



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

CASE OF COOPER v. THE UNITED KINGDOM
(Application no. 48843/99)

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:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mrs V. STRÁŽNICKÁ,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr A. KOVLER,
Mr S. PAVLOVSKI,
Mr L. GARLICKI,
Mr J. BORRERO BORRERO,

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

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 case originated in an application (no. 48843/99) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a United Kingdom national, Mr Graham Cooper (“the applicant”), on 8 June 1999.

2. The applicant was represented by Mr G. Blades, a solicitor practising in Lincoln. The United Kingdom Government (“the Government”) were represented by their Agents, Mr C. Whomersley and, subsequently, Mr J. Grainger, of the Foreign and Commonwealth Office.

3. 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.

4. The application was allocated to the Fourth Section of the Court. On 4 June 2002 a Chamber of that Section declared inadmissible the specific complaint of unfairness under Article 6 and gave notice to the Government of his main complaint concerning the independence and impartiality of the court-martial (Rule 54 § 2 (b) of the Rules of Court). On 6 May 2003 a Chamber of that Section (composed of Mr M. Pellonpää, Sir Nicolas Bratza, Mrs V. Strážnicka, Mr R. Maruste, Mr S. Pavlovschi, Mr L. Garlicki, Mr J. Borrego Borrego, judges, and Mr M. O'Boyle, Section Registrar) relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to such relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

6. Pursuant to Article 29 § 3 of the Convention and Rule 54A § 3, the Grand Chamber notified the parties that it might decide to examine the merits of the complaint before it at the same time as its admissibility and decided to put an additional question to the parties.

7. The applicant and the Government each filed observations on the admissibility and merits of the case, together with separate submissions on the applicable domestic law and practice.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 October 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J. GRAINGER,	<i>Agent,</i>
Mr P. HAVERS QC,	<i>Counsel,</i>
Ms T. JONES,	
Mr H. MORRISON,	
Mr E. LATHAM,	
Air Vice-Marshal R. CHARLES,	
Commodore J. BLACKETT,	
Commander S. TAYLOR,	
Brigadier T. PAPHITI,	<i>Advisers;</i>

(b) *for the applicant*

Mr G. BLADES, Solicitor,	<i>Representative,</i>
Mr J. MACKENZIE, Solicitor,	<i>Adviser.</i>

The Court heard addresses by Mr Havers and Mr Blades.

9. The Grand Chamber subsequently decided to examine the merits of the complaint before it at the same time as its admissibility (Article 29 § 3 of the Convention and Rule 54A § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1968 and lives in Birmingham. At the relevant time he was a member of the Royal Air Force (RAF).

11. On 18 February 1998 the applicant, along with a co-accused, was convicted by a district court-martial (pursuant to section 70(1) of the Air Force Act 1955) of theft contrary to the Theft Act 1968. He was sentenced to fifty-six days' imprisonment, to be dismissed from the service and to be reduced to the ranks.

12. The applicant's court-martial was composed of a permanent president (Wing Commander Rodgers), two other officers of lower rank (Squadron Leader Borthwick and Flight Lieutenant Winks) and a judge advocate.

Wing Commander Rodgers' appointment to the post of permanent president was his last before retirement in September 1998. Although he had been the subject of appraisal reports prior to August 1997, he was not reported on thereafter. The two ordinary members had attended the junior officers' command course in 1993, which included training in disciplinary processes.

13. By a letter from the reviewing authority dated 3 April 1998, the applicant's representative was informed that neither the findings nor the sentence of the court-martial would be varied. The authority had received advice from the Judge Advocate General.

14. The applicant's appeal to the Courts-Martial Appeal Court against conviction and sentence was dismissed on 5 February 1999.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General

15. The Armed Forces Act 1996 ("the 1996 Act") came into force on 1 April 1997 and amended, *inter alia*, the Air Force Act 1955 (references below to "the 1955 Act" are to that Act as amended). Trial by court-martial in the RAF is regulated, *inter alia*, by the 1955 Act, the Courts-Martial (Air

Force) Rules 1997 (“the 1997 Rules”) and the Queen's Regulations for the RAF.

16. Section 70(1) of the 1955 Act provides that any person subject to air-force law who commits a civilian offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against that section.

17. Section 71(1) of the 1955 Act lists the punishments available to a court-martial following conviction and establishes, as a matter of law, the relative positions of each punishment in the hierarchy of punishments available (the “coda” to section 71(1) of the 1955 Act).

18. The powers of punishment of courts-martial (general and district) are set out in section 85 of the 1955 Act:

“(1) A general court-martial shall have power to try any person subject to air force law for any offence which under this Act is triable by court-martial, and to award for any such offence any punishment authorised by this Act for that offence.

(2) A district court-martial shall have the powers of a general court-martial except that it shall not try an officer or sentence a warrant officer to imprisonment, discharge with disgrace, dismissal or detention, and shall not award the punishment of death or of imprisonment for a term exceeding two years or make an order committing a person to be detained under section 71AA of this Act for a period exceeding two years.”

19. A person guilty of theft is liable on conviction on indictment to imprisonment for a term not exceeding ten years or, on summary conviction, to imprisonment for a term not exceeding six months or a fine or both (section 7 of the Theft Act 1968).

B. The court-martial – participants and procedure

1. The commanding officer (CO)

20. An allegation that a person subject to air-force law has committed an offence must be reported to the CO of the accused. The CO must investigate the charge, after which he may refer the matter to the higher authority (section 76(5)(b) of the 1955 Act).

2. The higher authority

21. The higher authority is a senior RAF officer (the Air Officer Commanding). He is not legally qualified. He must decide, in respect of cases referred to him by a CO, whether to refer the matter back to the CO to be dealt with summarily (unless the accused has already elected trial by court-martial); to refer the matter to the prosecuting authority for a decision as to whether the accused should be prosecuted; or to drop the charges. The higher authority's decision is essentially a command decision, the higher authority being required to ask himself whether there are service reasons for

prosecuting or not. Once the higher authority has taken this decision, he has no further involvement in the case.

