

## **THE CASE OF R V. BOYD AND OTHERS**

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*Source: R v. Boyd and others [2002] UKHL 31, [2002] 3 All ER 1074.*

### **HOUSE OF LORDS**

Lord Bingham of Cornhill Lord Steyn Lord Hutton Lord Scott of Foscote Lord Rodger of Earslferry

### **OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT**

#### **IN THE CAUSE**

Boyd, Hastie and Spear Saunby and Others (Appellants)

v.

The Army Prosecuting Authority

and

The Royal Air Force Prosecuting Authority

and

The Treasury Solicitor

(Respondents)

**ON 18 JULY 2002**

**[2002] UKHL 31**

### **LORD BINGHAM OF CORNHILL**

My Lords,

1. The conjoined appeals before the House fall into two groups. The first group comprises the three cases of Aircraftman Boyd and Messrs Spear and Hastie. These three appellants were all non-commissioned officers, Boyd in the Royal Air Force, Spear and Hastie in the army. All three were charged (Spear and Hastie jointly) with assault occasioning actual bodily harm to another member of their respective services. All three were tried by district court-martial, pleaded not guilty, were convicted and were sentenced. At both the courts-martial a permanent president of courts-martial (or PPCM, Wing Commander Chambers in the first case, Lieutenant Colonel Stone in the second) presided. The sole issue in the appeal before the House in these cases is whether, because of the part

played by the PPCM, the courts-martial lacked the qualities of independence and impartiality which article 6(1) of the European Convention on Human Rights requires of any judicial tribunal. The Courts-Martial Appeal Court (Laws LJ, Holman and Goldring JJ) decided this issue against the accused: [2001] QB 804.

2. The second group of appeals comprises the cases of Mr Saunby, Sapper Clarkson, Lance Corporal English, Flying Officer Williams, Senior Aircraftman Dodds, Messrs Leese, Marsh and Webb and Aircraftman Ashby. They were charged with a variety of different offences (Clarkson and English jointly). All appeared before district courts-martial (DCMs) except Williams (who, as a commissioned officer, appeared before a general court-martial, or GCM). All pleaded not guilty but were convicted, save for Ashby who pleaded guilty. A variety of different sentences were passed, ranging from 84 days' imprisonment and dismissal (Saunby, Webb) to forfeiture of three years' seniority (Williams). Petitions for review were rejected in all cases save in that of Dodds, whose sentence of 112 days' detention was reduced to 28 days'. The Courts-Martial Appeal Court (Laws LJ, Turner and McCombe JJ) dismissed appeals by all appellants save in the case of Marsh, whose sentence of 56 days' imprisonment was reduced to 42 days' detention, a reduction which greatly mitigated the financial loss suffered by him on leaving the service: 30 July, 2001, unreported. All the offences of which these appellants were convicted were offences under the ordinary law applicable in the United Kingdom. All the offences (with two exceptions) were committed within the United Kingdom. The issue which arises in all these appeals is whether a trial by court-martial in the United Kingdom of an offence against the ordinary criminal law of the land is compatible with article 6(1) of the European Convention, either generally or in cases where the offence in question had been committed within the United Kingdom.

(...)

5. The dual status of the soldier, as both soldier and citizen, raises no issue where he is said to have committed a purely military offence, that is, an offence which could not be committed by anyone who was not a soldier. Some such offences are potentially very serious: mutiny, desertion, absence without leave, striking a superior officer are examples. Since these are offences which cannot be committed by those not subject to military discipline, it is unsurprising that they cannot be tried in the ordinary courts of the land and can only be tried in a military tribunal. But the effect of section 70 of the Army Act 1955 ... is to expose the soldier accused of an offence against the ordinary criminal law of the land to prosecution either in the ordinary courts or in a military tribunal. Since he cannot be tried in either tribunal if he has already been tried in the other for substantially the same offence (see section 133 of the Army Act, and the ordinary common law rules of *autrefois* convict and acquit), a question may arise whether he should face trial in a civil court or in a military tribunal. ... [A] pragmatic solution has been adopted, largely dependent on identification of the public interest which the soldier's allegedly criminal conduct has infringed. If it appears to be the general public interest which has been injured (as where a civilian has been injured or non-military property damaged or stolen) a civil court is ordinarily regarded as the more appropriate forum, since the defendant's status as a soldier is essentially irrelevant to his criminal conduct. If, however, the public interest which the soldier's allegedly criminal conduct has infringed is primarily a service interest (as where another soldier has been injured or military property has been damaged or stolen) the charge is ordinarily considered appropriate for trial by a military tribunal: the general public

interest is much less directly engaged, and an internal offence of this kind may well have a direct effect on the morale and discipline of the unit involved. ...

7. (...) A court-martial ... has no exact equivalent elsewhere in the British legal system but has features closely reflecting those of well-established judicial models:

(1) Central to the conduct of a court-martial is the judge advocate, whose role is essentially that of the judge at a criminal trial on indictment in the crown court. He is a trained lawyer of standing and experience. He is responsible for ensuring the fair and regular conduct of the trial. He controls the course of evidence. He rules on legal objections. He gives all appropriate directions to the members of the court-martial on both the facts and the law. He elucidates issues on which the members seek further guidance. He plays no part in reaching a decision on guilt but (if the defendant is convicted) he guides the members on the question of sentence and casts a vote on that issue: (...)

(2) The role of the members of the courts-martial is closely analogous to that of jurors. They come to the case with no legal training (rule 17(b)) and no knowledge of the facts or issues (section 84C). At the outset of the hearing, the names of the members of the tribunal (and also of the judge advocate and of any interpreter) are read out, as is the practice with jurors, and the accused has the right to object to any of them. The members are bound to give effect to the legal directions given by the judge advocate and will heed the guidance which he gives (section 84B(4)). But they alone are the judges of fact, they alone must resolve issues of credibility and they alone decide whether the charge is proved or not (s 94(6)).

