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

FORMER THIRD SECTION

CASE OF MORRIS v. THE UNITED KINGDOM

(Application no. 38784/97)

JUDGMENT

STRASBOURG

26 February 2002

FINAL

26/05/2002

In the case of Morris v. the United Kingdom,

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

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 23 October 2001 and 30 January 2002,

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

PROCEDURE

1. The case originated in an application (no. 38784/97) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Dean Morris ("the applicant"), on 31 October 1997.

2. The applicant alleged that he had been denied a hearing before an independent and impartial tribunal on account of various structural defects in the court-martial system. In addition, he argued that his hearing before the court martial was not fair due to the actions of the prosecuting authorities and his own defending officer. He also maintained that he had been denied his right to free legal assistance.

3. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 3 July 2001 the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 52 § 1)., but this case remained with the Chamber constituted within the former Third Section.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 23 October 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr C. WHOMERSLEY, Foreign and Commonwealth Office, *Agent*,
Mr P. HAVERS QC, *Counsel*,
Mr J. BETTELEY,
Ms L. NICHOLL,
Mr D. HOWELL,
Mr G. RISIUS,
Mr S. ANDREWS, *Advisers*;

(b) *for the applicant*
Mr J. MACKENZIE, *Counsel*,
Mr S. LINDSAY, *Adviser*.

The Court heard addresses by Mr Mackenzie and Mr Havers.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. In September 1991, at the age of 16, the applicant became a member of the British Army, joining the Life Guards regiment of the Household Cavalry. In November 1992 the applicant was posted to the Household Cavalry Mounted Regiment ("the HCMR") where he was taught to ride a horse. The applicant alleges that during riding lessons he became the target of bullying by other soldiers, including a lance-corporal. According to the applicant, towards the end of November 1992 the lance-corporal hit him on the side of the head with his fist, causing him to fall and strike his head on the ground. On 30 November 1992, several days after the attack, the applicant reported sick and told the medical officer that the injury to his face had been caused by falling off a horse. On 26 February 1993 the applicant, who alleges to have feared a further physical attack, went absent without leave. On 17 March 1993 he wrote to the commanding officer ("CO") of the regiment (a lieutenant-colonel), stating, *inter alia*, that "[his] inability to

express sufficient enthusiasm during training sometimes resulted in physical abuse by certain NCOs [non-commissioned officers]", and asking to terminate his service. He received no reply to this letter.

10. The applicant was arrested by the civilian police on 16 October 1996 and taken to the HCMR's barracks at Hyde Park, London. The following day he was charged with being absent without leave contrary to section 38(a) of the Army Act 1955. On 18 October 1996 he was remanded in close arrest by Major Kelly, acting as subordinate CO. On the "Eight Day Delay Report" dated 24 October 1996, the reason for the detention is stated: "Likely to absent himself ... – has already offered bribe to JNCO on guard to release him." On 31 October 1996 he appeared before the CO and was remanded by him in close arrest for an abstract of evidence. He was subsequently released by the CO into open arrest on 11 November 1996. The CO remanded him for trial by district court martial on 13 March 1997.

11. In a statement dated 4 November 1996 to the Ministry of Defence Police, the applicant stated that the attack by the lance-corporal had occurred in the week prior to his going absent without leave, while in a statement dated 29 January 1997 he stated that the attack occurred sometime in February 1993. The police found that the lance-corporal had left the army and took statements from other soldiers who had been on the same riding course as the applicant. They found that there was no evidence to support his complaint. The applicant subsequently signed a statement saying, *inter alia*: "I have come to the conclusion that I just want to get out of the army and get on with my life ... Even though this assault happened, I do not want the Ministry of Defence Police ... to take any further action concerning the incident."

12. Following the applicant's remand for trial, the CO appointed Captain A. as "defending officer". Captain A. was an army officer with no legal training, serving as a troop commander with the HCMR. The applicant applied to the Army Criminal Legal Aid Authority ("the Legal Aid Authority") for legal aid to enable him to be represented by a solicitor. On the application form he stated that his weekly income after deduction of tax, rent and national insurance was 158.13 pounds sterling (GBP), and that he had no savings or other property of value. The form was countersigned by his CO. By a letter dated 26 March 1997, the Legal Aid Authority replied that a charge of absence without leave did not normally warrant legal representation but that either the CO or the applicant should write setting out his reasons if he considered that, exceptionally, legal aid should be granted. The applicant's solicitor wrote to the Legal Aid Authority on 18 April 1997 pointing out that the applicant faced a custodial sentence and needed to be represented. The Legal Aid Authority offered the applicant legal aid subject to a down-payment of GBP 240 in a letter dated 21 April 1997. The Government maintain that he could have paid in ten weekly instalments of GBP 24 each, but this is disputed by the applicant. On

30 April 1997 the applicant's solicitor wrote asking the Legal Aid Authority to reconsider the down-payment condition, but on 2 May 1997, before the Legal Aid Authority had replied, the applicant refused the offer of legal aid and was not, therefore, represented by a solicitor at the court martial.

13. Also on 2 May 1997, the applicant signed a document, addressed "to whom it may concern", in which he made the following statement:

> "This is to certify that I, 25009734 Tpr Morris D of The Life Guards no longer wish to be represented at my pending District Court Martial other than by my Defending Officer, Captain [A.].
>
> I have made this decision of my own free will. I understand that all previous correspondence with regard to my application for legal representation will now be ignored."

14. The applicant's court martial took place at Chelsea Barracks on 28 May 1997. The court was composed as follows: a president, Lieutenant-Colonel A.D. Hall of the Corps of Royal Electrical and Mechanical Engineers, who was a permanent president of courts martial (appointed to his post in January 1997 and due to remain until his retirement in September 2001); Captain R. Reid of the Royal Army Medical Corps, Aldershot; Captain W.D. Perks of the Second Battalion, Royal Gloucestershire, Berkshire and Wiltshire Regiment (Volunteers), Reading; and a legally qualified civilian judge advocate (see paragraph 26 below). All three military officers were outside the command area in which the applicant was serving. The president worked from home when not attending court-martial hearings.

15. Captain A. represented the applicant, who pleaded guilty to the charge of being absent without leave between 25 February 1993 and 16 October 1996. The applicant's letter of 17 March 1993 to his CO was handed to the court, but no other mention was made of the bullying allegedly suffered by him. The applicant was sentenced to dismissal from the army and nine months' detention.

