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

FOURTH SECTION

CASE OF MILLER AND OTHERS
v. THE UNITED KINGDOM

(Applications nos. 45825/99, 45826/99 and 45827/99)

JUDGMENT

STRASBOURG

26 October 2004

FINAL

26/01/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

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

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

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mrs V. STRÁŽNICKÁ,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Mrs E. FURA-SANDSTRÖM,
Mr D. SPIELMANN, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 5 October 2004,

Delivers the following judgment:

PROCEDURE

1. The case originated in three applications (nos. 45825/99, 45826/99 and 45827/99) 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 three United Kingdom nationals, Mr Darin Miller, Mr Michael Morrison and Mr Kevin Gillespie ("the applicants"), on 11 January 1999.

2. The applicants were represented by Mr G. Blades, a lawyer practising in Lincoln. The United Kingdom Government ("the Government") were represented by their Agents, Mr C. Whomersley and, subsequently, Mr J. Grainger, both of the Foreign and Commonwealth Office.

3. On 26 September 2000 the Court decided to join and communicate the applications to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the applications at the same time as their admissibility.

THE FACTS

4. Mr Miller was born in 1972 and he resides in Stockton-on-Tees, Mr Morrison was born in 1970 and he resides in Aberdeen and Mr Gillespie was born in 1974 and he resides in Greenock. They are represented before the Court by Mr Blades, a lawyer practising in Lincoln.

I. THE CIRCUMSTANCES OF THE CASE

A. The first and second applicants

5. In April 1996 the first applicant was a soldier and the second applicant was a non-commissioned officer in the regular forces of the British Army. On 29 April 1996 they were charged along with two others (pursuant to section 70 of the Army Act 1955) with four counts of indecent assault contrary to section 15(1) of the Sexual Offences Act 1956.

6. The convening officer, by order dated 26 July 1996, convened a general court-martial to try them. On 10 September 1996 the first applicant was found guilty on two of the charges and was sentenced to 4 years' imprisonment and to be dismissed with disgrace. The second applicant was found guilty on three of the charges and sentenced to 5 years' imprisonment, to be dismissed from the service with disgrace and to be reduced to the ranks. On 19 December 1996 the confirming officer reduced the first applicant's sentence to two years' imprisonment and the second applicant's sentence to three years and six months' imprisonment, but otherwise the findings of the court-martial were confirmed.

7. The applicants petitioned the Defence Council against conviction and sentence. By letters dated 18 February 1998 and 27 February 1997, their representatives were informed of the decisions (taken by the Army Board) to reject their petitions.

8. Both applicants applied to the single judge of the Courts-Martial Appeal Court ("CMAC") for leave to appeal to that court against conviction and sentence. The first applicant pointed to various alleged failings by the judge advocate during the court-martial and argued that his sentence was excessive. The single judge granted leave to appeal to the full CMAC. Before the full CMAC, the first applicant added a new ground of appeal (that he did not have a fair trial by an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention, citing *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I). The second applicant argued before the single judge that the judge advocate had erred and misdirected the court and that he had been denied a fair hearing by an independent and impartial tribunal (referring also to the *Findlay* judgment). The single judge granted leave to appeal to the full CMAC.

B. The third applicant

9. On 4 March 1996 the applicant, a soldier of the regular forces of the British Army, was charged (pursuant to section 70 of the Army Act 1955) with wounding with intent contrary to section 18 of the Offences Against

the Person Act 1861 and with inflicting grievous bodily harm contrary to section 20 of that Act.

10. The convening officer, by order dated 13 August 1996, convened a general court-martial. On 6 September 1996 the applicant was found guilty on the first charge and of assault occasioning actual bodily harm contrary to section 47 of the 1861 Act. He was sentenced to three years and six months' imprisonment and to be discharged from the army.

11. His petition against sentence to the confirming officer was rejected and his conviction and sentence were promulgated on 10 October 1996. By letter dated 20 November 1996, his legal representatives were informed that his petition against sentence had been rejected by a Reviewing Authority appointed by the Army Board of the Defence Council. By letter dated 24 March 1997, the applicant's representatives were informed of the decision (taken by the Army Board) to reject his petition against sentence.

12. On 20 May 1997 he presented a further petition to the Army Board of the Defence Council against conviction arguing that he had not had a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in accordance with Article 6 § 1 of the Convention (referring also to the above-cited *Findlay* judgment). By letter dated 22 May 1997, he was informed that the Reviewing Authority had decided not to waive the relevant time-limit which had by then expired. It was also indicated in that letter that the "*Findlay* issue" had been frequently rejected by the Army Board and by the CMAC.

13. His application to the single judge of the CMAC was dated 18 July 1997 and raised the *Findlay* issue together with the fact that he could not appeal against sentence only to the CMAC. On 6 October 1997 the single judge rejected that application considering that the grounds of appeal were not arguable. He renewed his application for leave to appeal to the full CMAC raising the same points.

