender identity to family or friends; (g) was imprisoned due to an offence related to the Ban; and (h) was forced to undergo medical tests or 'treatments' related to the Ban. Rule 30 provides that the level of the Impact Payment will be determined by the Independent Panel based on the information provided.

34. Eligibility for the three different levels of Impact Payment are set out at Annex B of the Rules. Those who, like the Claimants, were constructively dismissed will usually only qualify for a Level Two payment (between £5,000 and £10,000), on the basis that they were subjected to "*Investigation which did not lead to discharge/dismissal"* and/or they were "*Pressured to resign or leave*". This is reflected in the Impact Payments awarded

to the Claimants (or £7,000 and £5,000, respectively). Only those who suffered specific kinds of particularly acute treatment (such as "*Forced medical tests*") would be eligible for a Level Three payment of £10,000 to £20,000.

B4. The Claimants

(1) Mr Stewart

35. Mr Stewart served in HM Armed Forces from May 1988 until August 1995. He served as a Corporal in the Royal Military Police, including in both the Gulf War and Northern Ireland. He earned the Accumulated Campaign Service Medal. In his Witness Statement, he states that serving in the Army "*had always been [his] lifetime ambition"* and that he had "*every intention to follow the career structure, obtain promotions and achieve the highest rank possible during a lifetime of service*" **WSSS/§4**.

36. During the period of his service, Mr Stewart describes himself as having been "*confused about [his] sexuality*" **WSSS/§5**. He corresponded by letter with two men whom he knew to be gay. In or around late 1994, while Mr Stewart was stationed in Sennelager, Germany, he understands that one or more of the letters he wrote to one of these men was found during the search of a property in England **WSSS/§7** (the reports of the SIB[21] from this search are at [**139- 142**].

37. One day, while on duty at the Royal Military Police Station in Sennelager, he was approached by a Staff Sergeant who informed him that the Commanding Officer wished to speak with him. He was ordered to remove his duty pistol and marched into the Commanding Officer's office. At that time, Mr Stewart was a substantive Corporal with supervisory responsibilities, including oversight of junior personnel, operational duties and responsibilities within the Royal Military Police. The experience of being publicly stripped of his gun and escorted away from his position was humiliating **WSSS/§7**.

38. Upon entry into his Commanding Officer's office, he was confronted by an Officer of the SIB. Mr Stewart was immediately placed under arrest, informed of his rights under

[21] See discussion of the Special Investigation Branch in the Etherton Report cited at §17 above.

military law, and told that letters of his had been obtained during a search and had been sent to the military as evidence of his homosexuality **WSSS/§7**.

39. This was followed by a search of Mr Stewart's private possessions **WSSS/§8**. He was interviewed under caution by the SIB **WSSS/§9 at Sennelager**. He describes the interview as having left him "*ashamed and deeply humiliated*" **[97**]. He was then taken into custody to meet his Commanding Officer who expressed his disgust, stripped Mr Stewart of his Royal Military Police 'warrant card' (signifying the withdrawal of his policing powers), and made it clear that Mr Stewart was no longer welcome in his unit **WSSS/§10**. Mr Stewart was then transported to Herford (approximately 30 miles away). He was reassigned to a role as a driver and was not permitted to return to his original unit **WSSS/§10**.

40. Mr Stewart remained as a driver for six months. He assumes that during this time, investigation into his sexuality and conduct was ongoing, although he was at no point informed about the process which was occurring. Eventually, he was informed that he would face a formal interview with the Provost Marshall for Germany, Colonel Anthony Fig. In the course of that meeting, he was informed by Colonel Fig that he would face a court martial in relation to his sexuality, and that this would almost certainly lead to a dishonourable discharge and a possible prison sentence at Colchester Military Prison **WSSS/§11**.

41. When faced with the public humiliation of court martial and the risks of dishonourable discharge and potential detention, Mr Stewart in desperation sought to persuade Colonel Fig to permit him to buy himself out of HM Armed Forces instead **WSSS/§11**. After some discussion, this was agreed. Mr Stewart states that he felt "*he had no real option*" but to proceed as he did **WSSS/§11**.