3. The prosecuting authority

22. The role of prosecutor is performed by the prosecuting authority. He is appointed by the Queen and must have been legally qualified for ten years (section 83A of the 1955 Act). The prosecuting authority has a staff of between six to eight RAF officers, who are all legally qualified (section 83C of the 1955 Act) and employed full-time on prosecuting duties. The barristers on staff are, as members of the Bar of England and Wales, subject to the professional and ethical duties of the Bar Code of Conduct (including a duty to act with independence and in the interests of justice). Similar professional obligations apply to the solicitors on staff, who are members of the Law Society of England and Wales. Those lawyers also apply the Code for Service Prosecutors, which has been endorsed by the Attorney General.

23. Following the higher authority's decision to refer a case to it, the prosecuting authority has an absolute discretion, applying similar criteria as those applied in civilian cases by the Crown Prosecution Service, to decide whether or not to prosecute, what type of court-martial would be appropriate and what charges should be brought. The prosecuting authority also prefers the charges, conducts the prosecution (Part II of Schedule I to the 1996 Act) and, in particular, has the power to make all decisions concerning the prosecution (section 83B(7) of the 1955 Act).

24. The prosecuting authority (Air Vice Marshal Weeden) was, at the relevant time, also Director of Legal Services (RAF). In his prosecuting role, he was answerable solely to the Attorney General. As Director of Legal Services (RAF) he was answerable to the Air Member for Personnel/Commander in Chief of Personnel and Training Command. Air Vice Marshal Weeden was not reported on in relation to his performance as the prosecuting authority, although he was reported on in relation to his role as Director of Legal Services (RAF). Annual appraisal reports on prosecuting officers were drawn up by 1st reporting officers within the prosecuting authority.

4. The court administration officers (CAOs)

25. CAOs are RAF officers appointed by the Defence Council. Once notified of a prosecution by court-martial by the prosecuting authority, a CAO is responsible for making the arrangements for courts-martial, including arranging venue and timing, ensuring that a judge advocate and any court officials required will be available, securing the attendance of witnesses and selecting members of the court-martial. Before commencement of the court-martial hearing, the power to dissolve it is vested in the responsible CAO. The Courts-Martial Administration Unit

discharges the administration and functions of the CAOs on their behalf and at their direction.

26. A district court-martial comprises a judge advocate, a president and not less than two serving air-force officers (“the ordinary members”) of at least two years' experience in the RAF (section 84D of the 1955 Act).

5. The judge advocate

27. The Judge Advocate General and his staff of judge advocates are appointed by the Lord Chancellor and are civilians who must have at least seven years' experience as advocates or five years' experience as barristers. A judge advocate is appointed to each court-martial (section 84D(1) of the 1955 Act) by the Judge Advocate General.

28. A judge advocate is robed and sits in the centre with the president and one of the members on his left and the other member on his right. A judge advocate's role during a court-martial is to ensure the fair and regular conduct of the proceedings. He controls the course of the evidence and rules on legal objections. All rulings and directions on questions of law (including questions of procedure and practice) are given by the judge advocate in open court and are binding on the court-martial (section 84B(3) and (4) of the 1955 Act). In this respect, judge advocates have available to them the same model directions (prepared by the Judicial Studies Board) as are available to Crown Court judges. Once the court-martial hearing has commenced, the power to dissolve it is vested in the judge advocate.

29. A judge advocate also delivers a summing-up and further directions in open court before the members of the court-martial retire to consider their verdict, in the same way as a Crown Court judge would direct the jury. The judge advocate does not retire with the president and ordinary members and has no vote on verdict: as the members of the court-martial are the sole arbiters of fact, they alone must decide whether the charge has been proved or not (section 96(1) and (1A) of the 1955 Act). Following the deliberation on verdict, the judge advocate checks the findings. If he is satisfied that they are not contrary to law, the findings are announced. If he is not so satisfied, he gives the president and ordinary members further directions in open court, following which they retire to reconsider their findings in the light of the judge advocate's directions (Rule 72(3) and (4) of the 1997 Rules). The judge advocate retires with the other members of the court-martial for the deliberations on sentence (during which he can give, if necessary, guidance on the appropriate sentence to be imposed) and votes on sentence.

6. *The president of a court-martial and permanent presidents of courts-martial (“permanent presidents”)*

30. The president of a court-martial ensures that the hearing is conducted in accordance with service tradition (Rule 33 (1) of the 1997 Rules). During the deliberations on verdict, the president chairs the discussions.

31. The post of permanent president was first created in 1941, not by any statutory provision but rather as a matter of policy. Permanent presidents were selected from among serving RAF officers of suitable age and rank; they have always had the rank of wing commander. Legal qualifications or experience were not required. The appointment was full-time, was usually expected to be for a period in excess of three years and, almost without exception, was the officer's last posting before his retirement. The Air Secretary had the power to terminate the appointment of a permanent president, although this never happened. While appraisal reports were not prepared on permanent presidents sitting in army courts-martial, such reports were made on those sitting in RAF courts-martial. However, the reports did not concern their judicial decision-making.

32. In *R. v. McKendry* (6 March 2000, unreported), the judge advocate held that a particular permanent president could not be regarded as independent and impartial for the purposes of Article 6 § 1 of the Convention. Although the ruling was limited to the particular case, recourse to permanent presidents was abandoned pending the outcome of the judgment of the House of Lords in *R. v. Boyd, Hastie and Spear Saunby and Others* (“*R. v. Boyd and Others*”). That judgment was delivered on 18 July 2002 (see paragraphs 63-76 below), but permanent presidents have not been reintroduced to RAF courts-martial.

7. *The ordinary members of courts-martial*

33. There is no requirement that the ordinary members of courts-martial should have formal legal training (Rule 17(b) of the 1997 Rules).