16. After the hearing, Captain A. erroneously advised the applicant that if he appealed against the sentence he risked the commencement date for his sentence being put back to the date of dismissal of the appeal. On 31 May 1997 the applicant instructed a solicitor to represent him. On 19 June 1997 the solicitor lodged a petition with the Defence Council in its role as the "reviewing authority" (see paragraph 29 below), relying on the facts that the applicant had had no legal representation before the court martial and that his allegations of assault were not presented to the court, either by way of a defence of duress (which applies when a person charged with a criminal offence can show that, at the relevant time, he reasonably believed that he would be killed or seriously injured if he did not commit the offence) or in mitigation of sentence. The petition asserted that it was unlikely that the defending officer understood that the applicant might have had a defence on

the basis of duress and that the defending officer had indicated that he had been "ordered" not to allude to the allegations at the court martial without indicating who had so ordered him. It also mentioned instructions which the defending officer had given about what the applicant ought to do in the event that the court martial should, of its own volition, ask the applicant about the allegations which had been made. It also indicated that the defending officer had advised the applicant that, "if he appealed, his sentence might well be increased". On the same day the petition was introduced, the solicitor wrote to Captain A. asking for his comments on it and reminding him that he was subject to the rules of client privilege and should not disclose details of his dealings with the applicant to any third party. Despite this, Captain A. provided a statement to the Defence Council, in which he said, *inter alia*:

> "As [the applicant's] Troop Leader I was asked to represent him at Court Martial, this was the first Court Martial I have attended in any capacity. Although I have had experience in civil cases at both Magistrates' and Crown Courts. ...
>
> [The applicant] had indicated to me that he had gone absent from the Army for more than one reason. As expressed in his letter of 17 March 1993. He was showing reservations about his enthusiasm, commitment and devotion to duty. ...
>
> [T]he petition states that I assumed the petitioner had no choice but to plead guilty, as he had been Absent Without Leave. I was unaware that he could have entered a plea of not guilty to the charge on the basis of duress. [The applicant] and I did not discuss the allegations of bullying in any great detail. This was because these allegations had been withdrawn by him under interview by MOD Police.
>
> [The applicant] indicated to me that he wanted to drop all the references to the violence by the NCO during his training. This was in order that the trial date would be set significantly earlier and that the trial would be substantially shorter. This led me to advise [the applicant] to plead guilty as charged, as I had felt that this gave him his best opportunity to be discharged from the Army at the earliest date which was, after all, his overall aim. ...
>
> I discussed with the Adjutant my role as the Defending Officer. We talked about the procedural steps of the court martial and my conduct leading up to the trial. It was confirmed to me that a guilty plea would produce an earlier trial date than that of not guilty.
>
> I advised [the applicant] that references to his allegations of bullying could prolong and complicate his court martial. The mention of bullying would be introduced as part of his letter to his commanding officer dated 17 March 1993, which he agreed could be put forward for the court as mitigation. [The applicant] agreed that he did not wish to answer questions about his previous allegations, which he *had* dropped.
>
> I therefore advised him to refer such questions to me and I would state to the court that this was an avenue down which he did not wish to proceed. ..."

17. The petition was refused by the reviewing authority on 14 July 1997, in the following terms:

"The Reviewing Authority has considered the petition submitted by your above-named client, and has denied it for the following reasons.

The down payment for Legal Aid was carefully calculated, and was well in line with the amount the petitioner would have had to pay under the civil system. The certificate signed by him shows clearly that he had decided not to proceed with his application for legal representation. We cannot accept that [the applicant] was in any way forced to accept this decision. He also appears to have been content to accept Captain [A.] as his defending officer.

The complaints about the petitioner being bullied were investigated by the SIB and the allegations could not be substantiated. Indeed it came to light during this investigation that the petitioner had told [another soldier] that he planned to go absent because he was merely tired of the training and the long hours being worked. In view of the SIB report, the Reviewing Authority must accept that the allegation that the petitioner was subjected to violence by a Non-Commissioned Officer cannot be substantiated, and cannot be regarded as a mitigating factor.

In considering your complaint that, had the petitioner been advised by a qualified solicitor, he would have been able to plead not guilty on the basis of duress, we had to rely on the advice given by the Judge Advocate General. He stated that a person is subject to duress when words or conduct from another person cause him to fear that he will be killed or seriously injured, if he does not commit the offence. Clearly, the petitioner could never have reasonably believed that he had cause to fear that he would be killed or seriously injured.

The Reviewing Authority notes that the petitioner had dropped his allegations of being subjected to violence by the time he appeared in Court. All Captain [A.] intended to do was to inform the Court that the petitioner did not wish to proceed with these allegations. In fact the Court was made aware of them because the letter from (*sic*) the Commanding Officer was read out to them.

We accept that Captain [A.] was mistaken in referring the petitioner to the booklet 'Appeals and Petitions after conviction by Army Court Martial', which was out of date after 1 April 1997. In addition the wrong paragraph was used in his advice to the petitioner. However as we have now received a petition, in spite of this mistaken advice, we believe that no harm has been done. ..."

18. On 26 July 1997 the applicant lodged an application for leave to appeal against conviction and sentence to the Courts-Martial Appeal Court. Leave to appeal was refused by the single judge on 22 October 1997, on the grounds that the defence of duress had not been open to the applicant, that he had been properly advised to plead guilty, and that the sentence was not manifestly excessive.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The structure and procedure of courts martial

19. The Armed Forces Act 1996 ("the 1996 Act") came into effect on 1 April 1997, amending the Armed Forces Act 1955 ("the 1955 Act").

20. Under the 1996 Act, the initial decision whether or not to bring a prosecution is taken by the higher authority, who is a senior officer who must decide whether any case referred to him by the accused's commanding officer should be dealt with summarily, referred to the prosecuting authority, or dropped. Once the higher authority has taken this decision, he has no further involvement in the case.

21. Where the accused is a member of the army, the role of prosecutor is performed by the Army Prosecuting Authority ("the prosecuting authority"). Following the higher authority's decision to refer a case to it, the prosecuting authority has absolute discretion, applying similar criteria as those applied in civilian cases by the Crown Prosecution Service, to decide whether or not to prosecute, what type of court martial would be appropriate and precisely what charges should be brought. In addition, it conducts the prosecution (1996 Act, Schedule I, Part II). The prosecution is brought on behalf of the Attorney-General. The current prosecuting authority is the Director of Army Legal Services. In his role as prosecuting authority, the Director of Army Legal Services is answerable to the Attorney-General, while in his coexisting role as the army's senior lawyer he is answerable to the Adjutant General (the army's principal personnel and training officer, responsible, *inter alia*, for army disciplinary policy and a member of the Army Board). In pursuit of his latter role, the Director of Army Legal Services provides some military legal advice to the army chain of command. He does not advise the disciplinary chain of command of the army, this role being reserved to the Brigadier Advisory.

22. The Army Criminal Legal Aid Authority is also the responsibility of the Adjutant General.

23. The Court-Martial Administration Office (now the Army Court Service), independent of both the higher authority and the prosecuting authority, is responsible for making the arrangements for courts martial, including arranging venue and timing, ensuring that a judge advocate and any court officials required will be available, securing the attendance of witnesses and selecting members of the court. Its officers are appointed by the Defence Council. Before commencement of the court-martial hearing, the power to dissolve it is vested in the responsible court-administration officer. Until early 2001 the person in charge of the Court-Martial Administration Office was a retired officer. The Army Court Service was then created in its place, the head of which is now a serving brigadier.

24. At the relevant time, a district court martial ("DCM") was required to consist of a permanent president of courts martial, not less than two serving military officers of at least two years' military experience and a judge advocate (section 84D of the 1955 Act as amended by the 1996 Act). The court-administration officer, commanding officers of the accused, members of the higher authority, investigating officers and all other officers involved in inquiring into the charges concerned were all barred from selection to the court martial (section 84C(4) of the 1955 Act as amended by the 1996 Act). The Courts Martial (Army) Rules 1997 further provide that an officer serving under the command of: (i) the higher authority referring the case; (ii) the prosecuting authority; or (iii) the court-administration officer are ineligible for selection. The Queen's Regulations provide that a court martial is, so far as practicable, to be composed of officers from different units.

