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

CASE OF CABLE AND OTHERS v. THE UNITED KINGDOM

(Applications nos. 24436/94, 24582/94, 24583/94, 24584/94, 24895/94, 25937/94, 25939/94, 25940/94, 25941/94, 26271/95, 26525/95, 27341/95, 27342/95, 27346/95, 27357/95, 27389/95, 27409/95, 27760/95, 27762/95, 27772/95, 28009/95, 28790/95, 30236/96, 30239/96, 30276/96, 30277/96, 30460/96, 30461/96, 30462/96, 31399/96, 31400/96, 31434/96, 31899/96, 32024/96 and 32944/96)

JUDGMENT

STRASBOURG

18 February 1999

In the case of Cable and Others v. the United Kingdom,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr L. FERRARI BRAVO,
Mr P. KŪRIS
Mr J.-P. COSTA,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr B. ZUPANČIČ,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr T. PANTIRU,
Mr E. LEVITS
Mr K. TRAJA,
Sir John FREELAND, *ad hoc judge*,

and also of Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 9 December 1998 and 4 February 1999,

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

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 14 August 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in thirty-five applications (nos. 24436/94, 24582/94, 24583/94, 24584/94, 24895/94, 25937/94, 25939/94, 25940/94, 25941/94, 26271/95, 26525/95, 27341/95, 27342/95,

---

Notes by the Registry

1.-2. Protocol No. 11 and the Rules of Court entered into force on 1 November 1998.

3. As applicable before the entry into force of Protocol No. 11 and the establishment of a Court functioning on a permanent basis (Article 19 of the Convention as amended by Protocol No. 11).

27346/95, 27357/95, 27389/95, 27409/95, 27760/95, 27762/95, 27772/95, 28009/95, 28790/95, 30236/96, 30239/96, 30276/96, 30277/96, 30460/96, 30461/96, 30462/96, 31399/96, 31400/96, 31434/96, 31899/96, 32024/96 and 32944/96) against the United Kingdom lodged with the European Commission of Human Rights ("the Commission") under former Article 25 by thirty-five British nationals, namely, Mr Nicholas Robert Cable, Mr Peter Mowbray Elliott, Mr Serge Clency Poinen, Mr Mark Partoon, Mr Scott Birnie, Mr Simon Pascoe, Mr Michael Donald Jarrett, Mr Nigel David Frame, Mr Roger Michael Smith, Mr Stephen Edward Battle, Mr Paul Andrew Hunt, Mr Michael Billing, Ms Debra Hiley, Mr Simon Barron, Mr Christopher Rodgers, Mr James McDaid, Mr Hugh Campbell, Mr William Russell Young, Mr Derek Finch, Mr Nigel David Gooch, Mr Marcus Paul Smart, Mr Jason Lee Roberts, Mr Gareth Edward Smith, Mr Shane Evans, Mr Nicholas John Potter, Mr Anthony Boullemier, Mr Steven Douglas Graham, Mr David Ledger, Mr Paul Wardle, Mr David Glen Lewis, Mr Andrew James Wilson, Mr Edward Curran, Mr Tony Bruce, Mr Francisco Javier Nash and Ms Morag Ann Powell, on various dates between June 1994 and September 1996.

The Government's application referred to former Articles 44 and 48 of the Convention and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (former Article 46). The object of the application was to obtain a decision as to the amount of just satisfaction, if any, which should be awarded to the applicants under Article 41 of the Convention.

2. The applicants designated the lawyer who would represent them (Rule 30 § 1 of former Rules of Court A[1]).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Thór Vilhjálmsson, the Vice-President of the Court at the time, acting through the Registrar, consulted the Agent of the Government and the applicants' lawyer on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicants' and the Government's memorials on 16 and 17 November 1998, respectively.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom

---

Note by the Registry

1. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

(Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, together with Mr M. Fischbach and Mr J.-P. Costa, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr P. Kūris, Mr W. Fuhrmann, Mr K. Jungwiert, Mr B. Zupančič, Mrs N. Vajić, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Pantiru, Mr E. Levits and Mr K. Traja (Rules 24 § 3 and 100 § 4). Subsequently, Sir Nicolas Bratza, who had taken part in the Commission's examination of the cases, withdrew from sitting in the Grand Chamber (Rule 28). The Government accordingly appointed Sir John Freeland to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. The President decided that it was not necessary to invite the Commission to nominate a delegate in the case (Rule 99).

6. In accordance with the President's decision, the hearing in these cases, together with that in the case of Hood v. the United Kingdom, took place in public in the Human Rights Building, Strasbourg, on 9 December 1998.