(3) The role of the PPCM (such as served in the first group of cases under appeal and in the military cases in the second group) is similar to that of a juror in all the respects just noted. But his role differs from that of a juror, and from that of the other military members of the court-martial: during the period of his appointment his full-time professional occupation is to sit in courts-martial; he has administrative responsibilities in relation to the staging of the court-martial; it is his responsibility to see that the hearing is conducted in accordance with service tradition (rule 33(1)); and during the deliberations of the tribunal he will no doubt chair the members' discussion in the manner of a good chairman. The PPCM is in practice more than a permanent foreman of the jury, because he performs the functions already noted and because he has a casting vote on sentence (section 96(5)). Participating in a number of trials, he no doubt acquires a reasonable working knowledge of law and practice, such as a busy and experienced lay magistrate might acquire.

8. The European Court has defined with great clarity and consistency the meaning of the article 6(1) requirement that a tribunal be independent and impartial. It is enough to quote paragraph 73 of the court's judgment in *Findlay v United Kingdom* (1997) 24 EHRR 221 at 244-245:

"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. First, 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.

The concepts of independence and objective impartiality are closely linked and the court will consider them together as they relate to the present case.”

It should also be remembered, as the court pointed out at p 245, para 76, that in order to maintain confidence in the independence and impartiality of the tribunal appearances may be of importance. Relying on these statements of principle, Lord Thomas submitted that courts-martial, in relation to the trial of civil offences committed in England, despite the changes made by the Armed Forces Act 1996, lack the independence and impartiality required of any judicial tribunal by article 6 of the convention. This radical challenge, rejected by the Court of Appeal, plainly calls for very careful consideration.

9. Lord Thomas did not pursue in argument any challenge to the independence or impartiality of the judge advocate general. Given the key role played by the judge advocate general in the conduct of courts-martial, this is a very significant omission.

10. Lord Thomas did challenge the independence and impartiality of the PPCM, and this challenge founded the first group of appeals. (...) But Lord Thomas faced the difficulty that the European Court in *Morris v United Kingdom* (2002) 34 EHRR 1253, after and with full knowledge of the decisions both in *McKendry* and (by the Courts-Martial Appeal Court) in the first group of appeals, reached the opposite conclusion: see paragraphs 68-71. I do not for my part doubt that the Courts-Martial Appeal Court and the European Court were correct. PPCMs are appointed to that office in the closing years of their service careers, whether in the army or the Royal Air Force. They are officers who have no effective hope of promotion and no effective fear of removal. While no doubt they are, as officers, answerable for any extra-judicial delinquency, as any judge might be, they are answerable to no one for the discharge of their decision-making function. (...)

11. Lord Thomas also challenged the independence and impartiality of the junior officers who serve on courts-martial, and in this respect was able to rely on a finding of the European Court in *Morris* that such officers lacked the necessary qualities of independence and that the applicant's misgivings about the independence of the court-martial were objectively justified: see paragraphs 72, 76. In the first of these paragraphs the court said:

“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 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.”

12. It goes without saying that any judgment of the European Court commands great respect, and section 2(1) of the Human Rights Act 1998 requires the House to take any such judgment into account, as it routinely does. There were, however, a large number of points in issue in *Morris*, and it seems clear that on this particular aspect the European Court did not receive all the help which was needed to form a conclusion. It is true that the junior officers who sit on courts-martial have very little legal training, but that is also true of the PPCM whose presence was accepted (paragraph 71) as a guarantee of the rights of the accused. It is also true that junior officers sitting on courts-

martial remain subject to army discipline and reports. But there is nothing to suggest that any report ever is or ever has been made on any junior officer's decision-making as a member of a court-martial, and it is hard to see how any such report could be made given the prohibition on disclosure of the deliberations of the tribunal in the oath taken by the members. There is nothing to suggest that they remain subject to service discipline in relation to their judicial decision-making, and again it is hard to see how they could. (...) In considering the independence and impartiality of the PPCM both the Court of Appeal in its judgment in *R v Spear; R v Boyd* [2001] QB 804 at paragraphs 33 and 35 and the European Court in *Morris* (at paragraphs 68-69) attached weight to established convention and practice. In my opinion the rules governing the role of junior officers as members of courts-martial are in practice such as effectively to protect the accused against the risk that they might be subject to "external army influence", as I feel sure the European Court would have appreciated had the position been more fully explained.

13. In its judgment in *Morris* (at paragraphs 73-75) the European Court criticised the role of the reviewing authority established under section 113 of the Army Act. Lord Rodger has outlined the role of the reviewing authority and I need not repeat his account. Its role can certainly be seen as anomalous, since ordinarily a binding decision of any court cannot be disturbed otherwise than (exceptionally) by itself or by a superior appellate court. It is however to be noted that the review of conviction and sentence carried out by the reviewing authority, whether the accused seeks such review or not (section 113(3) of both Acts), cannot work otherwise than to the advantage of the accused. The reviewing authority cannot substitute conviction of a more serious offence, nor can it substitute a sentence which is in its opinion more severe (section 113AA(4)). (...) If the reviewing authority were to substitute a sentence which the accused considered to be more severe than that imposed by the court-martial, it would be open to the accused to challenge the substituted sentence on appeal to the Courts-Martial Appeal Court, and it is important to note that the intervention of the reviewing authority in no way diminishes the rights of the accused on appeal. It is difficult to see any analogy with the situation which the European Court considered in *Brumarescu v Romania* (1999) 33 EHRR 862 where the applicant, with a final and irreversible judgment of a court in his favour, was deprived of the benefit of that judgment by a later decision in proceedings initiated by a party not involved in the earlier case. If a court-martial is not an independent and impartial tribunal for the trial of civil offences committed by service personnel in England and Wales, the reviewing authority could not be relied on to save it. But if it is, I find it difficult to understand how the role of the reviewing authority can undermine or reduce its independence and impartiality. Lord Thomas recognised the difficulty of this argument and did not seek to sustain the judgment of the European Court on the point. For similar reasons I find it unnecessary to consider the role of the prosecuting authority, of which Lord Thomas made certain (to my mind unpersuasive) criticisms.