42. Mr Stewart's treatment had a devastating impact on his life. The effects on his relationships with family members, friends and with his former colleagues, as well as on his career and wider life were profound. He was engaged to a woman at the time, and felt he had no choice but to call off the engagement **WSSS/§13**. He describes that he has "*never fully come to terms with what happened, and the shame, humiliation and abrupt end to [his] career have had a lasting impact on [his] wellbeing*" **WSSS/§13.**

43. Mr Stewart applied to the Scheme on 16 December 2024 **[94- 103**]. He applied for both a DD Payment and an Impact Payment.

44. By letter dated 8 August 2025, Mr Stewart was awarded an Impact Payment of £7,000 [**105-108]**.

45. By letter dated 11 August 2025, Mr Stewart's application for a DD Payment was refused, on the basis that he "*[did] not meet the eligibility criteria as detailed in the Scheme Rules*" **[110- 112].** Mr Stewart appealed this decision. By letter dated 3 November 2025, this appeal was refused on the basis that he did not meet the appeal criteria **[125-128**].

46. Pursuant to the Rules, Mr Stewart submitted a further appeal request on 23 December 2025. By a letter dated 9 January 2026, the MoD refused his appeal on the basis it did not meet one of the relevant appeal criteria (the "**Stewart Second Appeal Letter**"). The Stewart Second Appeal Letter stated as follows:

> *"The submitted grounds for appeal do not fall into any of the admissible grounds for appeal. You apply to appeal the decision not to allow an appeal into the non-award of a Dismissed or Discharged Payment. It is fully accepted that you were in effect forced to resign as a result of SIB investigations into your sexuality. However, the Appeal Body and original deciding body can only act in accordance with the Scheme Rules as published. Personnel who submitted their notice or bought themselves out of their service are not eligible for a Dismissed or Discharged Payment (paragraph 27), only Officers who were ordered or instructed to resign are eligible (paragraph 23). Regrettably, as you were not an Officer, the fact that you resigned albeit under pressure does not bring paragraph 23 into play, the operative wording in that paragraph being that of 'Officer'. It is fully understood that this is not the answer that you would have hoped for, but Appeals can only proceed where one or more of the Appeal Criteria have been met, and in this case that bar cannot be crossed for the reasons set out above. Therefore, as you have not presented evidence to substantiate any grounds for appeal are present, I am of the opinion that the Scheme rules were applied correctly in this case, and I consider the grounds for appeal have not been met."*

(2) Mr Shephard

47. Mr Shephard served in the RAF from 1995 to 2001. Following completion of his training, Mr Shephard was posted to RAF Benson on 33 Squadron **WSMS/§4**. He had great ambitions for his career in the RAF, and, with the support of his Commanding Officer, was working towards progressing to the rank of Sargeant Aircrew **WSMS/§7**.

48. However, from the outset of his arrival in the 33 Squadron, Mr Shephard experienced persistent and severe bullying at the hands of his colleagues, on the basis that he was "*acting gay*" **WSMS/§4**. The pressure and distress which Mr Shephard felt as a result of this treatment built up, until, in or around December 1999, he broke down in front of his Sargeant. As a result, his Sargeant arranged a meeting with Mr Shephard's Commanding Officer **WSMS/§5**.

49. Mr Shephard was then called into a meeting with his Commanding Officer. He was asked intrusive questioning about his sexuality and then was asked point-blank whether he was gay. Having not been informed, and not appreciating at the time, that gay personnel were excluded from service as a result of the Ban, Mr Shephard honestly confirmed that he was. He was dismissed from his Commanding Officer's office **WSMS/§5**.

50. After several days of silence, he was summoned to a meeting with his Commanding Officer, a squadron leader, and the wing commander of his squadron. At that meeting, he was "*given clear instructions that [he] either had to*" (i) face summary dismissal with immediate effect (in which circumstances he would have to repay his service bonus), or (ii) apply for premature voluntary release ("**PVR**") **WSMS/§6**. In circumstances where he could not afford to pay back his bonus, Mr Shephard submitted a PVR.

51. Mr Shephard's treatment had devastating effect on his life. He states that he has "*never gotten over what happened*", [redacted]

52. On 18 December 2024, Mr Shephard applied for both a DD Payment and an Impact Payment under the Scheme **[162-170].**

53. By letter dated 8 August 2025, Mr Shephard was awarded an Impact Payment of £5,000 **[172-173].**

54. By letter dated 11 August 2025, Mr Shephard's application for a DD Payment was refused, on the basis that he "*[did] not meet the eligibility criteria as detailed in the Scheme Rules*" **[175-176**]. Mr Shephard appealed this decision **[178].** By letter dated 7 October 2025, this appeal was refused on the basis that he did not meet the appeal criteria **[184-187**]

55. Pursuant to the Rules, Mr Shephard submitted a further appeal request on 30 October 2025. On 9 January 2026, the MoD refused his second appeal on the basis that it did not meet one of the relevant appeal criteria (the "**Shephard Second Appeal Letter**").

