AS TO THE ADMISSIBILITY OF

Application No. 22107/93
by Alexander FINDLAY
against the United Kingdom

The European Commission of Human Rights sitting in private on 23 February 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
J. MUCHA
D. SVÁBY
E. KONSTANTINOV

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 28 May 1993 by Alexander FINDLAY against the United Kingdom and registered on 22 June 1993 under file No. 22107/93;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 19 April 1994, the observations in reply submitted by the applicant on 3 June 1994 and the supplementary observations submitted by the respondent Government on 10 February 1995;

- the parties' oral submissions at the hearing on 23 February 1995;

Having deliberated;

Decides as follows:

THE FACTS

The facts as submitted by the parties may be summarised as follows.

A. Particular circumstances of the case

Background

The applicant is a British citizen born in 1961 and resident in Windsor. He is represented before the Commission by Mr. John McKenzie, a solicitor practising in London.

The applicant joined the British Army in 1980 when he became a member of the Scots Guards. His service was due to terminate in or around October or November 1992 when he would have received a Resettlement Grant and, at the age of 60, an army pension.

On 28 September 1981 the applicant was sentenced by a military court to 50 days' imprisonment for absence without leave.

In 1982 the applicant took part in the Falklands campaign. He was wounded. He saved another soldier's life by administering a tracheotomy to him with a biro pen. The applicant suffered extreme stress as a result of his experiences.

Subsequently the applicant had three further convictions before military courts. On 29 November 1984 he was reduced to the rank of guardsman due to his failure to follow the correct sick leave procedure and for absence without leave. On 27 May 1986 the applicant was again reduced in rank for failing to report for a course. On 19 February 1987 the applicant was convicted of theft and of using a false instrument.

In 1987, the applicant sustained an injury during training for service in Northern Ireland. He fell from a rope and broke his arm and severely damaged his back. His back injury affected his performance during training and he suffered from depression as a result.

In or about 1990, the applicant, who had become a Lance Sergeant, was serving with his regiment in Northern Ireland. On 29 July 1990, after a heavy drinking session, he held members of his own unit at pistol point and threatened to kill himself and certain of his colleagues. He fired two shots which were not aimed at anyone and subsequently surrendered the pistol. The applicant was then arrested.

Pre-hearing

On 31 July 1990 an army psychiatrist ("Doctor A") examined the applicant and stated that the applicant was responsible for his actions at the time of the incident. However it was a combination of a number of stresses (including his back injury and posting in Northern Ireland) together with the applicant's heavy drinking on the day that led to the "almost inevitable" event. Doctor A recommended "awarding the minimum appropriate punishment" to the applicant.

The applicant was charged by the Convening Officer ("the C.O.") with eight offences (six civilian and two military), pursuant to the Army Act 1955. The C.O. decided that the applicant should be tried by general court-martial rather than by a civilian court or other form of court-martial.

In order to establish that the applicant was fit to stand trial, the applicant was examined, at the request of the army, by another army psychiatrist ("Doctor B"), who was a civilian consultant psychiatrist with the Ministry of Defence since 1980. Her report, produced in January 1991, confirmed that the applicant was fit to plead, knew what he was doing at the time of the incident, but his chronic back problem (which meant he was frustrated and depressed by not being fit for duty in his Northern Ireland posting), and "his previous combat stresses and a very high level of alcohol ... combined to produce this dangerous behaviour."

In March 1991 Doctor B produced another report, at the request of the army, confirming that while it was clear what were the stresses on the applicant, the nature of his reaction to them on the day in question was to be explained by the applicant's experiences in the Falklands war. She confirmed that similar incidents occurred in those who had previously experienced Post Traumatic Stress Disorder ("PTSD") and such incidents seemed to be a late feature of PTSD. Doctor B did

not clearly say that the applicant suffered from PTSD. She confirmed that the consumption of alcohol on the relevant day was due to the applicant's condition and not a cause of it.