C. The Courts-Martial Appeal Court (all three applicants)

14. In response to these appeals, affidavits were filed on behalf of the Ministry of Defence explaining that neither the presidents nor the members of the applicants' courts-martial had been under the command of the convening officer and that none had been subordinate to him in the chain of command. Accordingly, the convening officer would not have reported on either the president or the members of the court-martial in their annual confidential reports. A policy decision had been taken that, as from 1 January 1996, all courts-martial would be composed of a president and members who were not in the chain of command of the convening officer.

15. The applicants' appeals were rejected by detailed judgment of 13 November 1998. As to the "*Findlay* point", the CMAC noted the change in policy as regards the constitution of courts-martial in place since

January 1996. It considered that there was no chain of command influence and no obvious reason why any observer knowing the constitution of the courts-martial and the full facts would suspect any lack of independence or impartiality. In any event, the CMAC pointed out that the applicants' reliance on the *Findlay* judgment was misconceived as the only power of the CMAC was to enquire as to whether the convictions were unsafe. Where there was abundant evidence to support the conclusion of the courts-martial which had been properly convened in accordance with domestic law, the composition and behaviour of which had not been criticised, the CMAC considered that there was no possible reason to intervene. It noted that the time for having regard to the provisions of the Convention had not yet been reached, but it was difficult to see, even in such circumstances, how the provisions of Article 6 could be of any assistance to the applicants.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The relevant provisions of the Army Act 1955 which regulated court-martial procedures at the relevant time are set out in the above-cited *Findlay* judgment (at §§ 32-51).

17. Following the Commission's report in the *Findlay* case (*Findlay v. the United Kingdom*, no. 22107/93, Commission's report of 5 September 1995), it was decided that, as and from 1 January 1996, all courts-martial would be composed of presidents and members not in the chain of command of the convening officer. Thereafter, the 1955 Act was amended substantially by the Armed Forces Act 1996 ("the 1996 Act") which came into force on 1 April 1997. The new court-martial system for which the 1996 Act provides is summarised in the *Findlay* judgment (at §§ 52-57) and is outlined in more detail in the case of *Cooper v. the United Kingdom* ([GC], no. 48843/99, §§ 15-76, ECHR 2003-XII).

THE LAW

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

18. The applicants complained that they had not been afforded a fair trial by an independent and impartial tribunal established by law: they considered their courts-martial to lack structural independence and objective impartiality and they relied on the above-cited *Findlay* judgment. The Government disagreed.

19. Article 6 § 1, in so far as relevant, reads as follows:

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

A. Admissibility

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

21. It is not disputed that the final decision in the applicants' proceedings was that of the CMAC of 13 November 1998. Their complaints were introduced on 11 January 1999 and, therefore, within the six-month time-limit set down by Article 34 of the Convention. In addition, the Court is of the view that, given the nature of the charges (serious criminal charges under domestic law) together with the nature and severity of the penalties imposed (serious sentences of imprisonment), their courts-martial determined criminal charges against them within the meaning of Article 6 § 1 of the Convention (*Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, §§ 82-83 and, more recently, *Ezeh and Connors v. the United Kingdom* [GC], Nos. 39665/98 and 40086/98, §§ 69-130, ECHR 2003-X and the above-cited *Cooper v. the United Kingdom* judgment, § 80.)

22. The Court considers that the applicants' case raises a question of law which is 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 case admissible.

In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 3 above), the Court will immediately consider the merits of this complaint.

B. Merits

23. The Government mainly argued that the present cases were distinguishable from the above-cited *Findlay* case given the policy in place from 1 January 1996 to the effect that the president and members of the applicants' courts-martial were not in the convening officer's chain of command (although they were lower in rank to that officer) and were also all outside the "chain of command area" of the applicants. In addition, the convening officer could only dissolve the court-martial in prescribed circumstances. The post-trial review procedure did not affect the independence of a court-martial, the Court's misgivings in *Findlay* arising from the role of the convening officer as opposed to any post-trial procedures. They further considered that the delivery of the above-cited *Cooper* judgment confirmed their point of view.

24. The applicants disagreed with the Government's interpretation of the *Findlay* judgment (they were of the view that the change in practice after

January 1996 was insufficient to overcome the difficulties identified in that judgment) and also considered the Government's reliance on the above-cited *Cooper* judgment to be misplaced (since that latter case concerned the post-1996 Act system and their case concerned the system in place prior to the 1996 Act). In any event, they maintained that an entirely military court-martial could not try criminal charges compatibly with the independence requirements of Article 6 § 1 of the Convention.

25. In addition, the applicants pointed out that Presidents of courts-martial were not legally qualified and their presence was difficult to justify given the presence of judge advocates. The rank structure of courts-martial put pressure on the junior members. The judge advocates were not members and had no vote on findings or sentence. No reasons were given for the sentences imposed and the judge advocate's advice to the courts-martial was not made public. No reasons were given for the rejection of the applicants' petitions prior to the CMAC proceedings. They had no right to appeal to the CMAC against sentence only. The applicants further argued that the post-trial review procedures themselves breached certain fundamental principles of Article 6 of the Convention.