14. Lord Thomas also advanced a more general criticism of trial by court-martial. (...) I would for my part have no hesitation in agreeing that a court-martial is a court of law, not a parade, and its procedures (while properly involving some formality) should be those appropriate to a court of law and not the parade ground. I would also accept that officers serving on courts-martial will disapprove of those found to have acted in breach of the law governing their respective service. But judges and jurors in the crown court will similarly disapprove of those found to have infringed the ordinary criminal law. There is no reason to think that in the former case any more than in the latter

such disapproval will infect the tribunal's approach to deciding whether the particular accused has broken the law in the manner charged. Officers will appreciate, better than anyone, that to convict and punish those not shown to be guilty is not to promote the interests of good discipline and high morale but to sow the seeds of disaffection and perhaps even mutiny. In the absence of any evidence at all to support it, I could not accept the suggestion that any modern officer would, despite the oath he has taken, exercise his judgment otherwise than independently and impartially or be thought by any reasonable and informed observer to be at risk of doing so.

15. (...) But a court-martial either is or is not an independent and impartial tribunal. If it is, it can properly try civil as well as purely military offences. If it is not, it cannot, compatibly with article 6(1), try military offences, which may carry a severe sentence of imprisonment or detention. Nor, leaving aside issues concerning the territorial reach of the convention, and leaving aside also the special conditions in which a field general court-martial may be held, can it be compatible with the standard required by article 6(1) to subject service personnel accused of civil offences committed abroad to trial by court-martial if such is not an independent and impartial tribunal. Lord Thomas is not to be criticised for limiting his argument as he has, no doubt wisely, chosen to do. But if courts-martial are to be regarded, as in my opinion they are, as independent and impartial tribunals for the trial of military offences and civil offences committed abroad in the conditions noted, it must follow that they are also independent and impartial tribunals for the trial of civil offences committed in the United Kingdom.

16. For these reasons, and those more fully given by Lord Rodger with which I am in full agreement, I would dismiss both groups of appeals.

*[In paragraphs [17]-[19] Lord Steyn, Lord Hutton and Lord Scott of Foscote say they agree with the opinions of Lord Bingham of Cornhill and Lord Rodger of Earlsferry and would dismiss the appeals for the reasons they give.]*

## **LORD RODGER OF EARLSFERRY**

My Lords,

20. The appeals before the House challenge the compatibility of the appellants' trials by court-martial with article 6 of the European Convention on Human Rights and Fundamental Freedoms. In particular on behalf of the appellants Lord Thomas of Gresford QC based his challenge on their right to the determination of the charges against them by "an independent and impartial tribunal" in terms of the first sentence of article 6(1):

"In the determination of his civil rights and obligations or 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."

(...)

29. The present appeals are by no means an isolated phenomenon. They are the latest in a series of challenges to the system of trial by court-martial under United Kingdom law which has been going on for a number of years. These challenges have borne fruit in the shape of substantial reforms to the court-martial system. Particularly important was the judgment of the European Court of Human Rights ("the European Court") in *Findlay v United Kingdom* (1997) 24 EHRR 221 which criticised the system as it stood before the Armed Forces Act 1996 introduced a number of very significant changes, in particular the abolition of the institutions of "the convening officer" and "the confirming officer". The changes were designed to ensure the independence of the prosecuting authority and of its decision-making and also to make the courts-martial themselves independent of both the prosecuting authority and the wider Service command structure. The effects of the reforms were accurately summarised by the Appeal Court in *R v Spear* [2001] QB 804, 812-813, para 18. In *Morris v United Kingdom* (2002) 34 EHRR 1253, 1275, para 61 the European Court noted that these reforms had gone a long way to meeting its concerns in *Findlay*. All the appeals before the House arise from cases conducted in accordance with the reformed procedures. Despite the reforms, challenges to the system continue to come before the European Court. It was indeed only after leave to appeal to this House had been granted in the present cases that the European Court gave judgment in *Morris v United Kingdom*. Your Lordships were told that there were other cases in the pipeline. In *Morris* the Third Chamber of the European Court rejected a challenge based on the role of the permanent president but upheld the contention that there were no adequate safeguards of the independence of the other two officers. The Court also held that the role of the reviewing authority was incompatible with a court-martial being an independent "tribunal" in terms of article 6(1). (...) While the decision in *Morris* is not binding on the House, it is, of course, a matter which the House must take into account (section 2(1)(a) of the Human Rights Act 1998) and which demands careful attention, not least because it is a recent expression of the European Court's view on these matters.

30. In presenting the appeal, Lord Thomas made a number of separate criticisms of the system of trial by court-martial, his purpose being to show that, taken overall, the system as operated in the appellants' cases had infringed their right to a fair trial under article 6. (...)

*[In paragraphs 31-40 the system of trial by court-martial in the United Kingdom is explained.]*

41. Lord Thomas's submission that the appellants' rights under article 6(1) had been infringed did not depend on any specific circumstances relating to their trials or to the individuals who had made up the courts-martial: rather, his was a general challenge to the system of trial of civil offences allegedly committed in the United Kingdom by courts-martial duly set up in accordance with the legislation. In such cases courts-martial did not constitute an independent and impartial tribunal. In support, Lord Thomas cited the dissenting opinion of Laskin CJC in *MacKay v The Queen* 114 DLR (3d) 393, 401-402 where he was considering the case of a serviceman who had been tried by court-martial for various drugs offences under the Narcotic Control Act 1970. The Chief Justice said: (...)