The prosecuting officer assigned to the case therefore requested the attendance of Doctor B at the court-martial to be convened, but Doctor B indicated that she was unwilling to attend. The applicant's representative was then informed of Doctor B's response. In addition, by letter dated 24 June 1991 the prosecutor wrote to the applicant's representative offering to secure the attendance of any doctors who may have treated the applicant, requesting that the applicant's representative indicate which doctors he would require to attend a court-martial, and stating expressly that the prosecuting officer anticipated that Doctor B's attendance may be required. No response was received from the applicant's representative despite a further reminder, dated 16 July 1991, sent on behalf of the C.O..

In July 1991 the applicant brought a civil action against the Secretary of State for Defence on the basis of the negligence of the army medical authorities in failing to diagnose and treat his PTSD and also (but forming a lesser part of this action) in respect of his back injury received during training in 1987.

In October 1991 a third psychiatrist ("Doctor C") produced a report which clearly confirmed that the applicant was suffering from PTSD as a result of the Falklands conflict and that the combination of the frustration and depression due to his chronic back problem, his posting in Northern Ireland and the consumption of alcohol triggered the incident. In addition Doctor C was of the opinion that the applicant was psychotic, out of touch with reality and did not know what he was doing at the time of the incident.

By order dated 31 October 1991 the C.O. convened a general court-martial. The C.O. was a Major General and was General Officer Commanding ("GOC") of the London District and Household Division.

The court-martial comprised a President and four other members and all were subordinate in rank to the C.O.:

- The President was a Colonel in the Territorial Army and TA Adviser HQ, London District. He was appointed by name by the C.O. and was not a permanent president.

- Member B was a Lieutenant Colonel (Royal Anglian) and his diary was administered by the London District. He was appointed by name by the C.O. and was a permanent president sitting in the capacity of ordinary member.

- Member C was a Captain (2nd Battalion Coldstream Guards) stationed in the London District. He was appointed to the court-martial by his commanding officer.

- Member D was a Major (2nd Battalion Grenadier Guards) stationed in London District and the C.O., as GOC, was this member's second superior reporting officer. He was appointed to the court-martial by his commanding officer.

- Member E was a Captain (Postal and Courier Department, Royal Engineers (Women's Royal Army Corps)) appointed by her commanding officer. The Postal and Courier Depot is under the direct command of the Ministry of Defence and is administered by the London District.

The assistant prosecuting and defending officers were both officers from the 2nd Scots Guards stationed in the London District.

The Judge Advocate ("J.A.") was a barrister on general secondment

to the office of Judge Advocate General until February 1996.

On 2 November 1991, though not fully cognisant of the opinion of Doctor B at that time, the applicant's representatives made a written request to the prosecuting authorities to ensure the appearance of Doctor B at the court-martial. On 5 November 1991, the prosecutor issued a witness summons requiring Doctor B's attendance.

The court-martial hearing

On 11 November 1991 the applicant appeared before the general court-martial. Doctor B did not appear in answer to the witness summons. The applicant was told that Doctor B would not be available and he claims that it was for this reason that he pleaded guilty to seven of the charges on the charge sheet (2, 3, 4, 5, 6, 7 and 8). Charges 2, 4 and 5 were charges of common assault (civilian offences), charges 3 and 6 were charges of conduct to the prejudice of good order and military discipline (a military offence) and charges 7 and 8 were charges of threatening to kill (a civilian offence). The applicant's representative did not apply for an adjournment of the proceedings (in light of Doctor B's absence) nor object to any of the members of the court-martial hearing the case.

The applicant was also presented with a second charge sheet which he had not seen before and which contained two charges of a disciplinary nature related to the consumption and storage of alcohol. He pleaded guilty to the former and not guilty to the latter charge.

The applicant introduced to the court-martial, at the beginning of his case, the above described reports prepared by Doctors A, B and C. Doctor C was called by the applicant to give evidence in relation to PTSD. He confirmed in direct evidence his view that the applicant suffered from PTSD, that the effect on the applicant of the Falklands war was the main reason for his behaviour, that the applicant was not responsible for what he was doing at the time of the incident and that the applicant was in need of counselling for what was a well recognised disorder. During cross-examination Doctor C stated that this was, in fact, the first time he had dealt with battle-related PTSD.