34. Certain officers cannot be selected for courts-martial. Section 84C(4) of the 1955 Act provides that the CAO, the COs of the accused, members of the higher authority, investigating officers and all other officers involved in inquiring into the charges concerned are all excluded from selection. Rule 17 of the 1997 Rules excludes from selection an officer serving under the command of the higher authority referring the case, the prosecuting authority and the CAO. The Queen's Regulations for the RAF (QR 1154(f)) further underline that, so far as is practicable, a court-martial is to be composed of officers from different RAF stations.

35. At the relevant time (between 1997 and early 2000), ordinary members were randomly selected from a volunteer database for each court-

martial. Individual officers were allowed to volunteer by completing a standard form or, alternatively, over the telephone. The information so provided would be entered on a computer database by the CAO. When members were required for a court-martial, the CAO looked for members in the database who were not excluded from participating in a court-martial. If volunteers could not be found in this way, a station would be selected from an alphabetical roster in each command using a separate database. The station would then be notified of those officers on that station, if any, who were on the volunteer database and the station would then be responsible for designating the officer(s) and informing the CAO.

36. The ordinary members remain subject to RAF discipline in the general sense since they remain RAF officers, but they are not reported on in relation to the carrying out of their duties as members of the court-martial and, in particular, in relation to their judicial decision-making. Attempting to influence, or influencing, a member of a court-martial amounts to the common-law offence of perverting the course of justice and/or to the offence of conduct to the prejudice of good order and air-force discipline (section 69 of the 1955 Act).

8. The court-martial hearing

37. When the members have been designated and the court-martial has been convened, the members are sent the Courts-Martial Administration Unit (RAF) briefing notes for court-martial members (see paragraphs 45-62 below) along with a list of prosecution witnesses. The members are required to examine the list and to tell the CAO if any of the witnesses are known to them. They are also advised that, should they subsequently discover that they do know someone, they should inform the judge advocate.

38. At the start of the court-martial hearing, the names of all of the members of the court-martial are read out and the accused can object to any sitting member (section 92(1) of the 1955 Act and Rule 40 of the 1997 Rules). Each member of an RAF court-martial must take the following oath:

“I swear by Almighty God that I will well and truly try the accused before the court according to the evidence, and that I will duly administer justice according to law without partiality, favour or affection, and I do further swear that I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of this court-martial, unless thereunto required in due course of law.”

39. Deliberations of the court-martial members are confidential, a member being forbidden to reveal any opinion or vote. The members of the court-martial are required to speak during deliberations, and at the close of deliberations to vote on verdict and sentence in ascending order of seniority. Decisions on verdict and sentence are reached by majority vote (section 96 of the 1955 Act). The casting vote on sentence, if needed, rests with the president (section 96(5) of the 1955 Act) who, at the time of the applicant's court-martial, gave the reasons for the sentence in open court. Under the

present procedure, those reasons are given by the judge advocate (Rule 80(2) of the 1997 Rules).

9. The reviewing authority

40. All guilty verdicts reached, and sentences imposed, by a court-martial must be reviewed by the reviewing authority within prescribed time-limits (section 113 of the 1955 Act). Although ultimate responsibility rests with the Defence Council, the review is, as a matter of practice, generally delegated to the Air Secretary or to such officer who at that time is carrying out the duties of the Air Secretary (section 113(5)(b) of the 1955 Act). Post-trial advice is received by the reviewing authority from the Judge Advocate General, who advises whether or not the conviction or sentence should be altered in the convicted person's favour. This advice is not binding, but is generally accepted by the reviewing authority. It is disclosed to the accused, who has the right to present a petition to the reviewing authority.

41. The reviewing authority may substitute a finding of guilt which could have been made by the court-martial and if the court-martial must have been satisfied as to the facts which would justify making that finding (section 113AA(2) of the 1955 Act), and it may also “pass any such sentence (not being, in the opinion of the authority, more severe than the sentence originally passed) open to a court-martial on making such a finding as appears proper” (section 113AA(4) of the 1955 Act). The reviewing authority also has the power to quash any verdict of guilt and associated sentence and to authorise a retrial (section 113A(1) of the 1955 Act). It is then for the prosecuting authority to decide whether to seek a retrial. While the person concerned is not specifically heard by the reviewing authority on the question of retrial, the decision of the prosecuting authority to seek a retrial can be challenged by an accused as an abuse of process. If convicted following a retrial, an individual retains his access on verdict and sentence to the Courts-Martial Appeal Court (see paragraphs 42-44 below). The reviewing authority gives a reasoned decision and, should it substitute a finding of guilt and/or sentence, that ruling is treated for all purposes as if it was reached or imposed by the court-martial itself.

10. The Courts-Martial Appeal Court

42. The Courts-Martial Appeal Court is a civilian court composed of judges from the Criminal Division of the Court of Appeal. A convicted person has a right of appeal to the Courts-Martial Appeal Court against both conviction and sentence (section 8 of the Courts-Martial (Appeals) Act 1968, as amended – “the 1968 Act”).

43. An appeal against conviction will be allowed where the Courts-Martial Appeal Court finds that the conviction is unsafe, but dismissed in all other cases. The test of what is “unsafe” is the same as that applied in

appeals against convictions by the civilian criminal courts. An appeal against sentence may be allowed where the Courts-Martial Appeal Court considers that the sentence is not appropriate for the case (section 16A of the 1968 Act). It has power, *inter alia*, to call for the production of evidence and witnesses, whether or not produced at the court-martial (section 28 of the 1968 Act). It can also authorise a retrial (section 19(1) of the 1968 Act).

44. In *R. v. McKendry* (judgment of the Courts-Martial Appeal Court of 20 February 2001), the appellant pleaded guilty to a charge of absence without leave and was sentenced to, *inter alia*, 265 days' detention. The reviewing authority rejected his petition and Mr Justice Ouseley gave the judgment of the Courts-Martial Appeal Court. Having noted in detail the advice of the Judge Advocate General to the reviewing authority, he quoted as follows from a prior judgment of the Courts-Martial Appeal Court (*R. v. Pattinson*, judgment of 25 January 1999):

“In our judgment, the Court has to bear in mind, in dealing with an appeal of this kind, ... the somewhat 'hybrid jurisdiction' which [the Courts-Martial Appeal Court] exercises; in that it is clearly free to correct any injustice, but it nonetheless has to be mindful that those imposing and confirming sentences, particularly, it is to be said ... in relation to an offence of desertion, are particularly well placed and indeed better placed than [the Courts-Martial Appeal Court] in assessing the seriousness of offending in the context of service life.”