25. The post of permanent president of courts martial ("the permanent president") was first created in 1941. Permanent presidents were routinely appointed thereafter to sit on DCMs whenever one was available until suspension of the post in 2000, around the time of a ruling by Assistant Judge Advocate Pearson on 6 March 2000 in *McKendry* (see paragraph 31 below) that the appointment of permanent presidents meant that courts martial did not have the necessary impartiality and independence for the purposes of Article 6 of the Convention. Permanent presidents were selected from the ranks of serving army officers of suitable age and rank. Until around the end of 1996, permanent presidents of courts martial held the rank of major. Thereafter their rank was raised to lieutenant-colonel, which resulted in permanent presidents routinely outranking the other serving officers on a DCM, who were never above the rank of major. Legal qualifications or experience were not required. Their appointment was usually expected to be for a period in excess of three years and was almost without exception the officer's last posting before his retirement from the army. The Military Secretary (a senior subordinate of the Adjutant General) had power to terminate the appointment of a permanent president, but this has never happened in practice.

26. Judge advocates are appointed by the Lord Chancellor and are civilians who must have at least seven years' experience as an advocate or five years' experience as a barrister. A judge advocate's rulings on points of law are binding on the court and he delivers a summing-up in open court before the court martial retires to consider its verdict. Once the court martial hearing has commenced, the power to dissolve it is vested in the judge advocate. He has a vote on sentence, but not on verdict. Under the 1996 Act, the Judge Advocate General lost his previous role of providing general legal advice to the Secretary of State for Defence (Schedule I, Part III, sections 19, 25 and 27).

27. Each member of a court martial has to swear the following oath:

> "I swear by Almighty God that I will well and truly try the accused before the court according to the evidence, and that I will duly administer justice according to the Army Act 1955 without partiality, favour or affection, and I do further swear that I will not on any account at any time whatsoever disclose or discover the vote or opinion of the president or any member of this court martial, unless thereunto required in the due course of law."

28. Decisions on verdict and sentence are reached by majority vote (section 96 of the 1955 Act). The casting vote on sentence, if needed, rests with the president of the court martial, who also gives reasons for the sentence in open court. The members of the court are required to speak, and at the close of deliberations to vote on verdict and sentence, in ascending order of seniority.

29. All guilty verdicts reached and sentences imposed by a court martial must be reviewed by the "reviewing authority" (section 113 of the 1955 Act as amended by the 1996 Act). Although the ultimate responsibility rests with the Defence Council, the review is as a matter of practice generally delegated to a senior subordinate of the Adjutant General. Post-trial advice received by the reviewing authority from a judge advocate (different from the one who officiated at the court martial) is disclosed to the accused, who has the right to present a petition to the authority. The reviewing authority may quash any guilty verdict and associated sentence or make any finding of guilt which could have been made by the court martial, and may substitute any sentence (not being, in the authority's opinion, more severe than that originally passed) which was open to the court martial (section 113AA of the 1955 Act as amended by the 1996 Act). The reviewing authority gives a reasoned decision and its verdict and sentence are treated for all purposes as if they were reached or imposed by the court martial.

30. There is a right of appeal against both conviction and sentence to the Courts-Martial Appeal Court (a civilian court of appeal) (section 8 of the Courts-Martial (Appeals) Act 1968). An appeal will be allowed where the court finds that the conviction is unsafe, but dismissed in all other cases. The court has power, *inter alia*, to call for the production of evidence and witnesses whether or not produced at the court martial (section 28 of the Courts-Martial (Appeals) Act 1968).

B. Domestic case-law

31. The role of permanent president was examined by the Courts-Martial Appeal Court (which has the same composition as the civilian Court of Appeal) in *R. v. Spear and another* and in *R. v. Boyd* ([2001] Court of Appeal, Criminal Division (England and Wales) 2). The court dismissed the appellants' complaint that the position of permanent presidents on courts martial violated Article 6 § 1 of the Convention because permanent

presidents lacked the necessary independence and impartiality. The court declined to follow the reasoning of Assistant Judge Advocate Pearson in *McKendry*. Lord Justice Laws, delivering the judgment of the court, said:

> "24. Mr Mackenzie of course relies on the decision of Assistant Judge Advocate General Pearson in *McKendry*. His judgment was given as we have said on 6 March 2000, by way of a ruling in a then current court martial upon objections raised on behalf of the defence to the PPCM [Permanent President] sitting as a member of the court. The judge advocate's essential reasoning appears at pp. 8-9 of the transcript, after he had correctly directed himself as to the Article 6 standards to be applied (the numbering attached to the judge advocate general's text is ours, not his):
>
> '1. I am concerned as to the terms of appointment of these Permanent Presidents. It seems to me that there is no fixed time limit other than a time which may be quite short – two, three or four years; certainly two years is probably too short to ensure full independence, four years may be suitable – I express no comment on that.
>
> 2. I am concerned as to their training. This reference to their visiting the APA [Army Prosecuting Authority], I suspect that is mistyping, nevertheless it is there in their current job description and I must be concerned with the perception of bias, and it does not look appropriate, in my view, for Permanent Presidents to be told they should attend a briefing from the Prosecuting Authority.
>
> 3. I am concerned obviously with their potential removal. Clearly anybody exercising judicial or quasi-judicial functions should be free from arbitrary removal, and there should be some sort of guarantee that the removal would only be on the basis of some sort of misconduct within that particular office. There is no security, therefore, it would seem to me, that applies to Permanent Presidents at the present time in their role.
>
> 4. I am also obviously concerned with the question of reporting, whether it be annual – which I doubt; it is more likely to be every two years, or perhaps on the renewal of their appointment – I cannot say, but certainly there is some reporting that appears to take place, and it seems to me again that is a significant difficulty which affects the perception of independence.
>
> Now, I have specified those three [in fact, four] as being the main concerns that I have ... those particular concerns are sufficient in my view for me to rule that in the particular circumstances of the system as it now stands, the appointments of Permanent Presidents do not give rise to an independent and impartial tribunal.'
>
> The judge advocate was at pains to insist that his ruling was 'limited to this particular case'; but its reasoning plainly applies at least to all DCMs presided over by a PPCM.
>
> 25. Mr Mackenzie sought to build on the reasoning in *McKendry* with a series of further points ... In particular, he submitted that (a) there were no objective regulatory provisions governing the PPCM's appointment, beyond the ordinary procedures for staff appointments; (b) 'the medium rank of PPCM prevents such officers from being immune from general Army influence' ...; (c) the PPCM is senior in rank to the other officers on the court martial ..., and would be likely to exert a substantial influence over them.

26. It is convenient to deal with this last point first. In *McKendry* the judge advocate stated at 6C-D (referring to junior members of a DCM):

> 'Speaking for myself, having of course sat in on many, many sentencing matters with Permanent Presidents, I can say that I have found that the junior members ... the fact that they happen to be junior in rank, has not prevented them from being very robust in their sentencing arguments.'