There appeared before the Court:

(a) *for the Government*
Mr C. WHOMERSLEY, Foreign and Commonwealth Office, *Agent*,
Mr P. HAVERS QC, *Counsel*;

(b) *for the applicants*
Mr G. BLADES, Solicitor, *Counsel.*

The Court heard addresses by Mr Havers and Mr Blades.

7. Following the hearing, on 9 December 1998, the Court ordered the joinder of the thirty-five cases (Rule 43).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants, all of whom are British citizens, live in the United Kingdom, except Mr McDaid who lives in Germany.

9. At the time of the events in question, the following applicants were serving in the Royal Air Force: Mr Cable, Mr Elliott, Mr Poinen, Mr Birnie, Mr Pascoe, Mr Jarrett, Mr Frame, Mr R.M. Smith, Mr Hunt, Mr Billing, Mr Barron, Mr Rodgers, Mr Young, Mr G.E. Smith, Mr Evans, Mr Potter, Mr Boullemier, Mr Graham, Mr Ledger, Mr Wardle, Mr Lewis, Mr Wilson, Mr Curran and Mr Bruce. The other eleven applicants, namely Mr Partoon, Mr Battle, Ms Hiley, Mr McDaid, Mr Campbell, Mr Finch, Mr Gooch, Mr Smart, Mr Roberts, Mr Nash and Ms Powell, were serving in the Army.

10. Each applicant was charged with one or more civilian criminal offences or armed forces' disciplinary offences and tried, convicted and sentenced by a court martial under either the Air Force Act 1955 or the Army Act 1955 (see paragraphs 11 to 12 below). All the applicants pleaded not guilty, except Mr Rodgers and Mr Lewis who pleaded guilty.

II. RELEVANT DOMESTIC LAW AND PRACTICE

11. The relevant provisions of the Army Act 1955 and the Air Force Act 1955 are set out respectively in the Court's Findlay v. the United Kingdom judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 272-75, §§ 32-51, and its Coyne v. the United Kingdom judgment of 24 September 1997, *Reports* 1997-V, pp. 1848-52, §§ 20-44.

12. Central to the system under the 1955 Acts was the role of the "convening officer". This officer (who had to be of a specified rank and in command of a body of the regular forces or of the command within which the person to be tried was serving) assumed responsibility for every case to be tried by court martial. He or she had the final decision on the nature and detail of the charges to be brought and the type of court martial required, and was responsible for convening the court martial.

The convening officer would draw up a convening order, which would specify, *inter alia*, the date, place and time of the trial, the name of the president and the details of the other members, all of whom he could appoint. Failing the appointment of a judge advocate by the Judge Advocate General's Office, the convening officer could appoint one. He also appointed, or directed a commanding officer to appoint, the prosecuting officer.

Prior to the hearing, the convening officer was responsible for sending an abstract of the evidence to the prosecuting officer and to the judge advocate, and could indicate the passages which might be inadmissible. He procured the attendance at trial of all witnesses to be called for the prosecution. When charges were withdrawn, the convening officer's consent was normally obtained, although it was not necessary in all cases, and a plea to a lesser charge could not be accepted from the accused without it. He had also to ensure that the accused had a proper opportunity to prepare his defence, legal representation if required and the opportunity to contact the defence

witnesses, and was responsible for ordering the attendance at the hearing of all witnesses "reasonably requested" by the defence.

The convening officer could dissolve the court martial either before or during the trial, when required in the interests of the administration of justice. In addition, he could comment on the proceedings of a court martial. Those remarks would not form part of the record of the proceedings and would normally be communicated in a separate minute to the members of the court, although in an exceptional case, where a more public instruction was required in the interests of discipline, they could be made known in the orders of the command.

The convening officer usually acted as confirming officer also. A court martial's findings were not effective until confirmed by the confirming officer, who was empowered to withhold confirmation or substitute, postpone or remit in whole or in part any sentence.

13. Since the applicants' trials, the law has been amended by the Armed Forces Act 1996 (see the above-mentioned Findlay judgment, p. 276, §§ 52-57).

PROCEEDINGS BEFORE THE COMMISSION

14. In their applications to the Commission (see paragraph 1 above), the applicants submitted that they had been denied fair hearings by independent and impartial tribunals established by law, contrary to Article 6 § 1 of the Convention.

15. The Commission declared the applications admissible on 9 April 1997, except those of Mr Bruce, Mr Nash and Ms Powell, which it declared admissible on 2 July 1997.

In its thirty-five reports of 4 March 1998 (former Article 31 of the Convention), it expressed the unanimous opinions that in each case there had been a violation of Article 6 § 1, in that the applicant had not received a fair hearing by an independent and impartial tribunal, and that it was not necessary to examine other complaints raised by the applicants concerning specific aspects of the fairness of the court-martial proceedings. The full text of the Commission's opinions is reproduced as an annex to this judgment[1].