Mr Justice Ouseley continued:

“The offence of going absent without leave, as indeed the offence of desertion, is not one in respect of which any civilian parallel exists. The sentencing considerations involve factors that are particular to the armed services, in respect of which their judgment and experience are entitled to great weight. A court should be reluctant to interfere with such courts-martial sentencing decisions, particularly where the Judge Advocate General has reviewed the matter and has dismissed the petition in the terms in which he did here. The considerations particular to this sort of military offence relate to the significance of the offence for the maintenance of military discipline and efficiency, the need for deterrence, the significance of rank and the availability of other measures from dismissal to loss of rank and pay, which are in many ways not available or not paralleled in the civilian sphere. Indeed some of those factors would also be of particular weight when the Courts-Martial Appeal Court is dealing with offences which do have parallels in the civilian sphere, and would justify caution in interfering with courts-martial sentences; even more so do they justify caution when dealing with offences which have no parallel in the civilian sphere.”

R. v. Holtby-Smith (judgment of the Courts-Martial Appeal Court of 26 February 2003) concerned a retrial following a decision of the reviewing authority. Lord Justice Kennedy in the Courts-Martial Appeal Court stated as follows:

“The Reviewing Authority directed ... that the Prosecuting Authority consider whether there should be a retrial. That was an inappropriate direction on the part of the Reviewing Authority because under section 113A of the [1955 Act] the decision whether or not to order a retrial must be one for the Reviewing Authority itself and not for the Prosecuting Authority, though of course the Reviewing Authority could, if so disposed, canvas the views of the Prosecuting Authority, and of the proposed

defendant, as to whether or not there should be a retrial. Following that, the Reviewing Authority was advised of the error of its approach and ... directed a retrial in the interests of justice ... If [such a] decision of the Reviewing Authority was to be challenged, it could only be challenged by means of judicial review ... ”

In *R v. Ball and R. v. Rugg* (judgment of the Courts-Martial Appeal Court of 12 February 1998), the sentence of the court-martial was one year's detention and the reviewing authority substituted a sentence of one year's imprisonment. The Courts-Martial Appeal Court quashed the latter sentence and replaced it with a sentence of nine months' detention.

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

45. The briefing notes are sent by the Courts-Martial Administration Unit to the members selected for a court-martial. The notes applicable at the time of the applicant's court-martial (February 1998) could not be located by the parties. The notes issued in July 1999 are described below.

46. The introductory part of the notes was entitled “Important points for members of courts-martial” and provided as follows:

“Before trial

1. Read the accompanying briefing document.
2. Contact the Courts-Martial Administration Unit (CMAU) if you are wrongly described in the convening order.
3. If you think that you may not be eligible to sit as a member of the court-martial – e.g. because you know the accused or something about him or a witness, or for any other reason – tell the CMAU or, if you are already at court, ask to see the Judge Advocate privately and tell him. Do not mention your concerns to anybody else.
4. Do not attempt to find out any details of the case in advance of going to court, and do not speak to any one, or allow anybody to speak to you about it – including when you arrive at the unit where the court-martial is to be held.

At the trial

5. Once the trial has started you must not talk to anyone about the case (other than the remaining members of the court when all together) for as long as it continues.
6. Listen carefully to the witnesses and advocates, and to what the Judge Advocate tells you; and reach your decision only on what you hear in court.
7. You may only question witnesses through the Judge Advocate, or with his permission.
8. You must not visit the scene of the alleged offence unless the Judge Advocate so directs, when everyone involved in the case will go.

After the trial

9. You must never reveal anything to anyone about the deliberations on finding or sentence unless required to do so '... in due course of law'."

47. Paragraph 2 of the briefing notes emphasised the central role of the judge advocate by telling the members of the court-martial that:

"The main thing to remember is that the Judge Advocate will conduct the court-martial ... He will therefore decide all questions of law, practice and procedure ... He is a member of the court and his rulings and directions are binding on the other members of the court and, of course, the parties to the proceedings. Subject to the Judge Advocate's conduct of the trial, it will be the President's duty to ensure that the trial befits the traditions and standards of the Service; and, in particular, that officers and other persons under instruction do not interfere in the trial ... The following pages set out in general terms the order of events at a court-martial. Bear in mind, however, that the Judge Advocate may not follow it to the letter if he decides that the particular circumstances of the case do not warrant it. The Judge Advocate may also, if the interests of justice require, dissolve the court before conclusion of the trial."

48. The notes went on to warn the members as follows:

"3. When you arrive at the Unit, do not speak to any Unit personnel ... and certainly not to any Unit executive. If you disregard this direction you may find yourself inadvertently talking to, for example, a witness or a lawyer involved in the case, which in turn might result in you being debarred from the trial or, indeed, the trial being prejudiced. If someone has spoken to you and you have any doubts about your position in this respect, you must tell the Judge Advocate privately before the trial commences.

4. Mention has been made above of the President's duties. Apart from that, the function of the President and the other officer members is to decide, on the evidence, whether the accused is guilty or not guilty; and if guilty, then to decide, together with the Judge Advocate, the sentence to be imposed. The Judge Advocate will tell you all you need to know about the law and procedure in order to discharge those functions."

49. Paragraph 6 informed the members that they were:

"... exempted from occupying public accommodation on the accused's Unit. Justice must manifestly be seen to be done and this aim is assisted by your being seen to avoid local Unit influences."

50. Paragraph 8 of the briefing notes went on to advise that:

"Save for resolving any queries members may have about court etiquette and procedure (e.g. putting on and removal of head-dress, etc.) under no circumstances must the President purport to carry out any form of briefing with other members of the court in the absence of the Judge Advocate. However, he should at this stage make sure the officers under instruction are aware of their duty not to do anything which interferes with the conduct of the trial – e.g. must not say anything or make gestures or imply they have any prior knowledge about the case or the accused, etc."