As judge advocate he would not, of course, have participated in the court's deliberations upon conviction. It is to be noted that by paragraph 70(4) of the Court Martial (Army) Rules 1997 the junior officer is required to speak first in the course of any court martial's deliberations. The provision is plainly intended to ensure that junior members' genuine opinions are put forward.

27. Upon this point, Mr Mackenzie's argument does not go to the particular position of the PPCM at all, but rather to the differences in rank among the members of the court martial, whether the president is a PPCM or not. As such we doubt whether it is open to him. But we are clear in any event that there is no merit in it. If the argument were right, it would presumably mean that Article 6(1) required that the members of a court martial should be officers of the same rank. That cannot be the law. The notion, were it accepted, that it is reasonable to fear that between joint decision-makers of different rank there is a systematic likelihood that the more junior may be unduly influenced by the perceived views of the more senior would, surely, be an unlooked for and unwelcome side-effect of the Convention's beneficent regime. We consider it perfectly reasonable to suppose that junior officers would regard it as their duty to speak with their own voice, and that the modern culture of the Service would promote that very point of view. We do not think it would be reasonable for the accused soldier to entertain any different perception. This point is a bad one.

28. The argument as to the PPCM's medium rank and 'general Army influence' falls to be disposed of in like manner. But there is another point to be made. The way this argument is formulated – 'the medium rank of PPCM prevents such officers from being immune from general Army influence' – amounts, looked at rigorously, to an allegation of *actual* bias (whether unconscious or not). It is not, or not only, a matter of the appearance of the thing or of the presence or absence of objective guarantees. It is a delicate way of saying that such medium-ranking officers are relatively prone to take a prosecution line. That is quite a serious allegation, for which there is not a whisper of any supporting evidence. And in our view it is simply patronising to suggest that an officer in the rank of Lieutenant-Colonel ... will have his judgment on the concrete facts of a particular case affected by anything so amorphous as 'general Army influence'.

29. In our judgment Mr Mackenzie's further submission about the absence of any specific regulatory provision goes nowhere, unless it supports an argument to the effect that the PPCMs lack sufficient tenure in office for this court to be satisfied that the Article 6 requirements of independence and impartiality are met. ...

30. ... we should dispose of point (2) in *McKendry*. This rested in the judge advocate's understanding that Army PPCMs were required, as a training exercise, to visit and be briefed by the Army Prosecuting Authority. In fact the judge advocate himself reported (4E) the assurance given to him that no such visits took place. Lt Col Stone states in terms that he has never visited the APA. From the judge advocate's

reasoning in *McKendry* it looks as if there must have been some rogue document or documents in circulation; but there is obviously nothing of substance in the point."

32. Lord Justice Laws concluded as follows on the appellants' complaint about the position of permanent presidents (at paragraph 33):

"... We consider that the conditions upon which PPCMs have been appointed, and held office, have involved no violation of Article 6(1), and in particular there was no violation on the facts of these cases. We should first collect the facts which have weighed with us. (1) The PPCMs effectively operated outside the ordinary chain of command. They advisedly lived their professional lives largely in isolation from their Service colleagues. (2) While Mr Havers rightly accepted that there was no 'written guarantee' against removal, there is in fact no record of a PPCM ever having been removed from that position. Removal from office, we may readily infer, would only take place in highly exceptional circumstances which have never eventuated. (3) The appointment was the officer's last posting, offering no prospect of promotion or preferment thereafter. Neither of the PPCMs in these cases entertained any such prospect, hope or expectation. ... (4) The term of these PPCMs' appointments was for no less than four years ... (5) There have been no reports on Army PPCMs since April 1997. ..."

C. Other relevant case-law

33. In *R. v. Généreux* ([1992] 1 Supreme Court Reports 259), the Supreme Court of Canada examined, *inter alia*, the compatibility of a Canadian general court martial with section 11(d) of the Canadian Charter of Rights and Freedoms, which provides:

"11. Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

34. A general court martial consisted of between five and nine voting members, who were joined by a judge advocate who was called upon to determine questions of law or mixed law and fact during the trial. The judge advocate was appointed to the general court martial by the Judge Advocate General on an *ad hoc* basis.

35. The Supreme Court concluded that the judge advocate did not possess sufficient security of tenure to satisfy the requirement of "independence" under section 11(d) of the Charter. Lamer CJ, delivering the leading judgment of the court, commented as follows:

"... the judge advocate was appointed solely on a case by case basis. As a result, there was no objective guarantee that his or her career as a military judge would not be affected by decisions tending in favour of the accused rather than the prosecution. A reasonable person might well have entertained an apprehension that a legal officer's occupation as a military judge would be affected by his or her performance in earlier cases ... [or] that the person chosen as judge advocate had been selected because he or

she had satisfied the interests of the executive, or at least has not seriously disappointed the executive's expectations, in previous proceedings. ...

Military judges who act periodically as judge advocates must therefore have a tenure that is beyond the interference of the executive for a fixed period of time."

He went on to note that amendments to Canadian court-martial procedures, which had come into force subsequent to the proceedings at issue in the case, had corrected deficiencies in the judge advocate's security of tenure, providing for appointment for a period of between two and four years.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

36. The applicant made a series of complaints under Article 6 § 1 of the Convention relating to the general structure of the court-martial system in the United Kingdom following the 1996 Act. In addition, he made a number of specific complaints under Articles 6 §§ 1 and 3 (c) about the fairness of the proceedings and the lack of legal representation before his court martial.

37. The relevant parts of Article 6 provide:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

..."

A. Applicability of Article 6

38. In the Court's view, Article 6 is clearly applicable to the applicant's court-martial proceedings, since they involved the determination of sentence following his plea of guilty to a charge of going absent without leave. Although, in contrast with *Findlay v. the United Kingdom* (judgment of

25 February 1997, *Reports of Judgments and Decisions* 1997-I), the applicant was not charged with an ordinary criminal offence, the Court notes that following the hearing he was sentenced, *inter alia*, to nine months' detention. In the face of such a substantial deprivation of liberty, there was clearly a "determination of a criminal charge" (see *Findlay*, cited above, p. 279, § 69; *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, p. 36, § 85; and *Hood v. the United Kingdom* [GC], no. 27267/95, ECHR 1999-I). Indeed, the Government did not dispute this point.

B. General complaints

1. Arguments of the parties

(a) The applicant

39. The applicant complained of a number of structural defects in the court-martial system as amended by the 1996 Act. He argued that his commanding and defending officers, the higher authority, the Court-Martial Administration Office, the Army Criminal Legal Aid Authority, the Army Prosecuting Authority and the officers who sat on the court martial itself were all controlled wholly or in part by the Adjutant General, who was himself directly subordinate to the Defence Council. In particular, he commented that the appointment, future appointment and promotion of the commanding, defending and prosecuting officers and the officers sitting on the court martial depended at least in part upon the Military Secretary, who was a subordinate of the Adjutant General. He highlighted the fact that the prosecuting authority was also Director of Army Legal Services (see paragraph 21 above) and, as such, was answerable to the Adjutant General. He stated that the Adjutant General also had responsibility for maintaining discipline in the army.