42. Lord Thomas also referred to the opinion of Lamer CJC in the later case of *R v Généreux* [1992] SCR 259, 294 – 295 where he accepted that a military code of discipline would be less effective if the military did not have its own courts to enforce its terms, but continued: (...)

43. In both these passages on which Lord Thomas relied, a distinction is drawn between courts-martial trying military offences and courts-martial trying civil offences. Lord Thomas adopted the same distinction, limiting his challenge to trial of civil offences by court-martial in this country.

44. Despite the apparent support for it in the passages which I have quoted from the Canadian cases, I am unable to accept such a distinction. In principle, either a tribunal is independent and impartial or it is not. If it is, then it is independent and impartial whatever the offence it is trying, wherever the offence may have been committed and wherever the tribunal may be sitting; equally, if it is not, then it is not independent or impartial whatever the offence it is trying, wherever the offence may have been committed and wherever the tribunal may be sitting. So far as military offences are concerned, members of courts-martial may have a particular familiarity with the issues and values that underlie them. That familiarity cannot, however, justify the members in reaching a decision on conviction or sentence that is anything other than the decision of an independent and impartial tribunal. The article 6 guarantee applies in the trial of such purely military offences, just as it does in the trial of civil offences. And this is indeed plain from the decision of the European Court in *Morris v United Kingdom* 34 EHRR 1253 where article 6 was held to apply in the case of an applicant who had pled guilty to the military offence of being absent without leave. Indeed it would be astonishing if the standards of independence and impartiality required of a court-martial trying, for instance, the purely military offence of mutiny, which may attract the most severe punishment, were one whit less strict than those required of a court-martial trying the civil offence of assault.

(...)

46. For these reasons, while the certified question in *R v Saunby* concerns only courts-martial trying civil offences, in my view the issue of principle is whether, in any case where it is permitted, trial by court-martial infringes the accused's article 6 rights. (...)

47. (...) The case law of the European Court shows that, in principle, trial by court-martial does not infringe an accused's right to a fair trial under article 6.

*[In paragraphs 48-50 Lord Rodger of Earlsferry discusses case law of the ECtHR (including Engel v. The Netherlands (No 1) and Morris v. United Kingdom) to support the statement that trial by court-martial does not infringe an accused's right to a fair trial under article 6.]*

48. In *Engel v The Netherlands (No 1)* [1 EHRR 647](#) five members of the Netherlands armed forces were punished by their commanding officers for offences against military discipline. They appealed to the Supreme Military Court which confirmed their commanding officers' decisions. The applicants brought proceedings in Strasbourg alleging breach of their rights under various articles of the Convention, including article 6. In this connection the European Court, at pp 657-658, para 30, considered the composition of the Supreme Military Court. It comprised six members: two civilian jurists, one acting as the court's president, and four military officers. The civilian jurists had to be justices of the Dutch Supreme Court of Judges of the Court of Appeal and they were appointed by the Crown on the joint advice of the ministers of justice and defence for a term of office that was similar to their judicial term. The military members were also appointed by the Crown on the



recommendation of the ministers of justice and of defence but they could be dismissed by the Crown on the recommendation of the same ministers. The military members could therefore, in theory, be removed without observance of the strict requirements and legal safeguards that applied to the civilian members. On the other hand, their appointment as military members of the court was normally the last in their service career and, in their functions as judges on the court, they were not under the command of any higher authority and they were not under a duty to account for their acts to the service establishment. On assuming office, all members of the court swore an oath to be just, honest and impartial.

49. The European Court held, at pp 679-680, para 85, that in the case of three of the applicants the charges against them fell within the criminal sphere and that the Convention therefore obliged the authorities to afford them the guarantees under article 6. The court went on to hold, at p 680, para 89, that the Supreme Military Court constituted an independent and impartial tribunal established by law and that there was nothing to indicate that it had failed to give the three applicants a fair hearing. There was therefore no breach of article 6 in this respect, although the European Court did go on to find, at p 681, para 89, that the applicants' rights under article 6(1) had been infringed because the proceedings in the Supreme Military Court had taken place in camera.

50. In *Morris v United Kingdom* 34 EHRR 1253, 1274, para 59 the European Court said this:

"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 the above-mentioned *Engel [v The Netherlands (No 1)]* case, the court found that the Dutch 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."

While it is perhaps possible to detect some lack of enthusiasm in the use of the term "tolerate", the passage shows clearly that, in principle, a military court can constitute an independent and impartial tribunal in terms of article 6(1). What is required is that there should be sufficient safeguards of the independence and impartiality of its members. Applying that approach, I would reject Lord Thomas's submission that, of its very nature, trial of civil offences by court-martial is incompatible with article 6(1). In principle such a trial can fully satisfy the requirements of article 6 that the tribunal should be independent and impartial and that the accused should have a fair trial.

51. That being so, it is not necessary to "justify" trial by court-martial, whether by reference to the history of the system here and in many other countries or by reference to the situation of the Services today. Lord Thomas suggested that the Government and the armed forces wished to retain courts-martial for civil offences for no other reason than that the system exists and the staff are there to run it. I should therefore not wish to leave unmentioned the substantial arguments that can be advanced in favour of a system of trial by court-martial that covers both military and civil offences. The case is put forcefully in the witness statement dated 12 July 2001 of Air Chief Marshal Sir Anthony Bagnall, the Vice Chief of the Defence Staff. Before making the statement Sir Anthony

had consulted senior members of all three Services. Describing what he regarded as the special circumstances underpinning section 70 of the Acts and section 42 of the Naval Discipline Act 1957, he said *inter alia*:

“4. First and foremost of the special circumstances of the armed forces is that the willingness and readiness of every member and unit of the armed forces to act with the greatest possible speed and efficiency is essential for the defence of the realm from outside attack, for acting in operations outside the United Kingdom and sometimes for acting in aid of the civil power (as in Northern Ireland). (...) Success in operations depends on the ability of all members of a unit to act together as a single fighting force, in other words on operational efficiency.