56. The Second Shephard Appeal Letter recorded as follows:

> *"The submitted grounds for appeal do not fall into any of the admissible grounds for appeal. You have raised an appeal against a previous decision not to permit your appeal against the non-award of a Dismissed or Discharged Payment, on the grounds of the there being a materiel error as to the facts. This is on the basis that you were forced to PVR, having been marched into an office full of high-ranking Officers. You state that it is discriminatory that Officers are able to rely on Rule 23, whereas other ranks cannot. The original decision maker and any subsequent Appeal Board can only act in accordance with the Scheme Rules, and Rule 23 is clear that it only applies to Officers who were ordered or instructed to resign. Given that you were not an Officer at the material time, your application cannot proceed to Appeal Board, as the Appeal Board has no power to award a Dismissed or Discharged Payment. Therefore, as you have not presented evidence which substantiates that the decision was based on a material error as to the facts, or any other ground of appeal being present, I am of the opinion that the Scheme rules were applied correctly in this case, and I consider the grounds for appeal have not been met."*

B5. <u>Pre-Action correspondence</u>

57. On 18 February 2026, the Claimants' solicitors, Irwin Mitchell LLP ("**Irwin Mitchell**") wrote to the Secretary of State on the Claimants' behalf, in accordance with the Pre-Action Protocol for Judicial Review (the "**Pre-Action Letter**").

58. The Pre-Action Letter set out the Claimants' understanding at the time (which was based on the explanations given to the Claimants in the Second Appeal Letters), that a distinction was applied under the Rules between Officers and non-Officers who were constructively dismissed. The Claimants set out their concerns about the unfairness of such preferential treatment for Officers.

59. On 9 March 2026, the Secretary of State responded ("**the Pre-Action Response**"), stating:

> *"[N]either officers nor other ranks can claim a DD Payment for constructive dismissal […] The DD payment […] is for service personnel (officers and other ranks) who were dismissed or administratively discharged solely by reason of their*

actual or perceived sexuality or gender identity during the Ban. The only mechanism by which officers could be administratively discharged at the relevant time was if they were ordered or instructed to retire or resign their commission by their respective Service Board or the Defence Council as a result of administrative process."

60. The Claimants note that this position does not cohere with the explanation for the refusal of their applications provided to them in the Second Appeal Letters. Mr Stewart was told *"as you were not an Officer, the fact that you resigned albeit under pressure does not bring paragraph 23 into play, the operative wording in that paragraph being that of 'Officer'*". And similarly, Mr Shephard was told "*Rule 23 is clear that it only applies to Officers who were ordered or instructed to resign. Given that you were not an Officer at the material time, your application cannot proceed to Appeal Board*". The Secretary of State's position, from the Pre-Action Response, appears to be that Officer-status is not in fact "*operative*" in relation to eligibility for a DD payment: neither Officers nor non-Officers who were constructively dismissed are eligible.

61. This explanation does not, however, serve to justify the Scheme; in fact, it merely shifts the explanation for the Claimants' ineligibility from one arbitrary factor (non-Officer-status) to another (the fact that they were constructively rather than formally dismissed). For the reasons set out below, the Claimants consider that their exclusion from eligibility for DD Payments on the basis of the latter is unlawful.

C. GROUNDS

62. While procedural rationality is concerned with the process adopted in reaching a decision or determining a policy (including the requirement that the decision maker has "*regard to all mandatorily relevant considerations*" and that "*the process of reasoning [contains] no logical error or critical gap*"), substantive rationality is concerned with whether the ultimate decision is within the range of reasonable decisions open to the decision-maker: *R (KP) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] EWHC 370 (Admin), at §56. A rationality challenge thus may argue that "*the overall outcome of the decision-making process lies beyond the outer bounds of reasonableness*" (i.e. substantive) or that, "*even if the outcome could not be said to be irrational in itself, a critical step in the process of reasoning by which the decision was reached was irrational so that the decision must be taken afresh*" (i.e. procedural): *In re McQuillan*

[2022] AC 1063 (SC), at §244. The Claimants allege that the Scheme is irrational in both respects.