51. Paragraphs 9 and 10 provided:

“9. It is the [CAO]'s duty to ensure that the officer members of the court are qualified to act as members, and are not ineligible in any way, i.e.: that they have the requisite number of years' commissioned service, for example; and that they have not sat as members of a court-martial which has tried the accused before, or been involved in any investigation or inquiry into matters relating to the subject matter of the charge against the accused ... However, if before the date of trial, you think you may be ineligible, or not qualified to sit, or for example know something about the accused which could prejudice your impartiality, or know someone who might be a witness in the case (you will receive prior notice from the CAO of persons who may be called as prosecution witnesses) you must not mention the matter to any other member but should tell the CAO who will, if necessary, arrange for your place on the court to be taken by someone else. If your concern about any of the above matters does not arise until you get to court, you must not talk about it to anyone else but should ask to see the Judge Advocate privately and tell him. Likewise, if during the trial you realise that, e.g. you know a witness, you should tell the Judge Advocate privately without mentioning it to anyone else.

10. Before the court is opened, the Judge Advocate may join you in your room briefly and, if he does, will answer any queries about this briefing document. If he does not meet you beforehand and you have any such queries, you should send him a message to that effect through the Court orderly.”

52. Paragraph 15 provided that the convening order would be read when everyone was assembled in the courtroom, that the members of the court-martial would identify themselves and that the judge advocate would ask the accused if he or she objected to any of the members. The judge advocate would then administer the oath to each member of the court-martial individually (paragraph 17 of the notes).

53. Paragraph 20 informed members that, when the opening formalities were complete:

“... The Judge Advocate may then warn the court not to talk to anyone else about the case for as long as it continues. That includes family, friends, work associates, the prosecutor, defence counsel and, most importantly, the accused and anyone who may be a witness. To that end, other than when the Judge Advocate is sitting alone, members are not to leave the courtroom during the trial except to go to the lavatory, and for any overnight or luncheon adjournment; and are not to associate with Unit personnel either professionally or socially until it is over. Refreshments will be brought into the courtroom as required.”

54. Paragraph 21 of the notes provided:

“The President and members must not, when taking refreshments in the courtroom, or at any other time, including when sitting alongside the Judge Advocate, look at papers lying on the desks of the Judge Advocate, prosecutor or defence counsel. Such papers might include information which the court must not see under any circumstances.”

55. Paragraph 29 (reflecting Rule 62(2) of the 1997 Rules) pointed out that the president and ordinary members of the court-martial might only put questions to a witness through the judge advocate. If at the end of the witness's evidence they felt that they must hear that witness on a particular

question, then the question was to be passed on in writing to the judge advocate, who could put it to the witness in the correct way.

56. Paragraph 34 (drawing on Rule 69 of the 1997 Rules) provided that, following the addresses of the prosecuting and defence counsel, the judge advocate would sum up the main points of evidence and direct the other members of the court on the law relating to the case. The members of the court-martial were not to ask the judge advocate any questions during his summing-up, but they could ask in writing for further directions, which the judge advocate had to give in open court.

57. Paragraph 35 (reflecting rule 70 of the 1997 Rules) dealt with deliberations on the verdict:

“While the court is deliberating on the findings, no one is to be present except the President, members and officers under instruction. The President and members are not to separate until the finding has been reached, unless the Judge Advocate directs that in the interests of justice they may separate ... If any person has to leave the courtroom for personal reasons, he must be told by the President not to speak to any person on any account. If the court wishes to hear again evidence recorded by the VCR, the Judge Advocate must be told and, on his direction, the court must be reopened and the passage read in open court.”

58. Further guidance on deliberations was given in paragraph 38 of the briefing notes:

“The President will normally initiate the discussion on the issue of guilt or innocence. The President should ensure that every court member present gives his opinion as to the finding on each charge separately, in ascending order of seniority commencing with the junior member. A unanimous decision is preferable, but a majority of votes will decide the issue, and the finding of the majority will be recorded as the finding of the court. The President should write down the finding(s) on the record of findings sheet and sign it. Prior to reopening the court, the President should remind any members overruled by the majority that they must now adopt the finding of the court. This is important if it becomes necessary to consider the sentence, as their previous feelings should not influence their decisions.”

59. Paragraph 39 explained the process by which the judge advocate would review the record of the deliberations to check whether the findings were not contrary to law and his related powers (see also paragraph 29 above). This paragraph also noted that the judge advocate “may, for sentencing purposes, inquire into any finding of fact reached by the court during its deliberation on finding ... though it is anticipated he will exercise this power very sparingly”.

60. Paragraph 25 explained what was to happen when sentence was being considered, either after a guilty plea or following conviction:

“The court will close to deliberate on sentence, i.e. no one will be present save for the members (including, of course, the Judge Advocate) and any person under instruction. The Judge Advocate will initiate discussion on the sentence and will inform the members, e.g. about punishments and the principles to be observed. Sentence will be determined by a majority of votes if necessary and the opinions of the officer members will be given orally in ascending order of seniority, commencing

with the junior member. The Judge Advocate will decide where he votes in the order. In the case of an equality of votes, the President has a second or casting vote on sentence which is exercisable once, i.e. he has a final, determining vote. When sentence has been decided, it is entered on the record of sentence which the Judge Advocate will have. The President will sign that record, as will the Judge Advocate.”

61. Finally, paragraph 44 provided as follows:

“After the President has announced the trial is concluded and directed the court orderly to carry on, and the Judge Advocate has dissolved the court, the President may invite the officers under instruction to express their views about the case. Thereafter, he should remind them of the oath of secrecy they have taken before releasing them. The court orderly should be instructed to burn or shred all scrap paper. ...”