Note by the Registry

1. For practical reasons this annex will appear only with the printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

FINAL SUBMISSIONS TO THE COURT

16. The Government did not contest the Commission's findings of violations of Article 6 § 1, but stated that they had referred the cases to the Court in order to seek a ruling as to the amount of just satisfaction, if any, which the applicants should receive under Article 41 of the Convention (formerly Article 50).

The applicants invited the Court to find, for the reasons expressed in its above-mentioned Findlay and Coyne judgments, that the courts martial which dealt with them had not been independent and impartial within the meaning of Article 6 § 1. In addition, they asked to be awarded compensation for pecuniary and non-pecuniary damage and legal costs and expenses.

AS TO THE LAW

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

17. The applicants claimed that their trials by court martial did not meet the requirements of Article 6 § 1 of the Convention, which provides, so far as is relevant:

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

18. The Commission found that the applicants had not been given fair hearings by independent and impartial tribunals.

19. In view of the decision and reasoning of the Court in the above-mentioned Findlay and Coyne judgments (at pp. 279-83, §§ 68-80, and pp. 1854-55, §§ 54-58 respectively), the Government did not contest the Commission's conclusion.

20. The Court recalls that in its above-mentioned Findlay judgment it found that a court martial convened pursuant to the Army Act 1955 did not meet the requirements of independence and impartiality laid down by Article 6 § 1 of the Convention, in view in particular of the central part played in the prosecution by the convening officer, who was closely linked to the prosecuting authorities, was superior in rank to the members of the court martial and had the power, albeit in prescribed circumstances, to dissolve the court martial and to refuse to confirm its decision (see the above-mentioned Findlay judgment at pp. 279-83, §§ 68-80, together with paragraph 12 above). In its Coyne judgment cited above it came to a similar

conclusion in respect of a court martial convened under the Air Force Act 1955.

21. The Court can find no reason for distinguishing the cases of the present thirty-five applicants from those of Mr Findlay and Mr Coyne as regards the part played by the convening officer in the organisation of the courts martial. It notes that the applicants did not pursue before it their additional complaints, contained in their applications to the Commission, concerning other matters allegedly giving rise to unfairness in the court-martial proceedings.

22. It follows that, for the reasons expressed in the above-mentioned Findlay judgment, the courts martial which dealt with each of these thirty-five applicants were not independent and impartial within the meaning of Article 6 § 1.

In conclusion, there has been a violation of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

23. The applicants claimed compensation under Article 41 of the Convention, which states:

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

A. Pecuniary damage

24. The applicants sought compensation for alleged reduction in income and earning capacity experienced since their trials by court martial.

25. The Government observed that there were no grounds for believing that the applicants would not have been convicted and suffered the same or similar consequences if the court martial had been organised to comply with Article 6 § 1, and that no causal link had been established between the breach of the Convention complained of and the alleged financial loss.

26. The Court recalls that in its above-mentioned Findlay and Coyne judgments it decided not to award compensation for either pecuniary or non-pecuniary damage on the ground that it was impossible to speculate as to the outcome of the court-martial proceedings had the violation of the Convention not occurred (see the above-mentioned Findlay judgment at p. 284, §§ 85 and 88, and the above-mentioned Coyne judgment at pp. 1855-56, § 62). It considers that it would not be justified in awarding compensation for any alleged pecuniary loss by the present applicants, since no causal link has been established between this alleged loss and the breaches of the Convention of which the applicants complained.

B. Non-pecuniary damage

27. The applicants submitted that they were each entitled to 10,000 pounds sterling (GBP) compensation for non-pecuniary damage in view of the fact that they had been convicted by tribunals which did not meet the requirements of Article 6 § 1.

28. The Court considers that in the circumstances of the case the finding of a violation in itself constitutes sufficient just satisfaction for any non-pecuniary damage suffered by the applicants.

C. Punitive damages

29. At the hearing the applicants' representative argued that they were entitled to punitive damages, based on the respondent State's failure, immediately following the publication of the Commission's report of 5 September 1995 which found a violation of Article 6 § 1, to take steps to ensure that military personnel did not continue to be tried by courts martial convened under the impugned procedure.

30. The Court finds no basis, in the circumstances of the present cases, for accepting this claim (see, *mutatis mutandis*, the Selçuk and Asker v. Turkey judgment of 24 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 918, § 119).

D. Costs and expenses

31. The applicants' representative submitted a detailed bill of costs in respect of each applicant. In each case the costs and expenses amounted to between GBP 6,300 and GBP 6,750, giving a total of GBP 228,891.46, inclusive of value-added tax, for all thirty-five applications.