The applicant's representative urged the court-martial that, in light of the applicant's condition (demonstrated by the psychiatric reports) and the little likelihood of his re-offending, the applicant should be allowed to complete the few remaining months of his service and leave the army with his pension intact and a minimal endorsement on his record.

The applicant claims that during the trial the J.A. was hostile to the applicant's representative. In the first place, the Prosecutor introduced, under rule 71(3)(a) of the Army Rules of Procedure (1972), mitigating evidence as to the applicant's record since the incident. Evidence was given to the effect that the applicant's conduct in the year since the offence had been described by his company commander as impeccable and that his commanding officer wished to retain the services of the applicant in his battalion. The J.A. interrupted and commented as follows:

> "J.A. - That is the view of the Commanding Officer, who is aware, is he, that the accused has been found guilty by this court of two offences of making a threat to kill members of his unit, and the Commanding Officer wishes to retain him in the Battalion does he ?".

It is the applicant's recollection that the J.A. snapped a pencil in irritation while speaking as above.

Secondly Doctor C gave evidence to the effect that the applicant, while suffering from PTSD, was not suffering from any other form of

mental illness. The J.A. interrupted this evidence to ask for a pause to make a note of this point.

No psychiatric evidence was introduced by the Prosecutor either to rebut the reports and evidence submitted by the applicant or in furtherance of the Prosecutor's obligation, under rule 71(3)(a) of the Army Rules of Procedure (1972), to introduce evidence of matters which may have made the accused more susceptible to the commission of the offence.

The general court-martial sentenced the applicant to 2 years' imprisonment, reduction to the rank of guardsman and dismissal from the army. No reasons were given for the level of the sentence (though the court-martial noted the period of time the applicant had already been in custody on the charges). The applicant thereby suffered a reduction in his pension entitlements.

Post-hearing

The applicant petitioned the Confirming Officer for a reduction in sentence. The Confirming Officer was in fact the C.O. who had appointed himself Confirming Officer under section 111 of the Army Act 1955. The Confirming Officer received the advice of the Judge Advocate General's office and, on 16 December 1991, the applicant was informed that the sentence had been upheld.

The applicant was then removed from his unit to begin his sentence.

The applicant petitioned the first Reviewing Authority (the Deputy Director General of Personal Services as delegate of the Army Board) concerning his sentence. That officer, who was not legally qualified, also obtained advice from the Judge Advocate General's office. By letter dated 22 January 1992, the applicant was informed that this petition had been rejected.

The applicant then petitioned the Director General of Personal Services (also not legally qualified) as delegate of the Army Board in relation to his sentence. His petition was rejected on 10 March 1992.

The applicant was not informed of the identity of the Confirming Officer or of either of the Reviewing Authorities. He was not informed that advice had been obtained from the Judge Advocate General's office or of the nature of that advice. In addition the applicant was not given reasons for the decisions confirming his sentence and rejecting his petitions.

By application dated 10 March 1992, the applicant applied to the Divisional Court of the High Court for leave to challenge, by judicial review, the validity of the findings of the court-martial. In this application, the applicant challenged his sentence as being excessive and alleged that the proceedings were contrary to the rules of natural justice. On 14 December 1992, the Divisional Court refused leave on the basis that the conduct of the court-martial had been entirely in accordance with the Army Act 1955. In particular the Divisional Court found that the J.A.'s interventions were appropriate and noted that the applicant's representative had accepted at the court-martial hearing that the intervention by the J.A. during Doctor C's evidence was correct and appropriate.

A report dated 16 January 1994 was subsequently prepared by Doctor B for the purposes of the civil action against the Secretary of State confirming her previous opinion, though now clearly labelling the effect of the Falklands conflict on the applicant as PTSD. In March 1984 the applicant's civil action was settled by the Secretary of State for Defence by paying the applicant £100,000, though the settlement did not differentiate between the claim in respect of PTSD and the back

injury. The applicant claims that this was an effective acknowledgement by the Secretary of State for Defence that the applicant suffered from PTSD on the day of the incident because prior to the settlement the applicant was examined by a psychiatrist acting for the Secretary of State who offered the applicant treatment for PTSD.