62. An *aide-mémoire* for non-permanent presidents of courts-martial was annexed to the briefing notes (Annex A). This document described the court-martial procedures from the point of view of the duties and role of the president. Annex B to the notes outlined the court orderly's duties (essentially to ensure the smooth running of the court-martial). Annex C contained the general rules for personnel attending courts-martial which concerned the wearing of head-dress, seating arrangements for witnesses and members of the public and other matters of etiquette.

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

63. 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.

64. 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.

65. 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*

66. 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.”

67. 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."

68. 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."

69. 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*

70. 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.”

71. 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.”

72. 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.

73. 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.”

74. 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."

75. 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."

76. 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

77. In 2002 the rate of acquittals in contested RAF courts-martial was 52%. The rate of acquittals in contested Crown Court trials has been:

Year ending in March 1999: 42.8%

Year ending in March 2000: 42.8%

Year ending in March 2001: 44.3%

Year ending in March 2002: 42%

Year ending in December 2002: 37.4%

THE LAW

78. 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

79. Other than arguing that the complaint was manifestly ill-founded, the Government did not raise any other objection to its admissibility.

80. It is not disputed that the final decision in the proceedings was that of the Courts-Martial Appeal Court of 5 February 1999. The complaint was introduced on 8 June 1999 and, therefore, within the six-month time-limit set down by Article 34 of the Convention. Moreover, the Court considers, given the nature of the charge (theft contrary to the Theft Act 1968) together with the nature and severity of the penalty imposed (fifty-six days' imprisonment), that the court-martial proceedings constituted the determination of a criminal charge against the applicant (see *Engel and Others*, cited-above, pp. 34-35, §§ 82-83, and, more recently, *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, §§ 69-130, ECHR 2003-X).

81. 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

82. 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.

83. 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. Referring to a judgment of the Supreme Court of the United States (*Reid v. Covert* 354 U.S. 269, at p. 1240), he pointed to the armed forces' emphasis on harsh discipline and efficiency as opposed to the protection of individual rights and underlined the pressures flowing from chain-of-command connections (past or present), from rank superiority and, at the very least, from general service influences on all service personnel involved in the courts-martial process who were clearly concerned about their pay, promotion and service career prospects. 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.

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

85. He submitted that the higher authority only served to allow a Royal Air Force (RAF) officer who was not legally qualified to interfere with the prosecution process by sending a case back to an equally unqualified commanding officer (CO) for summary trial. He also suggested that the higher authority was the equivalent of the former "convening officer". He submitted, without expanding further, that the higher authority and the CO were in a direct chain of command.

86. He also argued that the prosecuting authority was part of the "legal branch" which gave "general advice" to the service authorities, so that its officers were subjected to pressures in relation to career prospects and discipline. The officers carrying out the functions of the prosecuting authority were also likely to be subordinate in rank to, and subjected to pressure from, the higher authority.

87. The applicant considered that the manner in which the court administration officer (CAO) selected members of courts-martial lacked transparency and did not have the independence and impartiality of the prior volunteer system.

88. He further observed that the permanent president of courts-martial was not legally qualified and argued that a permanent president would be “case-hardened”. Being of superior rank to the ordinary members of a court-martial, a permanent president would necessarily dominate them. Moreover, the applicant was not convinced that the permanent president at his court-martial had not been influenced by the procedure by which permanent presidents were reported on.

89. As to the judge advocate, the applicant considered that paragraph 21 of the briefing notes (see paragraph 54 above) demonstrated the kind of dangers inherent in the practice of a judge advocate sitting amongst members of courts-martial.

90. The applicant further argued that the ordinary members of his court-martial were in the same position as those in the court-martial in issue in *Morris*, so that the Grand Chamber should conclude in the present case that there were inadequate safeguards to exclude the risk of outside pressure and influence on them.

There were, in the applicant's opinion, no new relevant facts before the Grand Chamber in the present case justifying a departure from that conclusion in *Morris*. It was the applicant's belief that the Courts-Martial Administration Unit (RAF) briefing notes submitted by the Government had been drawn up after the judgment in *Morris* had been delivered and did not resemble those applicable during his court-martial in February 1998. While there had been various versions of the briefing notes in circulation prior to *Morris*, those existing at the time of his court-martial “may well have” contained a requirement that court-martial members make allowance for the inadequacies of young and inexperienced service prosecuting lawyers compared to the experienced civilian defence lawyers, the applicant indicating that his legal representative's attention had previously been drawn to such requirements. The existence of the offence of perverting the course of justice would have been clear to the Court in *Morris* and, in any event, such an offence could not insulate ordinary members from outside influences and pressures which were subtle, context-related and did not concern a particular act or gesture.

91. Finally, the applicant maintained that the power of the reviewing authority to interfere with the findings of a court-martial constituted a further reason to conclude that his court-martial did not satisfy the requirements of Article 6 § 1. He relied on *Findlay* and *Morris*, cited above, and *Brumărescu v. Romania* ([GC], no. 28342/95, §§ 61-62, ECHR 1999-VII) and argued that the House of Lords had misapplied this Convention case-law. He also maintained that the review would not always operate in

favour of a convicted person: a court-martial would adjust its sentences upwards in anticipation of a later reduction by the reviewing authority; the Courts-Martial Appeal Court was heavily influenced by the views on sentence and on any relevant service factors expressed by the Judge Advocate General and by the reviewing authority itself (see *R. v. McKendry*, cited above); the reviewing authority had the power to quash the findings of the court-martial and authorise a retrial and, while the prosecuting authority could then decide not to prosecute, the reviewing authority “set the pace” on retrials (see *R. v. Holtby-Smith*, cited above), a process not always beneficial to the individual; and the reviewing authority could make mistakes (see *R. v. Ball* and *R. v. Rugg*, cited above).

B. The Government's submissions

92. 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.

93. 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. The Government explained that the complaints in *Morris* had been broad and that they had therefore attempted to select the most relevant material for the Court. However, with hindsight they realised that, regrettably, they had omitted to submit to the Court three important items of information (the clarification that ordinary members are not reported on as regards their judicial decision-making; the Courts-Martial Administration Unit (RAF) briefing notes for members of courts-martial; and the coda to section 71(1) of the 1955 Act). 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*.