40. The applicant submitted that, in order to comply with Article 6 § 1 of the Convention, courts martial had to be independent of the army as an institution, particularly of senior army command. By contrast, at all key stages of the applicant's court martial, including the bringing of charges, the appointment of the members of the court, the reaching of a decision on verdict and sentence, and the review of such verdict and sentence, the applicant considered that the army hierarchy had been closely involved, as ultimately represented by the Adjutant General and the Defence Council.

41. The applicant drew particular attention to the means of selection by court-administration officers of the members of courts martial. He pointed out that there was no statutory or regulatory guidance as to how the members of the court martial were to be selected. Although there were rules

about eligibility to sit on a court martial, those conducting the defence were not, as a matter of practice, provided with the information necessary to enable them to check whether the officers appointed to sit at a court martial were disqualified. The applicant submitted that there was nothing to prevent court-administration officers, who are themselves appointed by the Defence Council, from considering themselves as acting in the army's interests when selecting the members of a court martial. He argued that the fact that the Adjutant General had, earlier in 2001, been able to replace the retired officer who had been in charge of the Court-Martial Administration Office with a serving army brigadier showed that that office was not, and never had been, independent of senior army command. He added that, in any event, in practice the appointment of serving officers from their units to courts martial was normally left to the army's operational chain of command. As for permanent presidents of courts martial, although they were allocated to individual courts martial by the Court-Martial Administration Office, they were appointed to their post as permanent president by way of the normal army staff appointment system. All of these factors, he argued, brought the independence of courts martial into question.

42. The applicant highlighted the lack of formal security of tenure of permanent presidents, indicating that the Military Secretary had the power to terminate their appointment at any time. He stated that the appointment of permanent presidents and the nature of their role were not governed by any statutory or regulatory provision. Similarly, there was no formal provision protecting the permanent president from improper outside influence. He pointed out that, as a lieutenant-colonel, the permanent president in the applicant's case substantially outranked the two serving officers who sat on the court martial. Contrasting the full-time nature of the permanent president's appointment with the *ad hoc* nature of that of the two serving officers, he contended that the permanent president had an apparent experience and authority to which the junior officers were bound to defer.

43. The applicant submitted that, in principle, a court made up almost exclusively of army officers trying charges brought by the army could not constitute an "independent and impartial tribunal", particularly in the case of offences against army discipline such as absence without leave. This was especially the case where, as here, two of the three army officers involved had been appointed on an *ad hoc* basis for a single case. There were also no measures in place which could guarantee that the two serving officers would not be interfered with when executing their judicial functions. He identified a strong officer corps ethos in the British Army which recognised the importance of army discipline and of setting a deterrent to others in imposing terms of detention and which, he said, gave rise to an unavoidable conflict of interest at every court martial under the 1996 Act.

44. The applicant stated that the presence of an independent and impartial judge advocate on a court martial was not capable of remedying

the failings which he had identified in the system, particularly as the judge advocate had no vote on verdict, was only one of four voting as to sentence and had far less influence over the other members of the court martial than did the permanent president.

45. At the sentencing stage, the applicant argued that army influence was illustrated by the fact that sentences were calculated by reference to previous decisions of courts martial which pre-dated the Court's decision in *Findlay* (cited above), and by the attendance of permanent presidents, and possibly other officers sitting on courts martial, at army-discipline conferences.

46. In view of the fact that the Defence Council, as "reviewing authority", had relatively wide powers to set aside the court martial's verdict following its mandatory review, and of the fact that those powers were in practice normally delegated as in the applicant's case to a serving officer, the applicant submitted further that the court martial did not possess the characteristics necessary to constitute a "tribunal established by law" and that its independence was brought further into doubt.

47. The applicant maintained also that the court martial before which he had appeared lacked the necessary characteristics to have been "established by law". In particular, the applicant highlighted the lack of any law substantially controlling the selection and appointment of members of a court martial.

(b) The Government

48. The Government submitted that the court-martial system introduced by the 1996 Act was fully compatible with the Convention.

49. They contended that the fact that the Defence Council has certain functions as to command and administration of the armed forces, and appointments in those forces, did not mean that the applicant was not tried by an independent and impartial tribunal. They drew a distinction between "command" and "staff" appointments, stating that discipline was a function solely of those holding command appointments. They stated that the Adjutant General was not a command officer at all, but rather a very senior staff officer responsible for personnel policy. They argued that the applicant was wrong to suggest that the Military Secretary controlled the appointments and promotion of the officers sitting on a court martial, since such control was exercised by promotion and selection boards.

50. The Government stressed that the new court-martial system met all of the objections to the previous system identified by the Court in *Findlay* (see paragraph 45 above). In particular, they pointed out that the post of "convening officer" had ceased to exist and that his main roles were now split between the higher authority, the prosecuting authority and the Court-Martial Administration Officer.

51. The Government indicated that the role of the higher authority was a narrow one. His key decision as to whether to refer a matter back to the accused's commanding officer for summary resolution, to refer it to the prosecuting authority for a decision on formal prosecution, or not to institute proceedings at all was essentially a command one, not a legal one.

52. In respect of the prosecuting authority, the Government highlighted that he and his staff were entirely independent of senior army command and brought prosecutions on behalf of the Attorney-General. They argued that the current prosecuting authority's coexisting role as Director of Army Legal Services, in which capacity he was answerable to the Adjutant General, did not prejudice his independence or impartiality as a prosecutor, especially since the Director of Army Legal Services was no longer involved with the giving of advice on disciplinary matters to the chain of command.

53. The Government pointed out that the person in charge of the Court-Martial Administration Office at the time of the applicant's court martial was also a civilian and that his subordinate officers were independent of both the higher authority and the prosecuting authority. They refuted the applicant's assertion that the task of selecting the members of a court martial was routinely taken out of his hands and left to the army's operational chain of command.

54. They highlighted that the permanent president at the applicant's court martial was in his last post before retiring from the army, thus being appointed as such for a likely term of four years and eight months. He was also outside the chain of command, did not receive any confidential reports and worked from home. There was no record of a permanent president ever having been removed from his post prematurely.

55. As for the two serving army officers who sat on the applicant's court martial, the Government again emphasised the fact that they were outside the chain of command of the applicant, the higher and prosecuting authorities and the defending officer. Other guarantees against outside pressures existed in the form of the oath taken by each member of a court martial (see paragraph 27 above) and their obligation to follow rulings on points of law made by the judge advocate. They indicated that, in many ways, the position of the serving officers on a court martial was analogous to that of juries at civilian criminal trials. Although they were, like the defending officer, under the ultimate command of the commander of the UK land forces, the same could be said for every army officer. The Government asserted that it could not be suggested that this fact alone rendered trial by court martial inherently incompatible with Article 6 of the Convention.

56. The Government maintained that, to the extent that there were any inadequacies as to sentencing under the pre-1996 Act court-martial system, these had been met by the expanded role in that context of the judge

advocate, and by the new right of appeal against sentence, both of which had been provided by that Act.

