



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

CASE OF COOPER v. THE UNITED KINGDOM

(Application no. 48843/99)

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JUDGMENT

STRASBOURG

16 December 2003

In the case of Cooper v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

(...)

Having deliberated in private on 1 October and on 3 December 2003,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

(...)

1. The applicant complained that he did not have a fair trial by an independent and impartial tribunal established by law, in violation of Article 6 § 1 of the Convention. In particular, he complained that the structure of the court-martial that had tried him was such that it violated the independence and impartiality requirements, and consequently the fairness requirement, of that Article. He also complained of unfairness based on the particular facts of his case.

(...)

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

[In paragraphs 10-14 it is explained that the applicant was a member of the Royal Air Force and was convicted of theft by a district court-martial. Further appeals made by the applicant were dismissed.]

II. RELEVANT DOMESTIC LAW AND PRACTICE**A. General**

(...)

B. The court-martial – participants and procedure

[The participants in a court-martial are first introduced in paragraphs 20-44. The most important participants are: the commanding officer (CO), the higher authority, the prosecuting authority, the court administration officers (CAOs), the judge advocate, the (permanent) president, the ordinary members, the reviewing authority and the Courts-Martial Appeal Court. The procedure of a court-martial hearing is also explained.]

C. The Courts-Martial Administration Unit (RAF) briefing notes for court-martial members issued in July 1999

[In paragraphs 45-62 the system of briefing notes is explained. These notes are sent to the members selected for a court-martial. They contain important points regarding the procedure, the role of the members of the court-martial, what a certain member can and can't do during or after the trial and other general guidance.]

D. *R. v. Boyd and Others* (House of Lords, 18 July 2002)

2. The appellants (from both the RAF and the army) had been convicted by a district court-martial (apart from one who had pleaded guilty). Their appeals to the Courts-Martial Appeal Court were unsuccessful. Before the House of Lords, three of the appellants argued that the permanent president's role meant that their courts-martial lacked independence and impartiality. The remaining appellants challenged more generally the compatibility with Article 6 § 1 of the Convention of their trials by court-martial on charges of an offence against the ordinary criminal law. The House of Lords granted leave to appeal.

3. Prior to the delivery of the House of Lords' judgment in that case, a Chamber of this Court adopted its judgment in *Morris v. the United Kingdom* (no. 38784/97, ECHR 2002-I), in which the Chamber concluded that Mr Morris's (army) court-martial, convened under the 1996 Act, fell foul of the independence and impartiality requirements of Article 6 § 1 of the Convention.

4. Subsequently, the House of Lords unanimously dismissed the appeal in *R. v. Boyd and Others*. Lord Steyn, Lord Hutton and Lord Scott of Foscote agreed with the detailed judgments delivered by Lord Bingham of Cornhill and Lord Rodger of Earlsferry.

1. The judgment of Lord Bingham of Cornhill

5. Lord Bingham rejected the challenge to the impartiality and independence of the permanent president, agreeing with the Chamber's finding on the point in *Morris*, cited above:

“I do not for my part doubt that ... the European Court [was] correct. [Permanent presidents] are appointed to that office in the closing years of their service careers, whether in the army or the [RAF]. 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. The only factual matters on which [the appellants] could rely were the reports written on Wing Commander Chambers who presided [at one of the RAF courts-martial] (there being no report on any army [permanent president]). It would in my opinion be preferable if no annual report were written on officers serving as [permanent presidents], but those on Wing Commander Chambers gave no support in substance to [the appellants'] argument. While praising the wing commander's efficiency and effectiveness as a [permanent president], they made no allusion at all to the quality or outcome of any of his judicial decisions, but instead made express reference to the isolated, unsupervised and independent nature of his role. There is no substance in this challenge.”