C1. Ground 1: Failure to take into account material consideration and/or procedural irrationality

63. Having resolved to design a Scheme to make "*appropriate financial award […] to affected veterans*" (Etherton Report Recommendation 28, referenced at §7 of the Rules), the Secretary of State had broad discretion as to how to go about doing so. That broad discretion was limited however, as a matter of law, by the bounds of rationality.

64. Under this Ground, the Claimants will argue that when designing the Scheme Rules, the Secretary of State either (i) failed to take into account a mandatory consideration, or (ii) gave it such little weight as to have been irrational.

65. The law distinguishes between the question of whether something is a material consideration and the weight which it should be given; while the former is a question of law, the latter is a question of judgment on the part of the decision-maker: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780F. However, in determining the proper weight to give to a particular consideration, the decision-maker must not lapse into 'Wednesbury' unreasonableness. When he or she forms a judgement as to the weight to give a particular consideration, the question is therefore "*whether the decision-maker acts rationally in doing so*": *R (Friends of the Earth) v Heathrow Airport Ltd* [2021] 2 All E.R. 967 at §121.

66. The objectives of the Scheme are stated as being "*to provide an acknowledgement of the applicant's **personal experiences** during their Service as a result of the Ban*" (Rules, §9) and to "*recognise those who served under and suffered during their service as a consequence of the Ban*" (Rules, §10). The Scheme was, as is clear from these Statements, intended to be responsive to the actual experiences and suffering of those who were affected by the Ban. The financial award available was clearly intended to bear some relationship to the severity of those experiences.

67. In light of the Scheme's stated objectives, it was necessary, when designing the Scheme, for the Secretary of State to turn his mind to crucial aspects of what was in fact experienced, and the treatment which veterans suffered. That included turning his mind

to the position of those who were compelled to resign or retire by way of an ultimatum, rather than formally discharged or dismissed.

68. It is clear from the Etherton Report that the cohort of those who were treated in this way may be large: 44% of LGBT veterans who responded to the Call for Evidence said they were "*forced or compelled to leave the services through unofficial methods or actions or due to general hostility towards LGBT personnel*".[22] Lord Etherton concluded that the Government would "*have to*" consider this group and determine "*a fair solution*" in terms of how to extend any financial award scheme to veterans in this cohort (see the passage cited at §22 above).

69. Although the Etherton Report does not use the term 'constructive dismissal' it is clear from the Government's own guidance that the group referred to is of those who have been subject to constructive dismissal, which the Government defines as being "*when you're forced to leave your job against your will because of your employer's conduct."*[23]

70. As is clear from the Rules (and how the Scheme has been applied to the Claimants) no provision was made to ensure that those who were, as a matter of practical reality rather than administrative characterisation, dismissed in the manner of the Claimants, would receive the payment intended for those who were 'dismissed' (a DD Payment of £50,000). Those veterans are, instead, only eligible for a far smaller payment (usually in the range of £5,000-£10,000) by way of an Impact Payment.

71. It appears from recent Ministerial correspondence that the Secretary of State's position is that the Impact Payment was included "*to address this"* as being "*for wider impacts of the ban and established to provide recognition for those who experienced such pressures"*.[24] However, this assertion is not only questionable (given that the Impact Payment covers eight types of impact, only one of which is that an applicant felt pressured to leave HM Armed Forces because of the Ban (Rules §29(5)), but wholly fails to engage with the substantive issue as to why those veterans who were constructively dismissed should not be entitled to the same financial recognition as those who were

[22] The Etherton Report, p. 21 **[275].**

[23] https://www.gov.uk/dismissal/unfair-and-constructive-dismissal

[24] Letter dated 5 January 2026 from the Minister for Veterans and People to Luke Evans MP **[190-191].**

dismissed by way of an administrative process. As properly recognised in the Second Appeal Letters, the personal experience of an Officer who is forced to resign by being called upon to do so is in principle no different to the personal experience of a veteran in other ranks who was forced to resign by being given an ultimatum of far worse consequences.