57. The Government stated that, contrary to the position at the time of *Findlay*, findings and sentences of courts martial were, at the time of the applicant's case, no longer subject to confirmation or revision by the "confirming officer". The role played by the "reviewing authority" could not, they argued, bring into question the fairness or independence of the applicant's court martial or its status as a "tribunal" under Article 6 § 1 of the Convention. The authority was independent of the higher authority and the prosecuting authority as it was in a separate chain of command. It essentially provided an extra level of protection to an accused by checking that nothing obvious had gone wrong at the court martial. It could do so relatively quickly in comparison with an appeal, especially in cases concerning courts martial overseas, and was obliged to consider the advice of the judge advocate before reaching its decision. The Government asserted that, in carrying out its review, the authority could not act other than in favour of the accused. The Government reiterated that the review in no way affected the applicant's right of appeal to the Courts-Martial Appeal Court.

2. The Court's assessment

58. The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

As to the question of "impartiality", there are two aspects to this requirement. Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see *Findlay*, cited above).

The concepts of independence and objective impartiality are closely linked and, as in *Findlay*, the Court will consider them together as they relate to the present case.

59. The Court notes that the practice of using courts staffed in whole or in part by the military to try members of the armed forces is deeply entrenched in the legal systems of many member States.

It recalls its own case-law which illustrates that a military court can, in principle, constitute an "independent and impartial tribunal" for the purposes of Article 6 § 1 of the Convention. For example, in *Engel and Others* (cited above), the Court found that the Netherlands Supreme Military Court, composed of two civilian justices of the Supreme Court and four military officers, was such a tribunal. However, the Convention will only tolerate such courts as long as sufficient safeguards are in place to guarantee their independence and impartiality.

60. In *Findlay* (cited above), the Court held that Mr Findlay's misgivings about the independence and impartiality of the general court martial before which he had appeared on various charges were objectively justified. The Court's concerns centred around the multiple roles played in the proceedings by the "convening officer". That officer played a key prosecuting role, but at the same time appointed the members of the court martial, who were subordinate in rank to him and fell within his chain of command. He also had the power to dissolve the court martial before or during the trial and acted as "confirming officer", with the result that the court martial's decision as to verdict and sentence was not effective until ratified by him. The Court held that these fundamental flaws were not remedied by the presence of safeguards, such as the involvement of the judge advocate, who was not himself a member of the court martial and whose advice to it was not made public (see *Findlay*, cited above, pp. 281-82, §§ 74-78).

61. The Court notes that the changes introduced by the 1996 Act have gone a long way to meeting its concerns as shown in *Findlay*. The posts of "convening officer" and "confirming officer" have been abolished, and the roles previously played by those officers have been separated. The convening officer's responsibilities in relation to the bringing of charges and progress of the prosecution are now split between the higher authority and the prosecuting authority (see paragraphs 20-21 above). His duties concerning the convening of the court martial, appointment of its members, arrangement of venue and summoning of witnesses have been entrusted to the Army Court Service (formerly the Court-Martial Administration Office), whose staff are independent of both the higher and prosecuting authorities. The convening officer's powers to dissolve the court martial have been invested, prior to a hearing, in the Army Court Service and thereafter in the judge advocate, who is now a formal member of the court martial, delivers his summing-up in open court and has a vote on sentence.

62. The Court concludes that a separation has existed since the entering into force of the 1996 Act between the prosecutory and adjudicatory functions at a court martial which was not present in *Findlay*. Advisory functions have also been allocated separately to the Director of Army Legal Services and Brigadier Advisory. Although the Director of Army Legal Services is also the prosecuting authority, the Court is of the view that sufficient safeguards of independence exist in that, in his advisory role, he does not deal with disciplinary matters and, in any event, he is in that role answerable to the Adjutant General, while as prosecuting authority he is answerable to the Attorney-General.

63. For these reasons, the Court does not find that the applicant's general complaint about the relationship between senior army command, as represented by the Defence Council and the Adjutant General, and those involved in the applicant's court-martial proceedings, of itself gives rise to any violation of Article 6 § 1 of the Convention.

64. However, the question remains whether the members who heard the applicant's court martial collectively constituted an "independent and impartial tribunal", as those concepts have been explained in the case-law of the Court.

65. The Court recalls that, in *Incal v. Turkey* (judgment of 9 June 1998, *Reports* 1998-IV, pp. 1571-72, § 67), which concerned the criminal trial of a civilian before the National Security Court, it identified certain safeguards of independence and impartiality which existed in relation to the military judges who sat as members of that court. In particular, it noted that the military judges concerned underwent the same professional training as their civilian counterparts, that when sitting they enjoyed constitutional safeguards identical to those of civilian judges and that, according to the Turkish Constitution, they had to be independent and free from the instructions and influence of public authorities. However, it went on (p. 1572, § 68) to identify other aspects of the military judges' status which made their independence questionable. In particular, they were servicemen who still belonged to the army, they remained subject to army discipline and assessment reports, decisions pertaining to their appointment were to a great extent taken by the administrative authorities and the army, and their term of office was only four years and could be renewed.

66. Looking first at the method of appointment in the present case, the applicant raised concerns about the means of selection of the officers who sat on his court martial, and about the independence of the Court-Martial Administration Office, which was responsible for that selection. The fact that the head of the Court-Martial Administration Office was appointed by the Defence Council does not of itself give reason to doubt the independence of the court martial because he was, in any event, adequately separated from those fulfilling prosecutory and adjudicatory roles at the court martial. It notes that he appears to have had no fixed term of appointment and that there were no clear guarantees against interference by senior army command in his selection of courts martial. However, there is no evidence of any such interference in the applicant's case. Therefore, the Court concludes that the manner in which the applicant's court martial was appointed does not itself give rise to any lack of independence in that tribunal for the purposes of Article 6 § 1 of the Convention.

67. Turning to the terms of office and the existence of safeguards against outside pressures, the Court considers that it is necessary to examine in turn the positions of the permanent president and the two serving officers on the applicant's court martial. The applicant raises no objection as to the independence of the remaining member of the court martial, namely the judge advocate.

68. The Court notes that the permanent president in the applicant's case was appointed to his post in January 1997 and was due to remain in post for four years, eight months, until his retirement in September 2001. He also

worked outside the chain of command. The Court considers that, in these respects, his position was similar to that of the military members of the Netherlands Supreme Military Court in *Engel* (cited above). In that case, in declaring the military court "independent and impartial", the Court drew attention to the fact that the appointment of the military members was usually the last of their careers and that they were not, in their functions as judges, under the command of any higher authority or under a duty to account for their acts to the service establishment (pp.12-13, § 30, and p. 37, § 89).

The Court recalls that, although irremovability of judges during their terms of office must in general be considered as a corollary of their independence, the absence of a formal recognition of such irremovability in the law does not in itself imply a lack of independence, provided that it is recognised in fact and that other necessary guarantees are present (see *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, p. 40, § 80). It notes also that, as highlighted by the Courts-Martial Appeal Court in *R. v. Spear and another* and *R. v. Boyd* (cited above – see paragraph 31), although there is no "written guarantee" against premature removal of permanent presidents, there is no record of a permanent president ever having been removed from office.

