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

THIRD SECTION

CASE OF MOORE AND GORDON v. THE UNITED KINGDOM

(Application nos. 36529/97 and 37393/97)

JUDGMENT

STRASBOURG

29 September 1999

FINAL

29/12/1999

In the case of Moore and Gordon v. the United Kingdom,

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

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

Having deliberated in private on 14 September 1999,

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

PROCEDURE

1. The case originated in two applications against the United Kingdom lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The first applicant, Mr Jonathan Moore, was born in 1973 and is resident in Scotland and the second applicant, Mr Garrick Gordon, was born in 1953 and is resident in Cornwall. Both applicants are British nationals and were represented before the Court by Mr Gilbert Blades, a solicitor practising in Lincoln. The applications were introduced on 10 June and 7 August 1997 and were registered on 16 June and 18 August 1997 under file nos. 36529/97 and 37393/97, respectively.

The applicants complained, under Article 6 § 1 of the Convention, that they were denied a fair and public hearing by an independent and impartial tribunal established by law. The first applicant also submitted that he was denied a voice in the choice of venue for his court-martial.

2. On 20 May 1998 the Commission (First Chamber) decided to give notice of the applications to the respondent Government and invited them to submit their observations on their admissibility and merits.

The Government, represented by Mr Martin Eaton, Agent, Foreign and Commonwealth Office, responded by letter dated 21 August 1998, stating that the Government did not have any observations to make on the admissibility of the applications in light of the judgment of this Court in the Findlay v. the United Kingdom case (25 February 1997, *Reports of Judgments and Decisions* 1997-I, no. 30).

3. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998 and in accordance with the provisions of Article 5 § 2 thereof, the applications fell to be examined by the Court.

4. In accordance with Rule 52 § 1 of the Rules of Court[1], the President of the Court, Mr L. Wildhaber, assigned the cases to the Third Section. The Chamber constituted within the Section included Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 26 § 1(a) of the Rule of Court) and Mr J.-P. Costa, the President of the Chamber (Rules 12 and 26§ 1(a)). The other members designated by the latter to complete the Chamber were Mr L. Loucaides, Mr P. Kūris, Mr W. Fuhrmann, Mrs H.S. Greve and Mr K. Traja (Rule 26 § 1 (b)).

5. On 2 March 1999 the Chamber decided to join the cases and not to hold a hearing on the merits. The Chamber also declared the applications admissible[2].

AS TO THE FACTS

1. THE CIRCUMSTANCES OF THE CASE

6. At the time of the events in question, both applicants were serving in the Royal Air Force and were tried by district courts-martial convened pursuant to the Air Force Act 1955 ("the 1955 Act").

7. Mr Moore was found guilty of common assault contrary to the Criminal Justice Act 1988 and he was fined £400, although the 1988 Act provides for a maximum sentence of six months' imprisonment (see paragraph 16 below). His subsequent petitions and appeals, as far as the single judge of the Courts-Martial Appeal Court, were unsuccessful.

8. Mr Gordon was found guilty of two charges of disgraceful conduct of an indecent kind (in the nature of indecent exposure, contrary to section 66 of the 1955 Act) and he was sentenced to a reduction in rank, although section 66 provides for a maximum sentence of two years' imprisonment (see paragraph 16 below). His subsequent petitions and appeals, as far as the full Courts-Martial Appeal Court, were unsuccessful.

II. RELEVANT DOMESTIC LAW AND PRACTICE

9. The relevant provisions of the Air Force Act 1955 are set out in the judgment of the Court in the Coyne case (the Coyne v. the United Kingdom judgment of 24 September 1997, *Reports* 1997-V, pp. 1848-52, §§ 20-44).

10. Central to the system under the 1955 Act 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

1. *Note by the Registry*: the Rules of Court came into force on 1 November 1998.
2. The text of the Court's decision is obtainable from the Registry.

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.

11. 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.

12. 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.

13. 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.

14. 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.

15. Since the applicants' trials, the law has been amended by the Armed Forces Act 1996 (see the above-cited Findlay v. the United Kingdom judgment, at p. 276, §§ 52-57).

16. The Criminal Justice Act 1988 provides for a penalty of up to six months' imprisonment, a fine or both for the offence of common assault. The maximum penalty for disgraceful conduct of an indecent kind is two years' imprisonment (section 66 of the 1955 Act).