6. As to the role of the ordinary or junior members of the court-martial, Lord Bingham found as follows:

“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 v. the United Kingdom*, 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 [permanent president] whose presence was accepted [in *Morris*] 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. It is true that there is no statutory bar on an officer being made subject to external army influence when sitting on the case. Any person seeking to influence the decision of a sitting member of a court-martial otherwise than at the hearing would, however, be at risk of prosecution either for perverting or attempting to pervert the course of justice or under section 69 of the 1955 Act. The officer members are drawn from a different command from the accused. Briefing notes sent to officer members of courts-martial before they sit enjoin them not to 'speak to any unit personnel and certainly not to any unit officer who may be attending the trial in an official capacity or as a spectator'. They are instructed in writing not to talk to anyone about the case (other than the other members of the court-martial, when all are together) for as long as the trial continues, and this instruction is routinely emphasised by the judge advocate. The officers do not occupy accommodation at the unit of the accused and are told to be seen to avoid 'local unit influences'. They are instructed 'not to associate with Formation or Unit personnel either professionally or socially until the trial is over'. At the outset of the hearing the officers take an oath in terms quoted by the European Court in [paragraph 27 of its judgment in *Morris*],

swearing to try the accused 'according to the evidence' and to 'administer justice according to the Army Act 1955 without partiality, favour or affection'. In considering the independence and impartiality of the [permanent president] both the [Courts-Martial Appeal Court in the appellants' cases] and the European Court in *Morris* ... 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."

7. Turning to the criticism of the reviewing authority in *Morris*, Lord Bingham noted:

"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 ... 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)). This subsection does not confer a discretion, but calls for an exercise of judgment. It is essentially the same exercise of judgment as is required of the Court of Appeal ... which has not given rise to difficulty in practice. 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* ... 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. [The appellants] recognised the difficulty of this argument and did not seek to sustain the judgment of the European Court on the point."

8. The appellants had also generally argued that the whole culture of the services was such as to incline those who took part in courts-martial to attach excessive weight to the values of discipline and morale, to the point of rendering a trial unfair. It was argued that the ritual accompanying courts-martial was oppressive and unfair. Lord Bingham observed:

"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.”

2. *The judgment of Lord Rodger of Earlsferry*

9. Lord Rodger rejected the suggestion that, by its very nature, a trial of a civilian offence by court-martial was incompatible with Article 6 § 1 of the Convention and he referred, in this respect, to this Court's judgment in *Engel and Others v. the Netherlands* (judgment of 8 June 1976, Series A no. 22) and to *Morris* (cited above, § 59). Since the trial by court-martial did not in itself violate Article 6 § 1, the decision as to whether the court-martial was to be regarded as an independent and impartial tribunal depended on the safeguards which were in place. He noted generally in this respect:

“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* ... 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.”

10. As to permanent presidents, Lord Rodger observed that, while there had been no appraisal reports on permanent presidents in the army since 1997, the RAF had continued the practice of preparing reports on permanent presidents. He was of the view that “that practice [was] undesirable and, as the army experience show[ed], unnecessary. It would be better if it were discontinued”. However, he went on to observe that such reports generally, and the ones completed in the case before him, commented on the manner in which the permanent president had tackled his role as a permanent president (referring to the administrative aspects of the job) and did not bear on his actual decisions when sitting in a court-martial. Indeed, Lord Rodger noted that the reports in question had recognised that the permanent president's role was one in which the president was “isolated and unsupervised and which require[d] independence” which the Air Secretary “honour[ed] and

respect[ed]”. The reports did not therefore give the slightest reason to doubt the permanent president's independence. On the contrary, he considered that

“ ... 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.”

11. As to the other members of the court-martial, Lord Rodger noted the conclusion of the Chamber in *Morris*. He also observed, however, that “for whatever reason ... the European Court was given rather less information than the [House of Lords] about the safeguards relating to the officers serving on courts-martial”. He drew parallels between the members of the court-martial and jurors, noting that, while jurors brought certain prejudices and experiences with them to a trial, the safeguards of an oath and the trial judge's directions were considered by the domestic courts and by the European Court to be sufficient to ensure that jurors put aside their prejudices and reached a just verdict on the evidence. The members of courts-martial took a similar oath and the judge advocate gave them the same kind of directions which a trial judge would have given jurors: there was no reason to suppose that members of a court-martial would be less faithful to their oath or less diligent in applying the directions given by the judge advocate than would jurors, particularly when “trust and obedience to commands” were important to the officers sitting on a court-martial.

12. Indeed, Lord Rodger considered that the steps taken to ensure that the members of a court-martial acted independently and impartially were, on one view, even more strict than with a jury. Those steps had not, he noted, been outlined to the Chamber in *Morris*. He went on to detail those steps. In this connection, he referred to the briefing notes sent to members of the court-martial and noted as relevant safeguards those matters outlined at paragraphs 2, 3, 4, 6, 8, 9, 20, 21, 25, 29, 30, 33, 35, 36, 39, 40, 42 and 45 of those notes. Lord Rodger commented on these safeguards as follows:

“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.