69. The applicant argues that the independence of the permanent president at the applicant's court martial could have been reinforced by formal security of tenure and by embodiment of his appointment in a legal instrument of some kind. However, the Court finds that the presence of the permanent president did not call into question the independence of the court martial. Rather, his term of office and *de facto* security of tenure, the fact that he had no apparent concerns as to future army promotion and advancement and was no longer subject to army reports, and his relative separation from the army command structure, meant that he was a significant guarantee of independence on an otherwise *ad hoc* tribunal.

70. In contrast to the permanent president, the two serving officers who sat on the applicant's court martial were not appointed for any fixed period of time. Rather, they were appointed on a purely *ad hoc* basis, in the knowledge that they would return to their ordinary military duties at the end of the proceedings. Although the Court does not consider that the *ad hoc* nature of their appointment was sufficient in itself to render the make-up of the court martial incompatible with the independence requirements of Article 6 § 1, it made the need for the presence of safeguards against outside pressures all the more important in this case.

71. The Court recognises that certain safeguards were in place in the present case. For example, the presence of the legally qualified, civilian judge advocate in his enhanced role under the 1996 Act was an important guarantee, just as the presence of two civilian judges in the Netherlands Supreme Military Court was found to be in *Engel* (cited above). This was

particularly so since the applicant's guilt, upon which the judge advocate would have had no vote, was not at issue before the court martial. As indicated at paragraph 69 above, the presence of the permanent president provided another guarantee. The Court notes also the protection offered by the statutory and other rules about eligibility for selection to a court martial and the oath taken by its members (see paragraphs 24 and 27 above).

72. However, the Court considers that the presence of these safeguards was insufficient to exclude the risk of outside pressure being brought to bear on the two relatively junior serving officers who sat on the applicant's court martial. In particular, it notes that those officers had no legal training, that they remained subject to army discipline and reports, and that there was no statutory or other bar to their being made subject to external army influence when sitting on the case. This is a matter of particular concern in a case such as the present one where the offence charged directly involves a breach of military discipline. In this respect, the position of the military members of the court martial cannot generally be compared with that of a member of a civilian jury, who is not open to the risk of such pressures.

73. In relation to the applicant's complaints about the role played by the "reviewing authority", the Court recalls that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal". The principle can also be seen as a component of the "independence" required by Article 6 § 1 (see *Findlay*, cited above, p. 282, § 77, and *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII). In *Findlay*, the role played by the "confirming officer" under the pre-1996 Act court-martial system was found to be contrary to this well-established principle.

74. In the present case, the applicant's sentence and conviction were subject, under changes introduced by the 1996 Act, to automatic review by the "reviewing authority". The Court notes that the authority was empowered to quash the applicant's conviction and the sentence imposed by the court martial. More importantly, it had powers to reach any finding of guilt which could have been reached by the court martial and to substitute any sentence which would have been open to the court martial, not being in the authority's opinion more serious than that originally passed. Any substituted verdict or sentence was treated as if it had been reached or imposed by the court martial itself.

75. The Court considers that the very fact that the review was conducted by such a non-judicial authority as the "reviewing authority" is contrary to the principle cited at paragraph 73 above. The Court is particularly concerned by the fact that the decision whether any substituted sentence was more or less severe than that imposed by the court martial would have been left to the discretion of that authority. The Court's concerns are not answered by the Government's argument that the existence of the review serves the interests of convicted soldiers such as the applicant, nor by the

essentially fair procedure followed by the authority when conducting its review.

76. The Court is of the view that the fundamental flaws which it has identified were not corrected by the applicant's subsequent appeal to the Courts-Martial Appeal Court, since that appeal did not involve any rehearing of the applicant's case but rather determined, in the form of a decision which ran effectively to two sentences, that leave to appeal against conviction and sentence should be refused.

77. For all these reasons, the Court considers that the applicant's misgivings about the independence of the court martial and its status as a "tribunal" were objectively justified.

78. In view of the above, it is not necessary to consider the applicant's other complaint under Article 6 § 1 that the court martial was not "established by law". Further, in view of the Court's conclusions about the applicant's complaint under Article 6 § 3 (c) (see paragraph 93 below), it is not necessary for the Court to examine the applicant's complaint about the lack of independence of the Legal Aid Authority.

79. In conclusion, in respect of certain of the applicant's complaints about the general structure of the court-martial system, there has been a violation of Article 6 § 1 of the Convention.

C. Specific complaints

1. Arguments of the parties

(a) The applicant

80. The applicant argued that he was entitled to legal representation at the court-martial proceedings but that this was denied him due to the unfairness of the army's legal-aid system. He pointed to alleged differences between that system and the civilian legal-aid system in the United Kingdom which he said disadvantaged his application for legal aid. In particular, he highlighted the fact that the army system required him to make a down-payment amounting to ten times his weekly disposable income, whereas the civil system would probably have required only weekly or monthly payments out of that income. He denied that he was offered the option of making the down-payment by way of ten weekly instalments and drew attention to the terms of the Legal Aid Authority's letter of 21 April 1997, which stated that legally aided solicitors would not be instructed until the payment had been made. He indicated that he was unable to afford the lump sum required and was thus effectively denied legal representation.

81. The applicant further argued that the defending officer who had the task of representing him was patently unable to act in his best interests since he was appointed by the applicant's commanding officer from within his own unit, and was thus subordinate to the very officer who had remanded the applicant for trial by court martial. He stated that he was not consulted about the choice of defending officer and that, as he had been out of the army for a considerable time by the time of his court martial, he would not have known any officer sufficiently well to make an informed choice. He commented that the defending officer failed to advise him properly on the possibility of lodging a "not guilty" plea based upon the defence of duress and to inform the court martial adequately of the reasons for the applicant going absent without leave. Although he recognised that he had signed a statement indicating that he did not want the military police to take any further action in connection with his allegations of bullying, he stressed that the statement concerned had continued to assert the truth of those allegations. He referred to the defending officer's disclosure to the Defence Council, following the court martial, of instructions given by the applicant in confidence, and of advice given to him, notwithstanding the applicant's solicitor's specific requests that he should not do so.

(b) The Government

82. The Government submitted that the down-payment of GBP 240 in respect of legal representation was requested by the Legal Aid Authority only following careful assessment of the applicant's means. They stated that the applicant was manifestly able to afford to pay that sum having regard to his net weekly income, as detailed in his initial application for legal aid. They alleged that payment by ten weekly instalments was an option and highlighted that the applicant chose to decline the offer before a reply had been received to the letter from his solicitor of 30 April 1997 seeking reconsideration by the Legal Aid Authority of the terms of the offer. They indicated that, had the applicant accepted the offer of legal aid, it would have been granted at once and would not thus have been conditional upon prior down-payment being made in full.

83. The Government further denied that the defending officer's appointment or conduct at the applicant's court martial had given rise to a violation of Article 6 § 1 of the Convention. They submitted that there was no basis for the defending officer to advise the applicant to plead not guilty to the charge since the defence of duress was bound to fail in the circumstances. The applicant's allegations of bullying and assault were insufficient in law to found such a defence and were, as confirmed by the investigating authorities at the time, not supported by the evidence. In any event, the applicant had withdrawn those allegations and had agreed that he did not want to answer questions about them at the hearing. They affirmed that the allegations were in any case brought to the court martial's attention,

and full reasons for the applicant's absence were thus given, because the defending officer had handed to the court the applicant's letter to his commanding officer of 17 March 1993 in the course of making arguments in mitigation.