5. Second, the requirements of Service discipline reflect the fact that their fundamental purpose is essentially to fight. (...)

6. (...) The fundamental purpose of a military justice system is to foster and promote the discipline and self-control required for the maintenance of the capability to act as an efficient fighting force, that is to say, operational effectiveness.

7. It is the combination of the need for utmost readiness, unit solidarity and deeply imbued self-control over long periods and often in most difficult situations which necessitate a comprehensive system of command and discipline, and require that this system should be capable of dealing fairly and, where possible, promptly with misconduct involving a criminal offence.

8. These factors make Service life unique, but, while they are all important, I should make a further point about one of them. Members of the regular armed forces do not simply do a job. They are at all times members of the armed forces, very often sharing accommodation, whether barracks or temporary accommodation, even in peacetime.

9. The special status of members of the armed forces means that an act which may be a criminal offence under civilian criminal law also has a disciplinary aspect when committed in a Service environment. The commanding officer is at the centre of the system of discipline. He is responsible for the behaviour of those under his command, both among themselves and in relation to the local community. (...) A CO may typically deal with cases of minor theft or assault. These cases are often nonetheless of importance to discipline and morale. A minor theft, which might be insignificant in some civilian contexts, can erode trust between members of a unit and undermine the effectiveness of what should be a close-knit team. More serious cases are likely to go [to] court-martial. The CO and the Service courts are uniquely placed to understand the circumstances of Service life and the significance of misconduct by Service personnel, especially where misconduct occurs in a Service context.

10. A requirement for all criminal offences in the United Kingdom to be dealt with by civilian courts would seriously undermine the CO's authority. Moreover it seems to me that the exclusion of courts-martial from dealing with criminal cases in the United Kingdom would inevitably bring with it the exclusion of the COs from dealing with such criminal offences on a summary basis.

11. (...) If section 70 did not apply to an offence committed in England, no disciplinary action could be taken against the guilty person; nor could the Service police arrest him. He would not have committed a disciplinary offence.

12. A distinction between criminal and Service offences is also in my view artificial. The same facts may amount both to a criminal and a purely Service offence. A theft may sometimes be looting; the circumstances of an assault may amount to mutiny. It would be anomalous if criminal misconduct

could be dealt with, but only where the circumstances also amounted to a Service offence. Nor is there a simple distinction in terms of seriousness. Looting, mutiny and desertion may be as serious as theft or even murder.”

52. This authoritative and up-to-date statement of the reasons why the armed forces wish to maintain the jurisdiction of courts-martial in civil offences complements passages in certain of the authorities where judges have recognised that a distinct system of justice for the armed forces can be justified by their peculiar position. (...)

53. [A]s the decision in *Morris v United Kingdom* 34 EHRR 1253 shows, it is impossible to say that in their very nature all trials by court-martial involve an infringement of the accused's article 6 rights.

54. Since trial by court-martial does not necessarily involve an infringement of the accused's rights under article 6, the decision as to whether the court is to be regarded as an independent and impartial tribunal depends on the safeguards which are in place. It follows that the decision in these appeals depends on whether the safeguards of the independence and impartiality of the members of the courts-martial in these cases can be regarded as satisfactory.

55. In *Findlay v United Kingdom* 24 EHRR 221, 244 – 245, para 73 the European Court recalled 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. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.”

In *Porter v Magill* [2002] 2 WLR 37, 84A-B, para 103 Lord Hope of Craighead, with whom the other members of the House agreed, having surveyed the European Court, United Kingdom and Commonwealth case law on this point, concluded:

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

56. Lord Thomas did not suggest that the members of the courts-martial in these cases had been subjectively biased. He argued, however, that the fair-minded and informed observer would conclude that the safeguards were inadequate to guarantee the independence and impartiality of the members of the courts-martial, especially having regard to the lack of security of tenure for permanent presidents and the ad hoc appointments of the other officers. Given their position as serving officers in the armed forces, the fair-minded observer would see it as possible that they would give undue weight to the need to maintain service morale and discipline and that, as officers, they would be unable fairly to judge cases involving lower ranks, especially if, say, convicting an officer or acquitting a private meant disbelieving an officer or non-commissioned officer. Courts-martial could not, therefore, be regarded as objectively impartial in terms of article 6.

57. A submission of this kind requires one, as a starting-point, to consider what is meant by the requirement that a tribunal should be independent and impartial. As the European Court noted

in *Morris v United Kingdom* (1992) 34 EHRR 1253, 1274, para 58, the concepts of independence and objective impartiality are closely linked. In the present cases, in substance, the court-martial must be guarded from the risk of influence by the prosecution and guarded from the risk of influence by the relevant Service authorities, especially superior officers who might wish to secure some particular result, supposedly in the interests of the morale or discipline of the Service or of some particular unit. As a result of the abolition of the role of the convening officer by the 1996 Act, no issue was raised in these cases as to the independence of the members of the tribunal from the prosecution. On the other hand, article 6 does not require that the members of the tribunal should not share the values of the military community to which they belong any more than it requires that the judge or members of the jury in a civil court should be divorced from the values of the wider community of which they form part. What matters is that, while sharing the values of the Service community, the members of the court-martial should put aside any prejudices which they may have and act - and be seen to act - independently and impartially in deciding the issues in the case before them.