[The appellants] 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."

13. Lord Rodger noted that there were, however, two differences between members of a court-martial and an ordinary jury, differences which he concluded did not undermine the independence of the former:

"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. [The appellants' counsel] 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. Indeed, it was somewhat undermined by the conviction of [two of] the appellants ... [Those appellants'] conviction was based on the evidence of [two Guardsmen] ... In accepting the guardsmen's evidence, the court-martial must have disbelieved the evidence of their superiors in rank ... 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.

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 ... 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 [Courts-Martial Appeal Court]. The members of the [Courts-Martial 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."

14. Lord Rodger considered that all of these matters had to be borne in mind when considering the particular characteristics of the members of the court-martial to which the Chamber attached importance in *Morris*. He went on to identify and disagree with the specific concerns expressed by the Chamber in that case as regards the independence of the ordinary members:

"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. the United Kingdom* the Third Chamber seems to have regarded the lack of formal legal training as a significant defect, as I have already noted, in *Engel v. the Netherlands* ... 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.

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 *Engel v. the Netherlands*, 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 [the Ministry of Defence] 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.

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. [The appellants] indeed drew attention to a number of such reports where mention is made of the fact that, during the year in question, the officer concerned had sat as a member of a court-martial. In itself that must be unobjectionable since the information that the particular officer has had this experience may be relevant at some future date if, for instance, consideration is being given to appointing a permanent president. What would be objectionable would be any report which made reference, whether favourable or unfavourable, to an officer's decisions when sitting on a court-martial. But [the appellants] could point to no report where this had been done. The only report which referred to an officer's performance in relation to a court-martial was one relating to [one officer]: 'Her foray into the court-martial arena has brought particular accolades for her thoughtful and incisive contribution to the legal process'. The report showed that [that officer] had acted not only as junior member on several courts-martial but also as assistant defending officer to an airman tried by a general court-martial. It appears that the comment may well have related to this second role. In any event the report makes no comment on any decision reached by [that officer] when sitting as a member of a court-martial. Indeed counsel for the [Ministry of Defence] showed the House a number of statements from officers concerned with personnel matters who had read thousands of annual reports and had never seen mention of such a thing. 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. the 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.

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 [Courts-Martial Appeal Court] 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.

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."

15. Finally, Lord Rodger turned to the reviewing authority and to the finding in *Morris* that the role played by that authority constituted in itself a reason for finding that a court-martial had not been independent or impartial. Lord Rodger did not agree. Indeed, he noted that even the appellants before him had difficulty in supporting the Chamber's reasoning in *Morris* on this point. He continued:

"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. It might, of course, be different if there were any suggestion that the decisions of the courts-martial were influenced by the existence of the reviewing authority, for example, because they tended to convict more readily or to impose heavier sentences in the knowledge that the reviewing authority could always quash them. But [the appellants] made no such submission and there is nothing whatever in the information before the House that would support it. On the contrary, [the appellants] accepted that the provision for review could only be to the benefit, and not to the detriment, of someone who had been convicted. In particular, it could provide a quick and simple means of correcting a mistaken decision by a court-martial.

...

In reaching its conclusion on this point the European Court was particularly concerned by the fact that the decision as to whether any substituted sentence was more or less severe than that imposed by the court-martial would have been left to the discretion of the reviewing authority. When making this observation the Court does not appear to have been referred to, or to have had in mind, the coda to section 71(1) of the [1955 Act] which establishes, as a matter of law, the relative positions of particular punishments in the hierarchy of punishments set out in the subsection and which deals specifically with how detention and imprisonment are to relate to one another. Particularly when these provisions are taken into account, it is hard to see how, in reality, there is likely to be any scope for the reviewing authority to exercise the kind of discretion that appears to have troubled the European Court. In truth, counsel could refer to no case where any problem as to the relative severity of two punishments had arisen. If, by chance, however, the reviewing authority were to go wrong on the point, the person affected could ask the appeal court for leave to appeal.

In all the cases under appeal except [one], the reviewing authority did not intervene, but the appellants were granted leave to appeal to the [Courts-Martial Appeal Court]. Where they had other arguable grounds of appeal relating to conviction or sentence, the [Courts-Martial 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. the United Kingdom*, unable to see why the mere existence of the reviewing authority, or the reduction of [a] period of detention [in one case], 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."