84. The Government accepted that the defending officer had erroneously advised the applicant following his conviction about the possible consequences of bringing an appeal. However, they argued that the applicant had not been prejudiced by that advice since he had engaged a solicitor shortly afterwards and, no doubt following that solicitor's advice, had lodged a petition with the Defence Council as "reviewing authority" and subsequently appealed to the Courts-Martial Appeal Court.

85. The Government maintained that the defending officer was entitled to disclose the previously privileged information to the Defence Council following the court martial, in view of the serious allegations which the applicant made about that officer in his petition to the Council.

86. The Government drew attention also to the fact that the applicant had been entitled to legal aid for legal representation before the court martial, was offered such aid subject to a "modest" down-payment in line with that which would have been required in the civilian courts, and chose to decline the offer. It followed, according to the Government, that the defending officer was not, and was never intended to be, a substitute for a legal representative. They contrasted the position with criminal proceedings in the civilian context where, if an accused refused an offer of legal aid, he would generally have to represent himself at trial. The Government highlighted that the applicant had the right to select his own defending officer from outside his own unit, and that he was provided with a document informing him of this right in October 1996, but had chosen not to do so.

87. The Government denied that the applicant's defending officer had any links, apparent or otherwise, with the prosecuting authority or with the members of the court martial, who were all from different regiments and a different chain of command. They submitted that the mere fact that the defending officer was under the command of the applicant's CO and, like every other army officer, was under the ultimate command of the commander the UK land forces, could not affect the fairness of the applicant's court martial since the decision to prosecute and the conduct of the prosecution were the responsibility of the prosecuting authority.

2. The Court's assessment

88. The Court recalls that, in *Croissant v. Germany* (judgment of 25 September 1992, Series A no. 237-B, pp. 34-35, §§ 33-38), it held that there was no violation of Article 6 § 3 (c) where an individual was required to pay a contribution to the cost of providing legal assistance and had sufficient means to pay.

89. The Court notes that the applicant was offered legal aid subject to a contribution of GBP 240. It does not regard the terms of the offer as arbitrary or unreasonable, bearing in mind the applicant's net salary levels at the time, regardless of whether or not the applicant was given the option of paying by way of instalments.

90. The Court notes further that, had the applicant accepted the Legal Aid Authority's offer of legal aid as communicated in its letter of 21 April 1997, he would have been represented at his court martial by an independent legal representative. Instead, the applicant refused that offer before the Legal Aid Authority had even responded to his solicitor's request for reconsideration of the terms of the offer. Indeed, the applicant certified on 2 May 1997 that he wanted to be represented by no other than his defending officer, and that he had made this choice of his own free will (see paragraph 13 above).

91. As a result, the Court finds no merit in the applicant's complaints about the independence of his defending officer and that officer's handling of his defence. In any event, it finds on the evidence that the defending officer did not fail adequately to advise or represent the applicant, save as regards the risks consequent to his appealing against the court martial's verdict. Even in that regard, the applicant went on to pursue an appeal with the assistance of legal representation, so that this error proved to be without consequence for the applicant.

92. The Court does not consider that the defending officer's disclosure of privileged information to the Defence Council in its capacity as "reviewing authority" gave rise in the circumstances to any unfairness in the court-martial proceedings.

93. Accordingly, as regards the applicant's specific complaints, there has been no breach of Article 6 §§1 or 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. Article 41 provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

95. The applicant claimed 5,000 pounds sterling (GBP) for non-pecuniary damage on the basis that, had he been represented in accordance with the Convention, he would have received a sentence substantially less

than the one he did receive and possibly would not have received a custodial sentence at all.

96. The Government submitted that it was inappropriate to speculate as to what the outcome of the applicant's court martial would have been had circumstances been different. They argued that the applicant's assertions about what would have happened had he been differently represented at the court martial were wholly improbable given the fact that the applicant had gone absent without leave for over three and a half years, had been arrested rather than surrendering himself, and that the offence of absence without leave is a serious one in the army context.

97. The Court notes that the applicant associates his claim for non-pecuniary damage with his complaints about the representation with which he was provided at his court martial. The Court has concluded above that none of those complaints give rise to a violation of the Convention.

98. In any event, the Court considers that it cannot speculate as to what the outcome of the court-martial proceedings might have been had the violations of the Convention which it has found not occurred (see *Findlay*, cited above, p. 284, §§ 85 and 88).

In conclusion, the Court considers that its finding of a violation of Article 6 § 1 of the Convention in itself affords the applicant sufficient just satisfaction for the alleged non-pecuniary damage.

B. Costs and expenses

99. The applicant also claimed GBP 20,925.46 in respect of costs and expenses, inclusive of value-added tax (VAT).

100. The Government submitted that the applicant's claim was excessive. They argued that the figure of 115 hours' work on the part of his main legal representative seemed very high. In particular, they questioned that part of the claim relating to the preparation of the applicant's submissions between November 1999 and January 2000, which amounted to fifty hours' work, and that part relating to preparation of his submissions for the hearing between July and October 2001, which amounted to thirty-five hours' work. They also suggested that work done during the latter period might have overlapped with domestic litigation in which the representative concerned was involved at the time. They indicated that there appeared no reason for the applicant to engage a second representative. They commented that a more reasonable figure for legal costs and expenses would be GBP 12,000, inclusive of VAT.

101. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II).

102. The Court notes that the bulk of the submissions made by the applicant's legal representative in January 2000 consisted of a general paper entitled "The British Army Court-Martial System following the Armed Forces Act 1996 and the European Human Rights Convention". It notes that the paper, which runs to some eighty-four pages excluding schedules, makes no specific mention of the present case and contained a significant amount of material which was never referred to in the proceedings before the Court. It considers that the paper was clearly intended for use beyond these proceedings. The Court therefore concludes that the applicant cannot claim that the entirety of the costs of the work done on that paper was actually and necessarily incurred and reasonable as to quantum. However, the Court does not accept the Government's argument that thirty-five hours' preparation for the hearing was excessive considering the breadth and complexity of the issues before the Court. Nor does the Court consider it unreasonable for the applicant to have instructed a second representative for the purposes of assisting at that hearing.

In the light of these matters, the Court awards the global sum of 30,000 euros for legal costs and expenses, inclusive of VAT.

C. Default interest

103. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that, as regards certain of the applicant's complaints about the general structure of the court-martial system, there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* that, as regards the applicant's specific complaints, there has been no breach of Article 6 § 1 of the Convention;

3. *Holds* that there has been no violation of Article 6 § 3 (c) of the Convention;

4. *Holds* that the finding of a violation of Article 6 § 1 of the Convention in itself constitutes sufficient just satisfaction for any non-pecuniary damage alleged by the applicant;

5. *Holds*

(a) that the respondent State is to pay to the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 30,000 (thirty thousand euros) in respect of the costs and expenses of the proceedings before the Convention organs, inclusive of value-added tax;
(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* the remainder of the claim for just satisfaction.

Done in English, and notified in writing on 26 February 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President