B. Relevant domestic law and practice

1. General

The law and procedures in respect of courts-martial for army personnel are contained in the Army Act 1955 ("the 1955 Act") and in the Rules of Procedure (Army) 1972 ("the 1972 Rules"). Under section 70 (1) of the 1955 Act, "civilian" offences are also offences under the 1955 Act. Therefore, even if the charges involve civilian and army offences, in most cases army personnel can be tried by the army authorities on all charges under the 1955 Act. Serious offences against army law can be tried by district, field or general court-martial.

A general court-martial must consist of a President (normally a brigadier or colonel in the army) and at least four other officers in the army. A Judge Advocate ("the J.A.") must also be appointed to a general court-martial. A general court-martial will be convened by a Convening Officer ("C.O.") who is normally a major-general in the army. The President of the court-martial must be appointed by name by the C.O., and the remaining members may be appointed by name, or by the C.O. requiring a particular commanding officer of a unit to nominate an officer of the required rank.

Each member of the court-martial must swear 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 the Army Act 1955, without partiality, favour or affection, and I do further swear that I will not on any account at any time whatsoever disclose or discover the vote or opinion of the president or any member of this court-martial, unless thereunto required in the due course of law."

2. The Convening Officer

The C.O. must be a "Qualified Officer" (meaning he must be at least a field officer or of a corresponding rank) who is in command of a body of the regular forces or in command of the unit within which the person to be tried is serving. The Qualified Officer can delegate this power to an officer under his command but not to an officer below the rank of colonel.

The powers and duties of the C.O. in relation to the prosecution are, inter alia, to direct upon what charges the accused is to be tried and to decide the wording of those charges. The C.O. decides on the type of court-martial required and convenes a court-martial for each case. The convening order specifies, inter alia, the date, place and time of the trial, the name of the President and the details of the other members. The C.O. ensures that a J.A. is appointed by the Judge Advocate General's office, or failing such appointment, appoints the J.A. himself. He also appoints the Prosecutor or directs a commanding officer to appoint an officer to prosecute. The C.O. sends an abstract of the evidence to the Prosecutor and to the J.A., and may indicate to the Prosecutor the passages of the evidence which may be inadmissible. He procures the attendance at trial of all witnesses to be called for the prosecution.

In relation to the defence, the C.O.'s powers and duties include ensuring that the accused has a proper opportunity to prepare his defence and that the accused has proper contact with, inter alia, his

witnesses. The C.O. must see that the accused is informed that he may require the attendance of defence witnesses and must order the attendance of witnesses "reasonably" requested by the defence. No other authority has this power. Witnesses not subject to military law may be summoned to attend the trial by order of the C.O.. The accused must also be informed by the C.O. if the prosecutor is legally qualified so that the accused has the opportunity to obtain his own legal representation.

The court-martial can be dissolved by the C.O. either before or during the trial when required in the interests of the administration of justice (section 95 of the 1955 Act). The C.O. also acts as Confirming Officer. Finally, before charges can be withdrawn the C.O. must consent.

3. Judge Advocate General and Judge Advocates

The current Judge Advocate General was appointed to the office by the Queen in February 1991 for 5 years. He is answerable to the Queen and is removable from office by the Queen for inability or misbehaviour.

A number of assistant and deputy J.A.'s are appointed to the Judge Advocate General's office by the Lord Chancellor and they must have at least seven and five years experience respectively as an advocate or barrister. One of these J.A.'s is assigned to a courts martial by the Judge Advocate General's office or by the C.O. himself. The J.A. does not swear an oath upon appointment and is normally exempted from doing so at individual courts-martial. The J.A. is removable only by the Lord Chancellor for inability or misbehaviour but is responsible for the proper discharge of his functions to the Judge Advocate General. The Judge Advocate General and the J.A.'s receive, out of money provided by parliament, such remuneration as the Lord Chancellor may determine.