E. Relevant statistics

(...)

THE LAW

16. The applicant complained under Article 6 § 1 of the Convention that his court-martial, structured as it was under the 1996 Act, lacked independence and impartiality and that the proceedings before it were consequently unfair. The relevant parts of Article 6 § 1 read as follows:

“In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...”

I. ADMISSIBILITY OF THE COMPLAINT

(...)

17. The Court considers that the applicant's complaint raises questions of law which are sufficiently serious that its determination should depend on an examination of the merits, and no other grounds for declaring it inadmissible have been established. The Court therefore declares the complaint admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraphs 6 and 9 above), the Court will immediately consider the merits of the complaint.

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

A. The applicant's submissions

18. The applicant accepted that the 1996 Act had addressed some of the concerns expressed by the Court in *Findlay v. the United Kingdom* (judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I). However, he maintained that the post-1996 court-martial system remained incompatible with the independence and impartiality and, consequently, the fairness requirements of Article 6 § 1 of the Convention. In so submitting, he disagreed with certain of the Court's conclusions in *Morris* (cited in paragraph 64 above), although he endorsed those concerning the ordinary members of a court-martial and the reviewing authority.

19. More generally, he maintained that service tribunals should have no role to play in the trial of criminal charges against service personnel in times of peace given the nature and ethos of the armed forces. (...) These factors alone gave rise, in the applicant's opinion, to legitimate doubts about the ability of an armed forces' tribunal to try its personnel on criminal charges independently and impartially.

20. In the alternative, he argued that his court-martial, convened in accordance with the 1996 Act, lacked independence and impartiality.

(...)

B. The Government's submissions

21. The Government noted that, in *Morris*, the Court had rejected the applicant's general argument (as had the House of Lords) that service tribunals could not try service personnel on criminal charges consistently with Article 6 of the Convention. The core question in *Morris* and the present case was not whether military tribunals were acceptable under Article 6 in times of peace or war but rather whether the applicant had obtained a fair trial by an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention, and the Government maintained that he had.

22. In so submitting, the Government relied on the Court's conclusions in *Morris*, apart from those concerning the ordinary members of courts-martial and the reviewing authority. In these latter respects, the Government preferred the conclusions of the House of Lords in *R. v. Boyd and Others*, cited above. (...) It was this material which later enabled the House of Lords to reach conclusions concerning ordinary members of courts-martial and the reviewing authority different from those in *Morris*.

(...)

C. The Court's assessment

1. Relevant principles and case-law

23. The Court reiterates that, in order to establish whether a tribunal can be considered “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 to the question whether the body presents an appearance of independence.

(...)

There are two aspects to the question of “impartiality”: the tribunal must be subjectively free of personal prejudice or bias, and must also be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see *Findlay*, cited above, p. 281, § 73). The Court notes that the present applicant did

not suggest that anyone involved in his court-martial process was subjectively biased against him.

Since the concepts of independence and objective impartiality are closely linked, the Court will consider them together in the present case (*ibid.*).

24. In *Findlay*, the Court concluded that the applicant's misgivings about the independence and impartiality of his army court-martial, convened prior to the entry into force of the 1996 Act, had been objectively justified. (...).

25. In the subsequent *Morris* case (also cited above), a Chamber of the Court examined concerns expressed about the structural independence and objective impartiality of an army court-martial convened following the entry into force of the 1996 Act.

The Court found that service tribunals could in principle determine criminal charges against service personnel consistently with Article 6 § 1 of the Convention, although such tribunals would only be tolerated as long as sufficient safeguards were in place to guarantee their independence and impartiality (see *Morris*, § 59). It was also found that the 1996 Act had gone a long way towards meeting the concerns expressed in *Findlay*, abolishing as it did the posts of “convening officer” and “confirming officer” and separating the prosecution, convening and adjudication elements of the court-martial process (*ibid.*, §§ 61 and 62). The Court further found that the independence of the court-martial was not undermined by the manner of appointment of its members (*ibid.*, § 66).

However, and while considering the permanent president to be a “significant guarantee of independence” and the presence of the judge advocate to be an “important guarantee”, these and other safeguards (rules on eligibility for selection and the oath taken by members) were considered insufficient by the Court to exclude the risk of outside pressure being brought to bear on the ordinary officer members (see *Morris*, §§ 69-72). Further, the Court found that the principle that a tribunal's binding decision should be unalterable by a non-judicial authority had been breached by the role of the reviewing authority, a principle which had been considered in *Findlay* (cited above) to be a component of the “independence” guarantee of Article 6 § 1 of the Convention.