AS TO THE LAW

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

17. Each of the applicants complained, invoking Article 6 § 1 of the Convention, that he did not have a fair or public hearing by an independent and impartial tribunal established by law. Article 6 § 1, insofar as relevant, reads as follows:

> "1. 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. …"

A Applicability of Article 6 § 1 of the Convention

18. The Court notes the potential penalty of six months' imprisonment (in Mr Moore's case) and of two years' imprisonment (in Mr Gordon's case), together with the nature of the charges of which the applicants were found guilty. It considers that the applicants' court-martial proceedings involved the determination of charges of a criminal nature within the meaning of Article 6 § 1 of the Convention (see, for example, the Garyfallou Aebe v. Greece judgment of 24 September 1997, *Reports* 1977-V, no. 49, p. 1830, §§ 32-33, with further references).

B. Independence and impartiality of the applicants' courts-martial

19. The applicants mainly argued that their courts-martial were not independent or impartial and that the proceedings against them were consequently unfair. The Government made no observations on the admissibility of the case except to note that it raised issues similar to those in respect of which the Court had found a violation of Article 6 § 1 in the above-cited Findlay case. Having reserved their position as to the merits, the Government did not submit any further observations.

20. The Court recalls that, in the above-mentioned Findlay judgment, the Court held that a general court-martial convened pursuant to the Army Act 1955 did not meet the requirements of independence and impartiality set down by Article 6 § 1 of the Convention in view, in particular, of the central part played in its organisation by the convening officer. In this latter respect, the Court considered that the convening officer was central to the applicant's prosecution and was closely linked to the prosecution authorities; the Court expressed some concern that the members of the court-martial were subordinate (either directly or indirectly) to the convening officer; and the Court found it significant that the convening officer also acted as confirming officer.

21. The Court subsequently found a district court-martial convened pursuant to the Air Force Act 1955 to have similar deficiencies (the above-cited Coyne v. the United Kingdom judgment). In particular, it considered that there were no significant differences between the part played by the convening officer in Mr Coyne's court-martial, under the Air Force Act 1955, and in that of Mr Findlay, under the Army Act 1955. While an appeal to the Courts-Martial Appeal Court was open to Mr Coyne, the Court concluded that the organisational defects in the court-martial could not be corrected by any subsequent review procedure because an accused faced with a serious criminal charge is entitled to a first instance tribunal which meets the requirements of Article 6 § 1 of the Convention. In addition, the Court subsequently found a violation of Article 6 § 1 on the same basis in a series of cases involving complaints about the independence and impartiality of army and air force district and general courts-martial convened pursuant to the Army and Air Force Acts 1955 (the Cable and Others v. the United Kingdom judgment of 18 February 1999, unpublished).

22. The Court recalls that in the present case district air force courts-martial were convened pursuant to the Air Force Act 1955 to try the applicants. It can find no reason to distinguish the present cases from those of Mr Findlay, Mr Coyne or Mr Cable and Others as regards the part played by the convening officer in the organisation of their courts-martial. Accordingly, the Court considers that the applicants' courts-martial did not meet the independence and impartiality requirements of Article 6 § 1 of the Convention. The Court also considers that, since the applicants were faced with, *inter alia*, charges of a serious and criminal nature and were therefore entitled to a first instance tribunal complying with the requirements of Article 6 § 1, such organisational defects in their courts-martial could not be corrected by any subsequent review procedure.

23. Accordingly, and for the reasons expressed in detail in the above-cited judgment of the Court in Mr Findlay's case, the Court concludes that the courts-martial which dealt with the applicants' case were not independent and impartial within the meaning of Article 6 § 1 of the Convention.

24. The Court is further of the opinion that, since the applicants' courts-martial have been found to lack independence and impartiality, they could not guarantee either of the applicants a fair trial (the above-cited Findlay v. the United Kingdom judgment, Comm. Report, at § 108).

C. Remaining points at issue

25. The applicants also complained that their courts-martial were not "public" or "established by law" within the meaning of Article 6 § 1 of the Convention. Mr Moore further complained that he had had no say in the choice of venue for his court-martial hearing.

26. In view of its conclusions at paragraphs 23 and 24 above, the Court finds that, in the present case, it is unnecessary also to examine these complaints of the applicants.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

27. Article 41 of the Convention provides:

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

28. Following the decision of the Court declaring the applications admissible, the Court, by letter dated 15 March 1999, requested the applicants to submit by 3 May 1999 their claims for just satisfaction. Although the applicants had claimed just satisfaction, without further elaboration, in their original applications, no claims either for compensation or reimbursement of costs and expenses were submitted in response to the Court's letter of 15 March 1999.

The Court recalls that it is not required to examine such matters of its own motion and, consequently, finds that it is unnecessary to apply Article 41 in this case (the Huvig v. France judgment of 24 April 1990, Series A no. 176-B, p. 57, § 37-38).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* that it is not required to apply Article 41 of the Convention in this case.

Done in English, then sent as a certified copy on 29 September 1999, according to Article 77 §§ 2 et 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President