The Judge Advocate General's role is mainly advisory. He advises the Secretary of State for Defence on all legal matters pertaining to his appointment, the confirming and reviewing authorities on post-trial matters and the Ministry of Defence on legal matters. He is also responsible for superintending the administration of army law and retaining the records of court-martials.

Once assigned to a court-martial the J.A. must provide, on request, an opinion on any point of law or procedure to the prosecution and the accused either outside of or during the court-martial. He advises on all questions of law and procedure that arise during the hearing and the court-martial must accept his advice unless it has weighty reasons for not doing so. On a number of specified matters, on which he is consulted by the court-martial, the opinion of the J.A. must be followed. The J.A. is also responsible for advising the court-martial as to any defect in its constitution or in the charge sheet.

At the close of the trial, the J.A. sums up the relevant law and evidence. If during the court-martial's deliberations on the charges (at which the J.A. cannot be present) further advice is required then the court-martial must receive that advice in open court. The J.A. can, however, advise the court-martial in private on the general principles governing the approach to sentencing. The J.A. is not a member of the court-martial and has no vote in the decision on the charges or on the sentence.

Finally, the J.A. must ensure (in conjunction with the President) that the accused does not suffer any disadvantage during the hearing. Where an accused pleads guilty the J.A. should explain to the accused the nature of the charges, the resulting difference in procedures and the full import of his plea. If the accused or his representatives subsequently make submissions that might imply that the accused is not

guilty of the charges, the J.A. has a duty to satisfy the court-martial that the accused and his representative are not under any misapprehension as to the plea of guilty, and that the accused's clear admission has addressed all elements of all charges.

4. The court-martial hearing

When the applicant pleads guilty, the Prosecutor outlines the facts and must then, pursuant to Rule 71(3)(a) of the 1972 Rules, put in evidence any circumstance which may have made the accused more susceptible to the commission of the offence by way of mitigation. The defence then makes a plea in mitigation. The members of the court-martial retire (with the J.A.) to consider the sentence, decide, return and announce the sentence. There is no provision for the giving of reasons by the court-martial for its decision.

5. Sentencing

Certain types of sentences are not available to a court-martial even if the charges are civilian. A court-martial cannot suspend a prison sentence, issue a probation order, sentence to community service or issue orders under the mental health legislation. Moreover the level of sentencing power depends on the type of court-martial that is convened. A district court-martial is more restricted in terms of sentencing than a general court-martial. The maximum sentence laid down by the 1955 Act and civilian law, for the charges on the first charge sheet in respect of which the applicant pleaded guilty, are as follows:

- Charges 2, 4 and 5: six months' imprisonment or a fine
- Charge 7: 10 years' imprisonment
- Charges 3 and 6: imprisonment not exceeding two years.

The court-martial must award one global sentence in relation to all the offences in respect of which the accused is found guilty.

6. Post-hearing reviews

(a) A Courts-Martial Appeal Court can hear appeals from a court-martial but there is no provision for such an appeal against sentence in circumstances where the accused pleaded guilty.

(b) The court-martial's findings are not treated as a finding of guilt or a sentence until confirmed by the Confirming Officer (normally the C.O. or any officer superior in command to the C.O.). The confirmation procedure is automatic but if a petition is presented prior to the decision of the Confirming officer it will be considered. Prior to confirmation the Confirming Officer must consult the Judge Advocate General's office for advice, but the actual J.A. who attended the court-martial hearing does not proffer this advice. That advice is not disclosed to the appellant on grounds of legal privilege and/or public interest immunity. The Confirming Officer can withhold confirmation, substitute a sentence, remit in whole or in part any punishment, commute a punishment for one or more lesser punishments and postpone the carrying out of the sentence.

(c) Once the Confirming Officer has confirmed the sentence, the defendant can petition the Reviewing Authorities. A petitioner can have more than one review. The relevant Reviewing Authorities were the Queen, the Army Board as delegate of the Defence Council, the Deputy Director and the Director General of Personal Services (Army) at the Ministry of Defence as delegate of the Army Board and any officer superior in command to the Confirming Officer. The Reviewing Authorities may consult the Judge Advocate General's office for advice and have the power to quash a sentence and to exercise the same powers as the Confirming Officer in relation to substituting, remitting or commuting the sentence.