2. *Application of those principles to the present case*

26. The parties agreed that the relevant regulatory frameworks governing army and RAF courts-martial, which were in issue in *Morris* and in the present case, were the same in all material respects. However, they considered the Court's conclusions in *Morris* (see paragraph 106 above) to be incorrect. The applicant disagreed with the first three of those

conclusions, considering that these matters remained problematic under the 1996 Act. The Government preferred the conclusions of the House of Lords in *R. v. Boyd and Others* to those of the Court in *Morris* as regards the independence of the ordinary members and the role of the reviewing authority.

In examining the independence and impartiality of the present applicant's court-martial, the Grand Chamber has examined the parties' submissions on each of the Chamber's conclusions in *Morris* and assessed whether there are good reasons to depart from those conclusions (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI), bearing in mind, in particular, the information and material before it which had not been submitted to the Chamber in *Morris*.

(a) Service tribunals and Article 6 of the Convention

27. The first point to be considered is whether a service tribunal can try criminal charges against service personnel consistently with the independence and impartiality requirements of Article 6 § 1 of the Convention.

28. The Court reiterates that the independence and impartiality of service tribunals was examined in *Engel and Others* and *Findlay* and in certain subsequent judgments (including *Coyne v. the United Kingdom*, judgment of 24 September 1997, *Reports* 1997-V, *Hood v. the United Kingdom* [GC], no. 27267/95, ECHR 1999-I, and *Cable and Others v. the United Kingdom* [GC], nos. 24436/94 et seq., 18 February 1999). In those cases, the Court examined in detail the structure and functioning of the relevant court-martial process, but neither the parties to those cases nor the Court raised the more fundamental question of whether service tribunals could ever determine criminal charges against service personnel consistently with the independence or impartiality requirements of Article 6 § 1 of the Convention.

29. The Grand Chamber agrees with the Chamber's finding in *Morris* (§ 59) that there is nothing in the provisions of Article 6 which would, in principle, exclude the determination by service tribunals of criminal charges against service personnel. The question to be answered in each case is whether the individual's doubts about the independence and impartiality of a particular court-martial can be considered to be objectively justified and, in particular, whether there were sufficient guarantees to exclude any such legitimate doubts (see paragraph 104 above).

(b) The higher authority, the prosecuting authority and the CAO

30. The Court has, in the first instance, assessed the independence and impartiality of those bodies involved in the proceedings prior to the court-martial hearing itself, namely, the higher authority, the prosecuting authority and the CAO.

31. While the higher authority decides on the basis of service considerations whether a charge should be brought before the prosecuting authority, it is the prosecuting authority which decides whether a prosecution by court-martial should be pursued or not. (...) Since the decision to prosecute by court-martial is one exclusively for the prosecuting authority, it is not relevant to the independence of the court-martial process whether the higher authority is legally qualified or not or whether there is a chain-of-command connection between that authority and the CO. The applicant's suggestion that the higher authority is the equivalent of the former "convening officer" is clearly incorrect.

32. The prosecuting authority is appointed by the Queen and is legally qualified. Members of his staff are legally qualified and are employed exclusively on prosecution duties. The decision to prosecute is made on the basis of legal criteria similar to those applied by the Crown Prosecution Service and in accordance with the codes of conduct of the respective branches of the legal profession. While the prosecuting authority is also the RAF Director of Legal Services, he is answerable to the Attorney General only, and is not reported on within the service on his prosecution duties. There being no chain of command or service connection between the higher and prosecuting authorities either claimed or apparent, any seniority in rank of the higher authority over the prosecuting authority would not be sufficient to conclude, as the applicant suggests, that the latter is "likely to" be influenced by the former.