72. In light of the lacuna in the way the Scheme operates, such that no proper provision is made for those who were constructively dismissed, there has clearly been a failure on the part of the Secretary of State. Either:

    72.1. the Secretary of State failed to consider the position of those who were constructively dismissed, the severity of their mistreatment and the fact that their position was relevantly analogous to those who were in fact dismissed or discharged; or

    72.2. the Secretary of State gave such little weight to those matters as to have acted irrationally.

73. The Scheme is therefore unlawful on the grounds of procedural irrationality.

C2. <u>Ground 2: Substantive irrationality</u>

74. Further or alternatively, the Scheme is irrational as a matter of substance.

75. There is a "*well-recognised principle of public law that all persons in a similar position should be treated similarly and that any discretionary power 'must not be exercised arbitrarily or with partiality as between individuals or classes potentially affected by it*'": <u>*R (Mitocariu) v Central and North West London NHS Trust*</u> [2018] EWHC 126 (Admin), [2018] PTSR 1287 at §36. As Lang J put it in <u>*R (KBL) v SSHD*</u> [2023] EWHC 87 (Admin) at §87, "*Inconsistency, unequal treatment, unfairness or arbitrariness in public decision-making are contrary to good administration, and may lead to a conclusion that a decision is irrational. However, such flaws are not to be treated as free-standing grounds for judicial review."* As Lord Sales and Lady Rose put it in <u>*Shvidler v SSFCDO*</u> [2025] UKSC 30, [2025] 3 WLR 346 at §219: "*a measure may respond to a real problem but nevertheless be irrational … by reason of its being discriminatory in some respect that is incapable of objective justification*."

76. At common law, the courts have recognised that, as a matter of practical reality, a person who is given an ultimatum and thereby forced to resign, is in an analogous position to someone who was in fact dismissed. "*Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment?"*": Martin v Glynwed Distribution [1983] ICR 511 per Donaldson MR at 519G. As Sir John Brightman put it in East Sussex County Council v Walker (1972) 7 ITR NIRC (cited more recently in Singh v PK Imperial Retail Ltd [2014] ET S/4106245/13 at §23):

> *"Suppose that the employer says to the employee, "Your job is finished. I will give you the opportunity to resign. If you don't you will be sacked." How, we would ask, is it possible to reach a conclusion other than that employment is being terminated by the employer even though the employee takes the first and more respectable alternative of signing a letter of resignation rather than being the recipient of a letter of dismissal? We feel that in such circumstances there really can be no other conclusion than that the employer terminated the contract."*

77. The Scheme gives rise to a disparity in financial award which is entirely incongruent with the practical reality of constructive dismissal, and its substantive equivalence to formal dismissal, as recognised at common law. In doing so, the Scheme enables the Secretary of State to benefit from the historic unconscionable behaviour of Officers of the HM Armed Forces Officers who put the Claimants in the intolerable position of having to choose between resigning and facing court martial/summary dismissal.

78. Neither of the Claimants departed HM Armed Forces at their own initiation. Both men had aspirations of a future in the HM Armed Forces, and sought to serve with dignity and integrity, and envisioned doing so for decades to come. The Claimants were prevented from doing so as a result of the clear stipulations of their Commanding Officers. Each resigned only upon being compelled to do so, in circumstances where he would have otherwise faced court martial (in Mr Stewart's case) or summary dismissal (in Mr Shephard's case), each with unacceptable attendant risks or consequences. As a matter of substance, their treatment was analogous to those who were in fact administratively discharged, and, as their Witness Statements convey, each suffered enduring harm.

79. Under the Scheme, the Claimants (and others in the Claimants' position) are eligible for **tens of thousands** of pounds less than those who were in fact administratively discharged

(including Officers who were given an instruction to resign). Irrespective of whether it was lawful to exclude a veteran who was constructively dismissed from eligibility from a DD Payment and make them eligible for an Impact Payment only, the size of this disparity of awards available between those two options is incapable of objective justification.

80. As set out above, the Scheme is intended to recognise, and to provide a financial reward which is responsive to, the actual experiences and suffering of those who were affected by the Ban. As can be seen from the facts of the Claimants' cases, those who were constructively dismissed had analogous experiences to those who were administratively discharged: intrusive investigation, public humiliation, and enduring psychological and relational harm, as well as the premature foreclosure of their careers in HM Armed forces.