58. Lord Thomas dealt first with the position of permanent president. (...) In challenging the role of the permanent presidents in these cases Lord Thomas had, of course, to take account of the judgment of the European Court on this point in *Morris v United Kingdom* 34 EHRR 1253, 1276-1277, paras 68-69:

"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 Dutch Supreme Military Court in the above-mentioned *Engel [v The Netherlands (No 1)]* 1 EHRR 647] case. In that case, in declaring the military court 'independen[t] 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.

"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. It notes also that, as highlighted by the Courts Martial Appeal Court in the above-mentioned cases of *R v Spear* and *R v Boyd*, 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.

"60. 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."

59. About two years before this judgment of the European Court, apparently giving a clean bill of Convention health to permanent presidents, in *R v McKendry* (unreported) 6 March 2000 Judge Advocate Pearson had held that the president of that particular district court-martial should stand down because he could not be regarded as independent and impartial for purposes of article 6(1). Although the judge advocate purported to limit his ruling to the particular case, the result of it was that the use of permanent presidents was forthwith abandoned. Officers who had been serving as permanent presidents found themselves without a role. It appears that, pending the outcome of these appeals, the use of permanent presidents has not been resumed.

(...)

61. So far as Lieutenant Colonel Stone is concerned, Lord Thomas accepted that the position was as outlined by the Appeal Court. In particular he accepted that, since 1997, in the Army there had been no reports on permanent presidents. That being so, in the appeals of Spear and Hastie Lord Thomas was not able to distinguish *Morris v United Kingdom* 34 EHRR 1253. Since he did not argue that, on its facts, this aspect of the decision in *Morris* had been wrong, Lord Thomas's submissions on behalf of these appellants were really of a more general nature, dealing with the perceived weaknesses in the role of any officer as a member of a court-martial.

62. In the case of the appellant Boyd, however, Lord Thomas argued that the position was not so straightforward as the account given by the Appeal Court would suggest. Unlike the Army permanent presidents, in particular the permanent president in *Morris v United Kingdom*, Royal Air Force permanent presidents, such as Wing Commander Chambers, remained subject to reports. Mr Havers accepted that, for some reason that he could not explain, the Air Force had indeed continued the practice of preparing reports on officers who were serving as permanent presidents. In my view that practice is undesirable and, as the Army experience shows, unnecessary. It would be better if it were discontinued. ... [T]he reporting process, with its possible consequences for his future, could have affected his independence and impartiality.

63. As Mr Havers pointed out, however, while the reports make various comments on the way that Wing Commander Chambers tackled his role as a permanent president, these are better seen as referring to the administrative aspects of the job, such as checking the trial facilities and briefing the other participants. Crucially, there was not the slightest indication that the reports bore on his actual decisions when sitting as president of a court. On the contrary the reports recognise that that role is one in which the permanent president is “isolated and unsupervised” and which requires independence which the Air Secretary “honour[s] and respect[s]”, there being only an administrative and welfare linkage. The reporting officer recognises the limitation on his role since he is not “allowed any direct insight into the way [Wing Commander Chambers] has discharged his duties. Indeed a key ingredient is the ability to work without supervision.” In these circumstances I readily conclude that neither the fact that Wing Commander Chambers was subject to reports of this nature, nor the actual reports themselves that were made on him, give the slightest reason for considering that his independence or impartiality as a member of the appellant Boyd’s court-martial was compromised. On the contrary, all involved in making these reports were well aware of the need not to intrude upon the decisions reached by him when sitting as president. Even had anyone wished to intrude, the oath of secrecy taken by the members of courts-martial would have made it impossible to investigate those decisions.

64. That being so, there is nothing in the particular circumstances of the cases of *Spear* and *Hastie* or of *Boyd* which would be a reason to reach a different result from the European Court in *Morris v United Kingdom* on the issue of the independence and impartiality of the officers acting as president of their courts-martial. I respectfully agree with and adopt the reasoning of the European Court on this point. I would accordingly reject Lord Thomas's argument that these appellants' rights under article 6(1) were infringed because the presidents of their courts-martial were permanent presidents.

65. When he turned to the position of the other officers on the courts-martial, Lord Thomas was able to claim support for his argument from the relevant aspect of the decision of the European Court in *Morris v United Kingdom* 34 EHRR 1253, 1277-1278, paras 70-72:

"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 Dutch Supreme Military court was found to be in the above-mentioned *Engel* case. 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.

"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 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."

Lord Thomas submitted that the House should follow this part of the decision of the European Court in *Morris* and that, indeed, it would be unprecedented for a court not to do so where the decision of the European Court was so recent.

66. In reaching its decisions the European Court always pays careful attention to the facts of the case as explained to it. In the jargon of the subject, its decisions are said to be "fact-sensitive". As can be seen from the passage in question, the decision in *Morris* is no exception. For whatever reason, however, the European Court was given rather less information than the House about the safeguards relating to the officers serving on courts-martial. And, like the European Court, the House must have regard to all the relevant factual information presented to it when deciding whether the safeguards of the independence and impartiality of the members of the courts-martial were adequate.

67. It is true that, apart from any permanent president, the officers selected to serve on courts-martial are appointed only ad hoc. As the European Court points out, that is not in itself sufficient to make the court incompatible with the independence requirements of article 6(1). Indeed, in performing the role only occasionally, the members of a court-martial resemble jurors and should bring to the task the freshness of approach which is one of the benefits of the jury system. Of course, as individuals and as officers in the armed forces, those asked to sit on a court-martial may well have certain prejudices. Jurors too have prejudices and, as McIntyre J rightly pointed out in *MacKay v The Queen* (1980) 114 DLR (3d) 393, 420-421, quoted above at paragraph [52], the same can be said of those appointed to judicial office in civilian society. In the light of their experience of jury trial, however, courts in countries which operate with juries have concluded that the safeguards of the oath and the judge's directions are generally sufficient to ensure that jurors put aside their prejudices and reach a just verdict on the evidence. (...) The European Court too has recognised that the jurors' oath, to faithfully try the case and to give a true verdict according to the evidence, and their obligation to have regard to the directions given by the presiding judge will generally be sufficient to safeguard their independence and impartiality. (...)