33. It is true that the CAOs are RAF officers appointed by the Defence Council. However, the applicant did not dispute that a CAO operates independently of the higher and prosecuting authorities, a conclusion also reached in *Morris* (§§ 61 and 66). Moreover, the CAO's duties are largely administrative in nature, (...). As to the more significant and sensitive task of selecting members of a court-martial, the detailed criteria and procedures to be followed by a CAO (see paragraphs 34-35 above) allow that officer little discretion in that selection and rebut the applicant's claim that the selection process lacks transparency. In addition, these criteria expressly exclude from a court-martial any officer from the accused's RAF station and any of his COs, as well as any officer who has been involved in the investigation and prosecution of the charges or in the convening of a court-martial. Furthermore, all officers selected to sit are reminded in the

Courts-Martial Administration Unit (RAF) briefing notes received by them (see paragraphs 45-62 above) of these and any other factors that could render them ineligible, and members are encouraged to inform the CAO prior to the trial (or the judge advocate once the trial has started) if they are worried that they may be ineligible.

34. For these reasons, the Grand Chamber finds that the applicant's submissions concerning these three bodies do not cast any doubt on the Chamber's findings in *Morris* (§§ 61-62) as to the genuineness of the separation of the prosecuting, convening and adjudicating roles in the court-martial process under the 1996 Act. The Grand Chamber further considers that there is no reason to doubt the independence of the decision-making of those bodies from chain-of-command, rank or other service influence.

(c) The members of the court-martial

35. The Court has also examined the position of the members of the court-martial, having regard to the manner of their appointment, their terms of office, the existence of guarantees against outside pressures and whether the court-martial presents an appearance of independence (see paragraph 104 above).

(i) The judge advocate

36. The judge advocate is a legally qualified civilian appointed to the staff of the Judge Advocate General (also a civilian) by the Lord Chancellor and from there to each court-martial by the Judge Advocate General. The independence of air-force judge advocates is not questioned by the applicant, and the Court considers that there is no ground to do so. Moreover, a judge advocate has a central role in the court-martial proceedings which, like Lord Rodger in *R. v. Boyd and Others*, the Grand Chamber would compare to that of a Crown Court trial judge. The judge advocate is responsible for the fair and lawful conduct of the court-martial and his rulings on the course of the evidence and on all questions of law are binding and must be given in open court. The judge advocate has no vote on verdict and does not therefore retire with the other court-martial members to deliberate on verdict. However, he sums up the evidence and delivers further directions to the other members of the court-martial beforehand, and he can refuse to accept a verdict if he considers it "contrary to law", in which case he gives the president and ordinary members further directions in open court, following which those members retire again to consider verdict. The judge advocate retires with the other members in order to provide advice, deliberate and vote on sentence. Moreover, and as Lord Rodger also noted (see paragraph 72 above), there is no evidence to suggest that members (the permanent president and the

ordinary members) of a court-martial would be less diligent than civilian jurors in complying with binding rulings and directions on points of law given to them.

In such circumstances, the Court finds that the presence in a court-martial of a civilian with such qualifications and with such a pivotal role in the proceedings constitutes not only an important safeguard but one of the most significant guarantees of the independence of the court-martial proceedings.

(ii) *The permanent president*

37. The Grand Chamber, like the Chamber in *Morris* (§§ 68-69), considers certain factors illustrative of both the permanent president's independence and the important contribution of the post of permanent president to the independence of an otherwise *ad hoc* tribunal.

Most importantly, the Court observes that, while the permanent president is a serving officer, the post was a full-time one filled by a high-ranking officer (wing commander) for a number of years prior to his retirement, at a time when that officer had “no effective hope of promotion” (in the words of Lord Bingham – see paragraph 66 above). Such factors were considered demonstrative of the independence of the military members of the court-martial in *Engel and Others* (cited above, pp.12-13, § 30 and p.37, § 89).

The Court does not accept the applicant's suggestion that the full-time nature of the post of permanent president would undermine the objectivity of that officer's judgment (see paragraph 88 above). Since the permanent president was bound by the legal rulings and directions of the judge advocate, the permanent president's lack of legal qualifications did not undermine his independence or the guarantee of independence provided by that post. While he may have been more senior in rank to the ordinary members, he could not brief them in the absence of the judge advocate and, although he deliberated on verdict alone with the ordinary members, the judge advocate exercised firm control over those deliberations both before and after they took place (see paragraphs 29 and 117 above).

It is true that, in contrast to the army, appraisal reports were prepared on permanent presidents in the RAF and the Court would echo the concerns expressed by Lords Bingham and Rodger in this regard. However, the essential point for present purposes is that no appraisal report had been drawn up on the present permanent president since August 1997 and, crucially, such reports could not have referred to that officer's judicial decision-making. As Lord Bingham pointed out (see paragraph 66 above), permanent presidents were answerable to no one in the discharge of their court-martial functions.