81. The Secretary of State has sought to defend the position on the following bases:

    81.1. *"[An instruction to an Officer to resign] would come with all the same connotations of dishonour as the equivalent discharge process for other ranks, and these orders/instructions meant an immediate discharge from service, with the immediate removal of commission/rank"*[25];

    81.2. *"While [MoD] acknowledges the hurt caused to veterans who felt compelled to resign, the DD Payment was designed to recognise those who were dishonourably removed from Service and were left with exit papers that placed the fault with them."*[26]

82. As can be seen from the Claimants' cases, some of those who were constructively dismissed faced very similar treatment and outcomes. Mr Stewart, for example, was immediately removed from his unit. He was stripped of his responsibilities and authority as a result or removal of his warrant card which was his formal identification as a serving member of the Royal Military Police and the document which evidenced his authority to carry out policing duties. Although he retained his rank, he was therefore no longer able to act in any policing capacity and could not continue his role within the Royal Military Police. He was left with a permanent record stating "*not recommended for re-entry"* to

[25] Letter dated 5 January 2026 from the Minister for Veterans and People to Luke Evans MP [**190- 191]**.

[26] Letter dated 2 March 2026 from the Minister for Veterans and People to Luke Evans MP [**192-193].**

HM Armed Forces **[148]**. In the premises, the explanations set out above do not bear the weight which the Secretary of State seeks to place on them: those factors cannot justify a discrepancy of tens of thousands of pounds when many of those who were constructively dismissed faced similar dishonour, immediate (and public) removal of title/responsibility, and permanent prejudice by way of a mark on their formal record.

83. In light of the above, for there to be a disparity of tens of thousands of pounds in the financial award available between those administratively dismissed and those constructively dismissed is not capable of objective justification and is irrational.

D. PROCEDURAL MATTERS

84. The Claimants seek expedition of their claims pursuant to Practice Direction 54B §3.1-3.2. Under §36 of the Scheme Rules, the Scheme will close on 12 December 2026. By way of the present claims, the Claimants act with a view not only to securing their own lawful treatment under the Scheme, but also to ensuring that others who were forced out of HM Armed Forces under the Ban in similar circumstances will be able to access fair financial recognition payments. This purpose would be substantially defeated if the relief sought were to be secured only shortly before the Scheme closed to applications, thereby limiting the extent to which the result would be of meaningful effect for many of those in an analogous situation to the Claimants.

85. A draft order to this effect is provided at **[48-49].**

86. The Claimants also seek disclosure of the following information and documents, pursuant to the Defendant's duty of candour and cooperation with the Court:

    86.1. Any policy papers, briefing papers, ministerial submissions and meeting minutes prepared by or for the MoD, the Office for Veterans' Affairs or the Cabinet Office which explain the genesis of the position, set out in Rules 22 to 27 of the Scheme, whereby those who were compelled to resign or retire and thereby constructively dismissed are ineligible for DD Payments;

    86.2. Any impact assessments, cost-modelling and equality analysis prepared by or for the MoD, the Office for Veterans' Affairs or the Cabinet Office which consider the impact of that position;

    86.3. The following figures:

i) The total number of applications that have been made under the Scheme for (a) DD Payments; and (b) Impact Payments;

ii) The total number of applications under the Scheme that have been accepted as being eligible for (a) a DD Payment only; (b) an Impact Payment only; (c) both a DD payment and an Impact Payment;

iii) The total number of applications under the Scheme that have been refused on the grounds of eligibility to date;

iv) The total number of applications under the Scheme that have been refused where the refusal was made pursuant to Rule 27.

E. RELIEF SOUGHT

87. The Claimants respectfully ask the Court to quash the Decisions and:

87.1. Make a declaration that the Scheme is unlawful, for the reasons contended by the Claimants; and

87.2. Accordingly, grant a mandatory order directing that the Secretary of State revise the Scheme, taking into account the Court's findings as to the unlawfulness of the Scheme as it currently stands.

88. The Claimants also seek their costs; and such further or other relief as the Court considers appropriate.

F. CONCLUSION

89. For all the foregoing reasons, the Scheme and the Decisions (by which the Scheme was applied to the Claimants) are unlawful. The Court is respectfully invited to grant permission for judicial review, to allow the claims, and to grant the relief sought.

KATE GALLAFENT KC

ISABELLE AGERBAK

Blackstone Chambers

1 April 2026