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

THIRD SECTION

CASE OF WILKINSON AND ALLEN v. THE UNITED KINGDOM

(*Applications nos. 31145/96 and 35580/97*)

JUDGMENT

STRASBOURG

6 February 2001

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In the case of Wilkinson and Allen v. the United Kingdom,

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

Mr W. FUHRMANN, *President*,
Mr J.-P. COSTA,
Mr P. KŪRIS,
Mr K. JUNGWIERT,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges,*

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 16 January 2001,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 31145/96 and 35580/97) 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") by two British nationals, Mr Mark Wilkinson and Mr Kevin Allen ("the applicants"), on 13 April 1996 and 1 April 1997, respectively.

2. The applicants were represented by Mr J. Mackenzie, a lawyer practising in London. The British Government ("the Government") were represented by their Agents, Mr M. Eaton and Mr C. Whomersley, both of the Foreign and Commonwealth Office.

3. The applicants alleged, as regards their trial by court-martial, that they did not have a fair and public hearing by an independent and impartial tribunal established by law. On 31 May 1999 the Commission found a violation of Article 6 § 1 of the Convention. By letter dated 27 September 1999 the Government referred the cases to the Court explaining that the reference had been made not to contest the breach of Article 6 § 1 which had been found by the Commission but to seek a ruling pursuant to Article 41 on what just satisfaction, if any, should be awarded to the applicants.

4. In accordance with Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 13 December 1999 that the applications should be considered by a Chamber constituted within one of the Sections of the Court. The applications were then allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Sir Nicolas Bratza, the judge elected in respect of the United Kingdom, withdrew from sitting in the case (Rule 28). While the Government initially appointed Sir Stephen Richards to sit as an *ad hoc* judge, by letter dated 9 November 2000 they agreed that Judge Costa, the judge elected in respect of France, would sit in place of Sir Nicolas Bratza (Article 27 § 2 of the Convention and Rule 29 § 1).

5. The Chamber decided to join the proceedings in the applications (Rule 43 § 1).

6. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASES

7. At the time of the events in question, both applicants were serving in the army and were tried by district courts-martial convened pursuant to the Army Act 1955.

8. Mr Wilkinson pleaded guilty to the armed forces' disciplinary offence of absence without leave (contrary to section 38(a) of the Army Act 1955). Although the Army Board upheld his petition against the custodial part of his sentence, the charge for which he was convicted carried a potential sentence of two years' imprisonment (see paragraph 17 below).

9. Mr Allen pleaded guilty to two charges of possession of controlled drugs contrary to the Misuse of Drugs Act 1971, these being civilian criminal offences. The Army Board reduced the custodial element of his sentence to six months' imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

10. The relevant provisions of the Army Act 1955 are set out in the judgment of the European Court of Human Rights in the Findlay case (Findlay v. the United Kingdom judgment of 25 February 1997*, Reports of Judgments and Decisions* 1997-I, §§ 32-51).

11. 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 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.

12. 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.

13. 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.

14. 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.

15. 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.

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

17. A person convicted of absence without leave shall be liable to imprisonment for a term not exceeding two years (section 38(a) of the 1955 Act).

THE LAW

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

18. Each of the applicants complained, invoking Article 6 § 1 of the Convention, that he did not have a fair hearing by an independent and impartial tribunal established by law. Mr Wilkinson also complained that he did not have a public hearing. 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

19. The Court notes the potential penalty of two years' imprisonment (in Mr Wilkinson's case) and the final sentence imposed on Mr Allen (six months' imprisonment) together with the nature of the charges to which, in particular, Mr Allen pleaded guilty. It considers that the applicants' court-martial proceedings involved the determination of their sentence on charges of a criminal nature within the meaning of Article 6 § 1 of the Convention (the above-cited Findlay judgment, § 69, and the Garyfallou aebe v. Greece judgment of 24 September 1997, *Reports* 1997-V, no. 49, §§ 32-33, with further references).

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

20. The Commission concluded that there had been a violation of Article 6 § 1 in that the applicants were not given a fair hearing by an independent and impartial tribunal. The Government made no observations on the merits of these complaints except to clarify that the cases had been referred to the Court by the Government not to contest the Commission's conclusions but to seek a ruling on the just satisfaction awards, if any, to be made.

21. 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.

22. The Court subsequently found a district court-martial convened pursuant to the Air Force Act 1955 to have similar deficiencies (Coyne v. the United Kingdom judgment of 24 September 1997, *Reports* 1997-V, pp. 1848-52, §§ 20-44). 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.

23. 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 (*Cable and Others v. the United Kingdom* [GC], No 24436/94 *et seq*., 18.2.1999).

24. In the present case, the Court recalls that district army courts-martial were convened pursuant to the Army Act 1955 to try the applicants. It finds no reason to distinguish the present cases from those of Mr Findlay, Mr Coyne or of 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.

25. 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 present applicants' cases were not independent and impartial within the meaning of Article 6 § 1 of the Convention.

26. 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 *(Smith and Ford v. the United Kingdom,* no. 37475/97, 29.9.1999, § 25, and *Moore and Gordon v. the United Kingdom*, no. 39036/97, 29.9.1999, § 24).

C. Remaining points at issue

27. The applicants also complained that their courts-martial were not "established by law" within the meaning of Article 6 § 1 of the Convention. Mr Wilkinson also claimed that his court-martial was not "public" within the meaning of that Article.

28. In view of its conclusions at paragraphs 25 and 26 above, the Court finds that it is unnecessary also to examine these complaints of the applicants.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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."

A. Loss

30. The applicants did not claim to have suffered any pecuniary loss.

31. They sought £7500 and £5000 pounds sterling (GBP), respectively in compensation for the non-pecuniary loss suffered as a result of the violations of their rights guaranteed by Article 6 § 1 of the Convention.

32. 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 courts-martial had been organised to comply with Article 6 § 1, and they submitted that no causal link had been established between the breach of the Convention of which the applicants complained and the alleged loss. The Government relied on the approach adopted by the Court on the question of just satisfaction following a finding of the same violation of Article 6 § 1 of the Convention in the above-cited Findlay, Coyne and Cable and Others cases.

33. The Court recalls that in the aforementioned Findlay judgment 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 (*loc. cit.,* §§ 85 and 88, and the Coyne judgment at § 62).

The Court, accordingly, considers that it would not be justified in awarding compensation for the alleged non-pecuniary loss of the present applicants, since no causal link has been established between any such loss and the breaches of the Convention established.

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

B. Costs and expenses

35. The applicants requested reimbursement of their legal costs and expenses in the sums of GBP 1988.10 and GBP 1022.25 (inclusive of value-added tax), respectively and the Government do not dispute this claim.

36. The Court recalls that it has found a violation of Article 6 § 1 of the Convention in respect of each applicant and considers it appropriate, in the circumstances of the cases, to award the sums claimed by the applicants in costs and expenses (which figures are inclusive of any value-added tax which may be chargeable).

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* that the finding of a violation in itself constitutes sufficient just satisfaction for any non-pecuniary damage alleged by the applicants;

3. *Holds*
   (a) that the respondent State is to pay the applicants, within three months, GBP £1988.10 and GBP £1022.25, respectively for costs and expenses, which figures are inclusive of any value-added tax that may be chargeable;
   (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* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 6 February 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

W. FUHRMANN
President