32. The Government submitted that the Court should only award costs and expenses that had been actually and necessarily incurred and were reasonable as to quantum. They expressed the view that, considering that all the applications had been dealt with together, the number of hours claimed was excessive, as was the hourly rate, and they proposed that GBP 40,000 would be a reasonable sum in respect of all thirty-five applicants. Finally, the Government noted that the real issue in the proceedings had been whether or not the applicants should receive substantial sums by way of just satisfaction. In the event that the Court found against the applicants on this issue, they should not receive anything by way of costs and expenses.

33. The Court recalls that it has found a violation of Article 6 § 1 in respect of each applicant and considers it appropriate, in the circumstances of the case, to make an award in respect of the applicants' reasonable costs and expenses. In addition, however, it notes that there was considerable overlap between the issues in each of the thirty-five cases which, in any

event, raised only limited questions in the wake of its Findlay and Coyne judgments. Making its assessment on an equitable basis, it awards the sum of GBP 40,000 in respect of costs and expenses, together with any value-added tax which may be chargeable but less the amounts received in legal aid from the Council of Europe (19,200 French francs).

E. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention in respect of each of the thirty-five applicants;
2. *Holds* by sixteen votes to one that the finding of a violation in itself constitutes sufficient just satisfaction for any non-pecuniary damage suffered by the applicants;
3. *Holds*, unanimously
   (a) that the respondent State is to pay the applicants, within three months, in respect of costs and expenses, a total of 40,000 (forty thousand) pounds sterling, together with any value-added tax which may be chargeable, less 19,200 (nineteen thousand, two hundred) French francs, to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment; and
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement.
4. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 February 1999.

Signed: Luzius WILDHABER
President

Signed: Paul MAHONEY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Zupančič is annexed to this judgment.

Initialled: L.W.

Initialled: P.M.

PARTLY DISSENTING OPINION OF JUDGE ZUPANČIČ

I voted with the majority on all points except the question of just satisfaction. I find the statement that it is "impossible [for the Court] to speculate as to the outcome of the court-martial proceedings" (paragraph 26 of the judgment) wholly unsatisfactory, the more so since the Court's own case-law, going back to the Colozza v. Italy case, judgment of 12 February 1985, does not offer any substantive explanation for this doctrine.

The question turns on the interpretation of Article 41 of the Convention, that is to say on the meaning of the words "... if the internal law of the High Contracting Party concerned allows only partial reparation to be made..." In these cases the domestic law of the respondent State ought to provide for a retrial.

It cannot be logically maintained that a conviction and sentence in a criminal case are legitimate if the criminal procedure in question violates the essential precepts of a fair trial, due process and so on. The legitimacy of a substantive judgment depends on the legitimacy of the procedure by which it was arrived at. To hold otherwise – that is, to separate the procedure entirely from its substantive outcome (conviction and sentence) – would reduce the meaning and import of the procedure to an ancillary status. This would mean, as it used to mean in the purely inquisitorial procedure, considering the procedure a mere "adjective" to the "substantive" importance of the case.

That, however, is no longer a tenable position. If it were, a fair trial would not be as central to the meaning of Article 6 of the Convention as it is, neither would the exclusionary rule figure as an essential procedural sanction in most national jurisdictions as well as in some international instruments such as the United Nations Convention against Torture (Article 15).

To say in the instant cases that it is "impossible to speculate as to the [substantive] outcome" of the case, in other words to say that the Court does not know what would have happened if the precepts of a fair trial had in fact been respected, is itself a speculation. It is a speculation that the case would have been decided identically – that the defendant would have been convicted – even if the trial had in fact been fair.

The Court is therefore faced with a dilemma. It is forced to speculate whether it accepts the final substantive outcome of the case or not.

The words in Article 41 "... if the internal law of the High Contracting Party concerned allows only partial reparation to be made..." ought, therefore, to be implemented so as to require the respondent State to permit retrial of the cases.

Some of the Contracting States' jurisdictions do in fact have appropriate provisions in their codes of criminal procedure. Those provisions afford a legal basis for convicted persons in situations similar to those of the

applicants in the instant case to request retrials. Such convicted persons thus acquire standing to lodge a special appeal where the European Court of Human Rights has held that the national criminal proceedings in which they were convicted did not satisfy a particular procedural requirement of the Convention. Only in such circumstances, I think, is the purpose of Article 41 fully achieved.

In situations such as the ones we are faced with here, however – in which no special post-conviction remedy is provided in the national legislation – the Court ought to take a less defeatist approach. Our judgment should at least imply that the national legislation ought to provide for retrial of cases in which the proceedings have been found not to comply with essential procedural requirements. That, I think, is the purpose of the Article 41 words referring to the reparation allowed by internal law.