A petitioner is not informed, when making the relevant petition, of the identity of the Confirming Officer or of the Reviewing Authorities. No statutory or formalised procedures are laid down for the conduct of the post-hearing reviews and no reasons are given for decisions delivered subsequent to the post-hearing reviews. Neither the fact of, nor the nature of, the advice received from the Judge Advocate General's office by these bodies is disclosed to a petitioner, as this advice is considered legally privileged or covered by public interest immunity.

COMPLAINTS

The applicant makes a number of complaints under Article 6 para. 1 of the Convention:

1. The applicant complains that he did not receive a fair hearing before the court-martial and in particular he complains in relation to:

(a) the alleged lack of equality of arms between the prosecution and defence;

(b) the inaction of the C.O. in relation to the attendance of a vital defence witness, and the conduct of the prosecution in respect of the psychiatric evidence. This meant that the applicant had to plead guilty and was then prevented from presenting his best plea in mitigation;

(c) the failure to inform the applicant of the advice given by the J.A. in private to the court-martial in relation to sentencing;

(d) the failure of the court-martial to give reasons for its decision on sentence; and

(e) the alleged hostility of the J.A. during the hearing.

2. The applicant also complains that he did not receive a fair hearing in relation to the post-hearing reviews as these procedures were appeals but were essentially administrative in nature and conducted in private.

In particular, he complains about the failure to give reasons for each of the decisions, to identify the persons making those decisions or to inform the applicant of the advice given by the Judge Advocate General's office. The applicant also complains specifically about the fact that neither of the Reviewing Authorities was legally qualified, which implies that, when the first review took place on the basis of the advice of the Judge Advocate General's office, it was likely that such advice would be followed. The second Reviewing Authority did not seek any such advice, and therefore a person without any legal qualifications or advice made the final decision on the applicant's petition against sentence. The applicant also complains about the lack of statutory or otherwise formal rules, procedures or oaths in relation to the conduct of the post-hearing reviews.

3. The applicant further complains that the internal organisation and structure of the court-martial, the Confirming Officer and the Reviewing Authorities meant that those bodies were not, or in the alternative were not seen to be, independent or impartial. In particular the applicant refers to:

(a) the fact that neither the court-martial, the Confirming Officer nor the Reviewing Authorities were independent of the prosecuting authority;

(b) the employment of the J.A. by the Ministry of Defence, the advice of the J.A. given in private, the alleged hostility of the

J.A. during the court-martial and the subsequent involvement of the Judge Advocate General's office in advising, in private, during the post-hearing reviews;

(c) the position and wide powers of the C.O., that officer's numerous roles prior to, during and after the hearing, his appointment of the members of the court-martial and the relationship between those members and the C.O.;

(d) the appointment of members for a specific court-martial only; and

(e) the fact that the Judge Advocate General's office acted as legal adviser at the hearing, as prosecutor at the confirming stage and as prosecutor and appeal authority at the review stages.

4. In addition the applicant complains that the decisions of the court-martial and in the post-hearing reviews were unreasonable in view of the psychiatric evidence submitted by the applicant.

5. Finally the applicant complains that he was subjected to an unreasonably limited sentencing regime (in comparison with that available in civilian courts) as a consequence of the unappealable decision by the C.O. to try him by general court-martial.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 28 May 1993 and registered on 22 June 1993.

On 1 December 1993 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application.

The Government's observations were received, after two extensions of the time-limit fixed for this purpose, on 19 April 1994 and the applicant's observations in reply were received on 3 June 1994.

On 7 December 1995 the Commission decided to invite the parties to a hearing, which was held on 23 February 1995. At the hearing the Government were represented by Mr. J. Rankin, Agent, Foreign and Commonwealth Office, Mr. P. Havers and Mr. N. May, both of Counsel, and Ms. J. Murnane, Major-General A. Rodgers and Air Vice Marshal G. Carlton, as advisers. The applicant was represented by Mr. J. MacKenzie and Mr. G. Blades, Solicitors.