It is also true that there was no express provision for their irremovability and that express security of tenure would be preferable, as such a domestic

provision is generally considered to be a corollary of judges' independence. However, its absence can be cured if irremovability is recognised in fact and if 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, and *Morris*, cited above, § 68). In this respect, the Court notes the finding of Lord Bingham (see paragraph 66 above) that a permanent president had “no effective fear of removal”, and it is not disputed that a permanent president has never been removed from office.

(iii) *The ordinary members*

38. The Court considers it clear that, having regard to the matters outlined in paragraph 114 above, there was no reason to doubt the independence of the ordinary members by reason of the position and role of the CAO or because of the manner in which the CAO appointed them.

39. The Grand Chamber has noted the *ad hoc* nature of their appointment (they return to ordinary service immediately after the court-martial) and their relatively junior rank (they were junior in rank to the permanent president and may have been junior in rank to other participants in the court-martial process, including the prosecuting authority). While such tenure and rank may not in themselves undermine their independence, it is considered, as it was in *Morris* (§ 70), that such factors emphasise the need for particularly convincing safeguards against outside pressure being brought to bear on those officers.

40. In *Morris*, the Chamber went on to find important the protection offered by the judge advocate, the permanent president and the rules concerning eligibility for selection to a court-martial and the oath taken by its members. Other safeguards were also referred to in *Morris*, including the right of the accused to object to any member sitting in the court-martial (see paragraph 38 above); the confidentiality of the deliberations, a point repeated in the members' oath (see paragraph 38 above); and the rule whereby the member most junior in rank expresses his or her view and votes first during deliberations on verdict and sentence (see paragraphs 39, 58 and 60 above). Moreover, the Grand Chamber considers that the possibility of a prosecution for perverting the course of justice under the common law or under section 69 of the 1955 Act (see paragraph 36 above) was implicit in the Chamber's assessment in *Morris*.

The Grand Chamber agrees that these constitute important safeguards of the independence of the ordinary members.

41. Nevertheless, the Chamber concluded in *Morris* that these safeguards were not sufficient to exclude the risk of outside pressure being brought to bear on the ordinary members because of three factors: those officers had

no legal training, there were no statutory or other bars to their being made subject to external service influence and they remained subject to army discipline and reports (§§ 71-72).

The Grand Chamber is of the view that the submissions and material before it in the present case are such as to justify it in departing from this latter conclusion in *Morris*.

42. As to the lack of legal qualification of the ordinary members, the Court reiterates that the participation of lay judges on tribunals is not, as such, contrary to Article 6: the principles established in the case-law concerning independence and impartiality are to be applied to lay judges as to professional judges (see *Langborger v. Sweden*, judgment of 22 June 1989, Series A no. 155, p. 16, § 32; *Fey v. Austria*, judgment of 24 February 1993, Series A no. 255-A, p. 12, §§ 27, 28 and 30; and *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, p. 14, § 30).

The Court does not find particularly relevant the fact that the ordinary members in the applicant's court-martial attended brief legal courses. However, it notes the instruction provided to the ordinary members by the Courts-Martial Administration Unit (RAF) briefing notes (see paragraphs 45-62 above and 124 below). The Court also refers to the key role of the legally qualified and experienced judge advocate, whose directions the ordinary members would be careful to respect (see paragraph 117 above). In such circumstances, the Court considers that the independence of the ordinary members is not undermined by their lack of legal qualifications.

43. Secondly, the submissions to the Court in the present case have disclosed an additional safeguard of the independence of the ordinary members.

The Government relied on the Courts-Martial Administration Unit (RAF) briefing notes distributed to all members of the applicant's court-martial. (...) Moreover, the Court considers these notes to be genuine instructions to the members of courts-martial by which they were expected to abide.

The notes provided a detailed step-by-step guide to the ordinary members of the procedures before a court-martial. They also constituted a comprehensive manual of the nature and limits of their role in those proceedings and, importantly, of the precise functions of the judge advocate and permanent president. The Court considers that the briefing notes thereby provided essential information and important orientation to officers who were appointed on an *ad hoc* basis to a court-martial and who had no legal qualifications and relatively little court-martial experience. Further, the provisions of the briefing notes fully instructed ordinary members of the need to function independently of outside or inappropriate influence or instruction, and of the importance of this being seen to be

done, providing practical and precise indications of how this could be achieved or undermined in a particular situation. The Court considers that those instructions served not only to bring home to the members the vital importance of independence but also to provide a significant impediment to any inappropriate pressure being brought to bear.