68. In the cases under appeal these particular safeguards were present. The oath taken by the members of the court required them to well and truly try the accused "according to the evidence" and to do justice according to the relevant 1955 Act "without partiality, favour or affection". In addition the judge advocate gave the other members of the court-martial directions of the same kind as would have been given to a jury if the case had been tried in a civil court. There is no reason to suppose that the members of the court-martial would be any less faithful to their oath or any less diligent in applying the directions given by the judge advocate than would the members of a jury. Indeed it is at the very least arguable that the officers on a court-martial, as members of the armed forces for whom trust and obedience to commands are particularly important, would be even more likely than civilian jurors to be true to their oath and to follow the directions given to them.

69. In any event, the steps taken to ensure that the members of a court-martial act independently and impartially are, on one view, even more strict than with a jury. Although these additional steps were not fully explained to the European Court, they are in my view important and must be recorded at some length, even at the risk of repeating some of what has been said already about the procedure to be followed.

*[In paragraphs 70-81 the procedure is set out.]*

82. The various provisions which I have quoted from the briefing notes for the members of courts-martial reinforce significantly the message, proclaimed in any event by the oath and the directions of the judge advocate, that the members are to act independently and impartially. In order to be seen to avoid local unit influences, the members are not to stay in public accommodation at the accused's unit. They are not to speak to unit personnel and especially not to any officer who may be attending the trial – at the risk of being debarred from the trial or indeed of the trial being prejudiced. They are not to associate either professionally or socially with such personnel until the trial is over. There is a veto on the president briefing the other members of the court in the absence of the judge

advocate. The members are to tell the court administration officer if they know something about the accused which could prejudice their impartiality or if they know someone who might be a witness in the case. The members are warned not to talk to anyone else about the case as long as it continues. They are not to look at any papers which are before the judge advocate, prosecutor or defence counsel, for fear of seeing something which they ought not to. When they deliberate on conviction or sentence, the most junior member is to give his opinion orally first – again, obviously, with the aim of ensuring that the junior members express their own personal view, uninfluenced by the more senior members. In terms of the members’ oath their deliberations are to be kept secret and this secrecy is further ensured by the instruction to the court orderly at the end of the proceedings to burn or shred all scrap paper. Again, the object is to prevent the members feeling, or coming under, any outside pressure during or after the trial by reason of their participation in the decision in the case.

83. Lord Thomas did not suggest that these were other than genuine instructions to the members which they were intended to observe. Nor was it suggested that the instructions were in practice ignored or that they had been ignored in these particular cases. But if they are indeed observed, I find it hard, if not impossible, to see how anyone either in the court or, more particularly, outside the court could improperly influence the members’ decision either on conviction or on sentence. Certainly, it is hard to see what more could be done to ensure that, while sitting in the court-martial, the officers act not as officers subject to command but as independent and impartial members of the court, reaching the verdict and determining the sentence according to law but according also to their own individual conscience.

84. Of course, the members of a court-martial are not just an ordinary jury. The difference shows itself in at least two different respects.

85. First, the routines, the periods of boredom and the pleasures, pains and pressures of Service life would be unknown to most jurors today, although they would have been familiar to many of their fathers and grandfathers. By contrast, members of a court-martial know all about them and about the society in which the accused lives and works. Lord Thomas suggested that officers on a court-martial, imbued by their training with notions of rank and discipline, would always tend to believe the evidence of a fellow officer or a non-commissioned officer rather than the evidence of a private. By contrast, he said, members of a jury, who carried no such burden of preconceptions, would be able to see more clearly and judge purely on the evidence before them. Of course, this submission was really just a matter of assertion. There was, and could be, no evidence to back it up. (...) In any event, it is possible to fashion an argument – equally a matter of assertion – that officers who are familiar with Service life and who are in close contact with Service personnel of all ranks may well be less impressed by mere rank and better able to gauge the underlying realities than jurors confronted for the first time with officers or non-commissioned officers telling an apparently plausible tale. Viewed in this light, the specialised knowledge and experience of the members of a court-martial could be seen as a positive advantage rather than as a disadvantage. However that may be, I see no reason to think that, when duly directed by the judge advocate, officers on a court-martial cannot properly assess the evidence and return a true verdict based on it. I therefore reject the appellants’ argument on this point.



86. The members of a court-martial perform a role in deciding sentence which is no part of a jury's function in the United Kingdom. I accept that, in determining sentence, the members will indeed have regard to such issues as the impact of the offence on Service morale and discipline. They will, inevitably, be more aware of these effects than a civil judge would be. Therefore, while the safeguards of the independence and impartiality of the members should mean that they approach their verdict in much the same way as jurors in a civil trial, it cannot be assumed that, when passing sentence, the court-martial will necessarily give exactly the same weight to these Service factors as would a Crown Court judge. The sentences which a court-martial passes may therefore not coincide exactly with the sentences which a civil judge would pass on the same facts. In my view that does not call the decisions of the courts-martial into question, either generally or in terms of article 6. Any difference in sentencing does not mean that the members are not independent or impartial, but merely that, though both independent and impartial, they may assess the various factors differently. (...) There are, besides, two additional points to bear in mind. The first is that the judge advocate advises the other members on sentence and also has a vote on sentence. He will be able to bring to bear his informed view as a lawyer on what sentence would be suitable. The second safeguard is that any sentence imposed by the court-martial is subject not only to review by the reviewing authority but also to appeal, on the ground that it is not appropriate, with the leave of the Appeal Court. The members of the Appeal Court are civil judges and are in a position to correct any inappropriate punishment that the court-martial may impose by reason of the members' military background.