94. The Government pointed out that the role of the higher authority was clearly defined and important, in that it allowed service considerations to be applied to the question of whether a charge should be referred back to the CO or be sent on to the prosecuting authority for a decision as to whether there should be a prosecution at all. The applicant's submission that the higher authority was superfluous and his reliance on the fact that it was not legally qualified were irrelevant to the question of the independence and

fairness of a court-martial, and his arguments that it was the equivalent of the former “convening officer” and interfered with the prosecuting authority were plainly incorrect. The Government did not understand the applicant's suggestion that the higher authority was in a chain of command: in any event, it was not the higher authority who took the decision to prosecute.

95. The Government underlined that the prosecuting authority was answerable to the Attorney General as regards the prosecuting function and delegated his prosecution functions to legal officers who formed a discrete group employed solely on prosecuting duties. The reporting processes as regards the prosecuting authority and his legal officers were entirely consistent with the requirements of independence of function. The prosecuting authority was wholly independent of the chain of command and of the judiciary, as were his legal officers and, in any event, those legal officers were subject to professional codes of conduct obliging them to act independently and in the interests of justice. There was nothing to suggest that such legal officers were under any pressure or influence in relation to their career that could conceivably call into question their independence.

96. The court administration officers (CAOs) in the RAF and the army being identical in every material respect, the Government relied on the Court's conclusions in *Morris* (§ 66).

97. As to the method of selection of the members of the applicant's court-martial by the CAOs, there was, according to the Government, no evidence to suggest that there had been any interference by air-force command in that selection process and, given the fixed criteria for selection, there was no reason to doubt the independence of the court-martial either by reason of the position of the CAO or because of the manner in which members of the court-martial had been appointed.

98. The Government also underlined that permanent presidents worked outside of the service chain of command and that the post of permanent president was found in *Morris* to constitute “a significant guarantee of independence”. The judge advocate was also described in *Morris* as an “important guarantee” of independence (§§ 69 and 71).

99. The Government then turned to the two matters on which the House of Lords in *R. v. Boyd and Others* had departed from the Court's conclusions in *Morris*: the position of the ordinary members of courts-martial and the role of the reviewing authority.

100. The Government disputed the three reasons given in *Morris* for concluding that there were insufficient safeguards to exclude the risk of outside pressure on ordinary officer members of courts-martial.

In the first place, the ordinary members in the applicant's court-martial had had some legal training (see paragraph 12 above). In any event, four of the six officers sitting in the court-martial in *Engel and Others*, cited above, had no legal training. Moreover, drawing a parallel between jurors and the ordinary members of courts-martial (all without legal training and guided by

binding rulings on points of law from the trial judge and judge advocate respectively), the Government pointed out that this Court had never suggested that the determination of guilt by lay jurors was incompatible with Article 6 § 1 of the Convention. Furthermore, armed with the Courts-Martial Administrative Unit (RAF) briefing notes and the instructions of the judge advocate, the ordinary members would have had a very clear idea of their role and duties at the court-martial.

Secondly, it was true that members of the court-martial remained subject to air-force discipline in the general sense because they remained air-force officers. However, members of courts-martial did not remain subject to service discipline in relation to their judicial decision-making, so that any reporting by the service authorities on them had to, and did in the applicant's case, exclude any comment on the carrying out by them of their duties as members of a court-martial. This was the position in *Morris*, and the Government regretted that this information had not been before the Court when it examined that case. Accordingly, the fact that ordinary members remained subject to air-force discipline did not undermine their independence (the Government referred to *Engel and Others*, cited above, pp. 12-13, § 30).

Thirdly, in the Government's opinion, there were clearly sufficient safeguards of the independence of the decision-making of the ordinary members of courts-martial. Perverting or attempting to pervert the course of justice was a common-law criminal offence and an offence under section 69 of the 1955 Act. The deliberations during which the members of the court-martial voted were confidential. Each member took an oath. As with civilian jurors, there was a reasonable expectation that the ordinary members would comply with the binding directions given by the judge advocate to try the case and give a true verdict according to the evidence and without prejudice (see *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, and *Gregory v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I). The Government emphasised the content, and distribution to each court-martial member, of the Courts-Martial Administration Unit (RAF) briefing notes. The Government could not locate the actual briefing notes applicable at the time of the applicant's court-martial but submitted those in force in July 1999, which they stated made only minor changes to those notes in force in February 1998. According to the Government, the notes reinforced the message, proclaimed in the oath, that members were at all times to act independently and impartially and they had the effect of preventing members feeling, or coming under, any outside pressure during or after the trial. These notes had been sufficient to convince the House of Lords that ordinary members were sufficiently protected against outside influence and the Government regretted that this material had not been put before the Court when it examined the *Morris* case.

101. The Government accepted that the reviewing authority was an anomalous and unusual institution. However, this body offered certain advantages: every court-martial was automatically reviewed; a review operated more quickly (normally within thirty days) than an appeal to the Courts-Martial Appeal Court, so that the review would be finalised prior to a short sentence having been already served; and it was beneficial to good discipline that the services were seen to put matters right quickly if something went wrong during the court-martial.

102. Apart from these advantages, the Government underlined, as did Lord Bingham and Lord Rodger in *R. v. Boyd and Others*, that the review could only operate to the benefit of an accused as a result of the detailed hierarchy of punishments set out in the coda to section 71(1) of the 1955 Act. They regretted that they had not brought this coda to the Court's attention during its examination of the *Morris* case. If the accused considered that the reviewing authority had, nevertheless, substituted a sentence more severe than that of the court-martial, he could bring this before the Courts-Martial Appeal Court. The fact that all post-court-martial matters remained open to the Courts-Martial Appeal Court, an independent tribunal, distinguished the case from the situation in issue in *Brumărescu*, cited above.

103. Accordingly, the Government concluded that the role of the reviewing authority did not diminish or undermine the independence or impartiality of courts-martial.

C. The Court's assessment

1. Relevant principles and case-law

104. 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.