Accordingly, the Grand Chamber is of the opinion that the distribution and content of these briefing notes constituted a further safeguard of the independence of the ordinary members, a safeguard of which the Chamber was not informed when it examined the *Morris* case.

44. Thirdly, the Court finds most important the Government's clarification in the present case that ordinary members of a court-martial could not be reported on in relation to their judicial decision-making. As Lord Bingham pointed out in *R. v. Boyd and Others*, the prohibition on the members disclosing any opinion expressed or vote cast during the court-martial proceedings presented a practical obstacle to such reporting. The Court also notes that the evidence submitted by the appellants and the Ministry of Defence to the House of Lords produced no example of any reporting on the decision-making of the members of a court-martial (see paragraph 75 above).

45. For these reasons, the Court finds that there were sufficient safeguards of the independence of the ordinary members of the applicant's court-martial.

(d) The reviewing authority

46. The Government contested the finding in *Morris* on the role of the reviewing authority: they emphasised that such a review could only operate to the benefit of the convicted person and that that person would retain full access to the Courts-Martial Appeal Court thereafter. The applicant relied on *Brumărescu*, *Findlay* (p. 282, §§ 77 and 79) and *Morris* (§§ 73-77), cited above. He pointed out that, in any event, such reviews did not always operate in favour of the accused.

47. In the Court's opinion, the judgments in *Van de Hurk v. the Netherlands* (19 April 1994, Series A no. 288, p. 16, § 45, and p. 17, § 50) and *Findlay* (p. 282, § 77, and p. 276, § 52) make it clear that it is the power of a non-judicial authority to interfere with the findings of a court-martial for which the 1996 Act provides which is to be examined by this Court, irrespective of whether that power was in fact used or whether that power could only have been exercised in the applicant's favour.

48. In the post-1996 system under review in the present case, a court-martial reached a verdict and decided on sentence. Whether or not an

individual applied to the reviewing authority, the latter would automatically review both the verdict and sentence. Subsequently, the individual could appeal against the verdict and sentence to the Courts-Martial Appeal Court. Consequently, the reviewing authority formed part of a process at the end of which the verdict and sentence became final. The Court therefore agrees with the Government that this can be contrasted with the position in *Brumărescu*, where the applicant had been deprived of the benefit of the legal certainty of a judicial decision which had already become final, irreversible and thus *res judicata*.

49. The Court further considers, as did Lords Bingham and Rodger in the House of Lords, that the reviewing authority is an anomalous feature of the present court-martial system and expresses its concern about a criminal procedure which empowers a non-judicial authority to interfere with judicial findings.

50. Nevertheless, the Court notes that the final decision in court-martial proceedings will always lie with a judicial authority, namely the Courts-Martial Appeal Court. This is the case even if a reviewing authority quashes a verdict and authorises a retrial: even if the prosecuting authority were to decide to bring a fresh prosecution and even if a court-martial were to refuse to stay those further proceedings as an abuse of process, the final review of any new conviction and sentence would remain with the Courts-Martial Appeal Court.

(...)

51. The Court regards as unsubstantiated the applicant's assertion that courts-martial adjust sentences upwards in anticipation of the reviewing authority's assessment. Moreover, it does not consider persuasive his submission that the Courts-Martial Appeal Court would be unduly influenced by the decision of the reviewing authority: the essential fact is that the Courts-Martial Appeal Court is not in any way bound by the advice to, or the decision of, the reviewing authority. Indeed, one of the domestic cases on which the applicant relied (*R. v. Ball and R. v. Rugg*, cited above) resulted in the Courts-Martial Appeal Court overturning the finding on sentence of the reviewing authority.

52. Accordingly, the Court finds that the role of the reviewing authority did not, in the circumstances of the present case, breach the principle outlined in paragraph 106 above and, in particular, did not undermine the independence or impartiality of the applicant's court-martial.

(e) Conclusion

53. In all of the above circumstances, the Court concludes that the applicant's misgivings about the independence and impartiality of his court-martial, convened under the 1996 Act, were not objectively justified and that the court-martial proceedings cannot consequently be said to have been unfair.

There has therefore been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 December 2003.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

[The concurring opinion of Mr Costa is omitted.]

L.W.
P.J.M.