87. All these matters must be kept in mind when considering the particular characteristics of the members of the court-martial to which the European Court attached importance in *Morris v United Kingdom* 34 EHRR 1253.

88. The first was that the officer members had no legal training. That applies also in the present cases and indeed must apply in virtually all cases. As the briefing notes show, officers who may be called upon to sit on courts-martial are given some training by being allowed to sit and observe proceedings, including the members' deliberations. This should mean that, when they are eventually asked to sit, they should not find the procedures wholly unknown or strange, but it goes no further than that. While in *Morris v United Kingdom* the Third Chamber seem to have regarded the lack of formal legal training as a significant defect, as I have already noted, in *Engel v The Netherlands (No 1)* 1 EHRR 647 the European Court held that the Dutch Supreme Military Court was an independent and impartial tribunal, even though four of the six members were military officers with no legal training. Given the other safeguards which were in place in the present cases, I see no reason to conclude that the absence of legal training undermined the members' independence and impartiality.

89. The European Court attached importance to the fact that the officers, other than the permanent president, remained subject to Army discipline and reports. In so far as the members of the courts-martial in the present cases also remained subject to Service discipline, they simply shared the characteristic of all serving members of the armed forces. It must have been equally true of the military members of the Dutch Supreme Military Court in *Engel v The Netherlands*. Moreover, the fuller information available to the House about the safeguards in place to protect the independence of the members of courts-martial shows clearly, in my view, that, just like the Dutch officers in

the *Engel* case, the officers in these cases would not have been under the command of any higher authority in their function as members of the courts-martial. Indeed, as Mr Havers pointed out, contrary to the assumption of the European Court, there was even a formal legal bar to any superior officer trying to influence their decision, since this would have constituted the criminal offence of attempting to pervert the course of justice.

90. It is true, of course, that, as in *Morris v United Kingdom*, so also in these cases, leaving aside the permanent presidents, the officers sitting on the courts-martial would have remained subject to reports. (...) That being so, again with the benefit of this more detailed information, I would not share the view of the European Court in *Morris v United Kingdom* that the independence and impartiality of officers sitting on courts-martial are compromised by the fact that they remain subject to the system of annual reports.

91. For all these reasons I consider that those charged with administering the system of courts-martial have been at pains to put in place a series of practical safeguards which are designed to secure the independence and impartiality of those sitting on these courts. Nor is this surprising. There is not a little force in the point made by the Appeal Court in *R v Saunby*, para 44 that, if Service factors are to be seen as an aspect or function of the public interest, they will themselves require that the court-martial process should be, and should be seen to be, fair and impartial and, so far as possible, to achieve accurate results. Otherwise both servicemen and the public would lose confidence in it, with consequential effects on good order and discipline.

92. Having regard in particular to the additional information which was not before the European Court, I would therefore hold that the safeguards built into the system are indeed such that no fair-minded and informed observer who had considered them would conclude that there was a real possibility that the courts-martial in these cases lacked independence or impartiality in this respect. In other words they were, objectively, independent and impartial. I would accordingly reject the article 6 challenge based on the role of the officer members.

93. In *Morris v United Kingdom* (2002) 34 EHRR 1253, 1278-1279, paras 73-77 the European Court went further, however, and held that the role played by the reviewing authority was in itself a reason for saying that the court-martial in that case had not been an independent and impartial tribunal:

"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). In [*Findlay v United Kingdom* 24 EHRR 221], the role played by the 'confirming officer' under the pre-1966 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."

Although Lord Thomas referred the House to this aspect of the Court's decision in *Morris v United Kingdom* and submitted that it, too, would constitute a basis for allowing the appeal, he said, frankly, that he had difficulty in supporting the reasoning.

94. The reviewing authority is, admittedly, an unusual institution. It does not operate like an ordinary court and, at a certain level of abstract theory, its existence could seem to be inconsistent with the charge against an accused being determined by only a system of "tribunals". That appears to be the way in which the European Court has treated it. But if, as the court indicates, the issue can also be characterised as relating to the independence of the court-martial, I find it difficult to see how the existence of this body affects that independence. (...) In particular, it could provide a quick and simple means of correcting a mistaken decision by a court-martial.

(...)

97. In all the cases under appeal except that of Dodds, the reviewing authority did not intervene, but the appellants were granted leave to appeal to the Appeal Court. Where they had other arguable grounds of appeal relating to conviction or sentence, the Appeal Court dealt with them, as well as with the article 6 grounds, in their reasoned judgments. In these circumstances I am, with due respect to the decision of the European Court in *Morris v United Kingdom* 34 EHRR 1253, unable to see why the mere existence of the reviewing authority, or the reduction of Dodds' period of detention, should lead to the conclusion that the determination of the charges against the appellants was not reached by a "tribunal" that was "independent and impartial" for the purposes of article 6. I would therefore reject the appellants' article 6 argument based on the role of the reviewing authority.

98. (...) On that approach any point relating to the decision to prosecute was subsumed in the issue relating to the fairness of the court-martial proceedings. That being so, since I have found that the court-martial proceedings did not infringe the appellants' article 6 rights, I would also reject the appellants' article 6 argument relating to the decisions to prosecute them.

99. In these circumstances it is unnecessary to consider in these appeals to what extent article 6 applies to the decision to prosecute. (...)

(...)

101. For these reasons, as well as for those given by my noble and learned friend Lord Bingham of Cornhill, I would refuse the appeals.