In this latter respect, the Court also reiterates that what is at stake is the confidence which such tribunals in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacked independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see *Findlay*, cited above, p. 281, § 73, and *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, pp. 1572-73, § 71).

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.*).

105. 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. The Court was mainly concerned about the conflicting roles of the “convening officer” in the proceedings: he had a key prosecuting role, but at the same time appointed the members of the court-martial who were subordinate in rank to him and fell within his chain of command. He also had the power to dissolve the court-martial before or during the trial and acted as “confirming officer” after the trial, so that a court-martial's verdict and sentence were not effective until “confirmed” by that officer.

106. 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*

107. 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*

108. 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.

109. 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.

110. 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

111. 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.

112. 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. The 1996 Act has not conferred on the higher authority, and there is no evidence that the higher authority fulfils, any other role in the pursuit of charges by court-martial. 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.

113. 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.

114. 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, requiring the CAO to take steps which have been regulated in some detail in the 1955 Act, the 1997 Rules and the Queen's Regulations to ensure that a court-martial hearing takes place with the necessary persons in attendance and with the required facilities in place. 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.

115. 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

116. 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

117. 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*

118. 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*

119. 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.

120. 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.

121. 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.

122. 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*.

123. 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.

124. 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. Admittedly, the actual notes applicable on that date could not be located by the Government, who merely asserted that the notes outlined in paragraphs 45-62 above were similar in all substantive respects to those actually distributed to members of the applicant's court-martial. However, in the absence of any precise and substantiated challenge to this assertion, the Court does not see any reason to doubt that the notes submitted to it in the present case were similar in all material respects to those actually distributed to members of the applicant's court-martial in February 1998. 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.

125. 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).

126. 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

127. 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.

128. 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.

129. 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*.

130. 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.

131. 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.

In *Van de Hurk*, cited above, the Court did not exclude that the Crown's power to deprive a court's judgment partially or completely of its effect could have been remedied by a subsequent review by a judicial body that afforded all the guarantees required by Article 6, although no such review was found to exist in that case. The appeal to the Courts-Martial Appeal Court was not considered sufficient in *Findlay*, since the applicant had pleaded guilty at first instance and no appeal lay against sentence only to the Courts-Martial Appeal Court.

132. 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.

133. 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

134. 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

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

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE COSTA

(Translation)

Not without hesitation, I have fallen in with the majority opinion of my colleagues, which has thus in the end become unanimous.

I wish to give the following brief explanation of my reasoning.

In *Morris v. the United Kingdom* (no. 38784/97, ECHR 2002-I), which also concerned the procedure before a court-martial, albeit in the army, not, as here, in the air force, a Chamber of the Court, of which I was a member, unanimously found a violation of Article 6 § 1 of the Convention as regards the applicant's complaints relating to the general structure of the system. In the present case, on the contrary, the Court has held that there was no violation of Article 6.

The reasoning in *Morris* was based on the following considerations.

(a) There were not sufficient safeguards against the risk of outside pressures on the two members who, with the permanent president, made up the court-martial. The two officers concerned – both captains – had not received any legal training, remained subject to military discipline and assessment reports and were not insulated from army influence by any legal provision.

(b) The “reviewing authority”, a non-judicial body, automatically reviewed conviction and sentence and was empowered to quash them. Above all, it could reach any finding of guilt which could have been reached by the court-martial and substitute any sentence which would have been open to the court-martial, provided it was not more serious, although the assessment of what would constitute a more serious sentence was left to the discretion of the reviewing authority itself.

In reaching the opposite conclusion in *Cooper*, the Grand Chamber took other factors into consideration.

(a) As regards the two “ordinary” members of the court-martial – a flight lieutenant and a squadron leader – the Grand Chamber took the view that their lack of legal training was made up for by the directions given by the judge advocate (one of the most significant safeguards) and by the briefing notes drawn up by the RAF's Courts-Martial Administration Unit (an argument raised by the Government in the present case), which the Court considered to be an additional safeguard of which the Chamber was not aware when its judgment in *Morris* was delivered. The Grand Chamber also took into account another piece of additional information now supplied by the Government, namely that the members of a court-martial cannot be reported on in relation to their judicial decision-making.

(b) As regards the role of the reviewing authority, while taking the view that it constituted an anomalous feature of the present system, and expressing its concern about the possibility of a court's findings being varied

by a non-judicial body, the Grand Chamber emphasised the role of the Courts-Martial Appeal Court, which was responsible for the final review of any new verdict or sentence and which was indeed a judicial body that afforded all the guarantees required by Article 6.

The above summary shows that there are certainly differences between *Morris* and *Cooper*. Some of these are to be found in the particular circumstances of each case; the others are explained by the fact that the respondent Government's submissions were more fully developed and more precise in the second case. Are these differences sufficient to justify reaching two opposite conclusions, separated by an interval of less than two years?

Ultimately, I think that they are. I still think that the intervention of the reviewing authority is anomalous, unfortunate and archaic, and that it would be desirable to put an end to the practice. But I would point out – and for me this is an important aspect in *Cooper* – that the reviewing authority's intervention did not in any way alter the verdict and sentence pronounced by the court-martial which tried Mr Cooper (see paragraph 13 of the judgment); ruling in this particular case, it would have been difficult for the Grand Chamber to uphold a complaint about a matter which had no bearing whatsoever on the outcome for the applicant. As regards the other complaint, the one concerning the “ordinary members” of the court-martial, without sharing completely my colleagues' conviction on this point (see paragraph 124), I accept that the briefing notes drawn up for the information of these officers were indeed capable of strengthening that independence to some extent.

In the final analysis, the whole system is rather complex, as shown *a fortiori* by a comparison with *Grievies*, concerning naval courts-martial. But the essential role of our Court in relation to fair trial is not to push member States towards simplification but to ensure that they comply with the guarantees of Article 6 § 1. As the file submitted to the Court in *Morris* stood, I considered that the respondent State had not done so, but on the basis of the file placed before the Court in *Cooper*, I can now find that it did.