26. The Court notes, at the outset, that it has recently rejected the submission, repeated by the present applicants, that service tribunals could not, by definition, try criminal charges against service personnel consistently with the independence and impartiality requirements of Article 6 § 1 of the Convention (the *Cooper* judgment, at §§ 108-110).

27. The Court recalls the relevant Convention principles concerning the independence and impartiality requirements of Article 6 § 1 (see the above-cited *Cooper* judgment, § 104):

> "...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.
>
> ... 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 ... ."
>
> ... the tribunal ... must ... be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect ...

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

29. The Court observes that the applicants were tried by courts-martial convened under the system for which the 1955 Act provided, prior to its amendment by the 1996 Act. Mr Findlay's trial by court-martial under that

system was found incompatible with the independence and impartiality requirements of Article 6 § 1 of the Convention in the above-cited *Findlay* case and, consequently, with the fairness requirement of that provision.

In particular, in that case, the Court was mainly concerned about the significant and conflicting roles of the convening officer in court-martial proceedings: he had a key prosecuting role and at the same time appointed members of courts-martial who were subordinate in rank to him and fell within his chain of command. He also had the power "albeit in prescribed circumstances" to dissolve the court martial either before or during the trial. It was further considered "significant" that he acted as "confirming officer" after the trial: a court-martial's verdict and sentence were not effective until "confirmed" by that officer and he could vary the sentence imposed by court-martial as he saw fit. The Court considered this contrary to the "well-established principle" that the power to give a binding decision not alterable by a non-judicial authority was inherent in the notion of "tribunal" and could also be seen as a component of the "independence" required by Article 6 § 1 of the Convention.

Such "fundamental flaws" in the court-martial system could not be remedied by the presence of safeguards (such as the involvement of the judge advocate who was not himself a member of the tribunal and whose advice to it was not made public), by the oath taken by the members of the court-martial board or by any subsequent review proceedings (the court-martial was concerned with serious charges classified as "criminal" under both domestic and Convention law so that the applicant was entitled to a first-instance tribunal which fully met the requirements of Article 6 § 1). The Court concluded that "for all these reasons, and in particular the central role played by the convening officer in the organisation of the court martial", Mr Findlay's misgivings about the independence and impartiality of his court-martial were objectively justified.

30. The parties disputed whether the present applications could be distinguished from the *Findlay* case since no member of the present courts-martial was in the chain of command of the convening officer. Having regard to the above-described reasoning in the *Findlay* judgment, the Court considers it clear that this factor is not sufficient by itself to distinguish the present from the *Findlay* case. The convening officer retained a key prosecuting role while appointing members of the applicants' courts-martial who remained subordinate in rank to him. He could still "albeit in prescribed circumstances" have dissolved the applicants' courts-martial. In addition, he continued to act as confirming officer: the present applicants' verdict and sentence were therefore not effective until "confirmed" by that officer and he had the power to vary their sentences as he saw fit.

31. Having regard also to the fundamental nature of the changes (introduced by the 1996 Act) which were later found to render the army and air-force court-martial system compatible with the requirements of Article 6

§ 1 which were introduced by the 1996 Act (see the above-cited *Cooper* judgment, at §§ 111-134), the Court considers that the present applicants' misgivings about the independence and impartiality of their courts-martial, convened under the 1955 Act, were objectively justified. Their courts-martial proceedings were, consequently, unfair. It is not therefore necessary to examine their additional submissions (outlined at paragraph 25 above).

32. In sum, there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. Article 41 of the Convention provides:

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

34. The applicants did not claim to have suffered any pecuniary or non-pecuniary damage.

35. They claimed reimbursement of a total sum of 7713.05 pounds sterling ("GBP") inclusive of value-added tax ("VAT") for their legal costs and expenses incurred before the Court. A breakdown of the legal work done was provided (including telephone calls and letters and amounting to a total of almost 40 hours work), as was the charge-out rate (GBP160/hour).

36. The Government considered excessive both the hourly charge-out rate (*inter alia*, most of the work had been completed some years ago) and the hours of work for which the applicant claimed reimbursement (given, *inter alia*, the overlap between the applicants' cases and the relative brevity of the parties' observations in the cases).

37. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses shown to have been actually and necessarily incurred and to be reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, and noting in particular the similarity of the three present applications and their relative lack of novelty in view of the above-cited *Findlay* judgment, the Court considers it reasonable to award the total sum of EUR 4000 (inclusive of VAT) for costs and expenses in the applicants' proceedings before the Court, this sum to be converted into pounds sterling at the rate applicable at the date of settlement.

C. Default interest

38. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the applications admissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the total sum of EUR 4000 (four thousand euros) in respect of all of their costs and expenses (inclusive of VAT), this sum to be converted into pounds sterling at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 26 October 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President