THE LAW

The applicant raises a number of complaints under Article 6 para. 1 (Art. 6-1) of the Convention in relation to the court-martial, the Convening Officer and the Reviewing Authorities and in respect of his hearings and petitions before those bodies.

Article 6 para. 1 (Art. 6-1), insofar as is relevant, reads as follows:

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

In the first place, the applicant complains that neither the court-martial, the Convening Officer nor the Reviewing Authorities were, or could be perceived to be, independent or impartial.

In this regard, the applicant mainly focuses on internal structural and organisational matters. He refers, inter alia, to the status, roles and duties of the Convening Officer, the Judge Advocate and the Judge Advocate General's office. The applicant also refers to the relationship of the members of the court-martial, the Convening Officer and the Reviewing Authorities to the prosecuting authority. He points to the lack of civilian judicial members of the court-martial, the absence of guarantees against outside pressures and the ad hoc nature of the appointment of the members of the court-martial. The applicant submits that, inter alia, the above factors demonstrate a lack, or at least a perceived lack, of independence and impartiality particularly when, as in his case, an important policy issue in respect of Post Traumatic Stress Disorder arose for consideration.

The Government argue that the independence and impartiality of these bodies is demonstrated by a number of factors. The Government point out, inter alia, that the members of the court-martial take an oath of independence and impartiality, that none of those members is subject to instruction by a higher authority, that the Convening Officer is not the prosecuting authority, that the Judge Advocate and the advisers in the Judge Advocate General's office are civilians, experienced members of the legal profession and totally independent of the armed forces, and that an individual member of a court-martial cannot be removed by a superior officer once appointed.

The Government also argue that the Judge Advocate must satisfy himself that none of the members of the court-martial knows the accused or has heard anything about the charges. In the present case the applicant did not object to the constitution of the court-martial and in any event, according to the Government, it does not follow from the fact that the members of the court-martial were all subordinate in rank to the Convening Officer (having no direct prior relationship with that Officer) that they lacked independence or impartiality.

In addition, the Government submit that military personnel are best suited to try a member of the armed forces under military law in respect of offences committed against fellow soldiers on military premises when on a tour of duty. The Government argue that the ad hoc convening of a court-martial for each case is in fact an enhancement of the protections available to an accused as the members are not serving a term of office which they may wish to be renewed.

Secondly, the applicant complains that the court-martial hearing and the post-hearing reviews were neither fair nor public.

In this respect the applicant points mainly to the lack of reasons for the decisions of the court-martial, the Confirming Officer and the Reviewing Authorities, the privacy surrounding the advice given by the Judge Advocate and the Judge Advocate General's office, together with the administrative and private nature of the post-hearing reviews. He argues that, inter alia, these factors meant that he was neither able to establish upon what basis the relevant bodies made their decisions nor, therefore, effectively able to participate in any of the post-hearing reviews and the judicial review proceedings.

The applicant also points, in this respect, to an inequality of arms between the prosecution and the defence due to the Convening Officer's effective control of the court-martial hearing through the prosecuting officer, and to the conduct of the prosecuting officer, the Judge Advocate and the Convening Officer (the latter of whom allegedly failed to ensure the attendance of a vital witness) in respect of that hearing. These factors, the applicant submits, also contributed to the overall unfairness of the proceedings against him. He also takes issue with the limited sentencing regime available and the reasonableness of the decisions reached in his case.

The Government argue, inter alia, that the procedural guarantees

accorded to the applicant before the court-martial (including the right to call and cross-examine witnesses and to representation) and the duties of the Judge Advocate towards the applicant during the court-martial hearing, ensured that the proceedings, taken as a whole, were fair. The Government also submit that, in light of the importance of discipline in the armed forces and in view of the seriousness of the charges, the reasons for the sentence were obvious.

In addition, the Government dispute that the Convening Officer controlled the proceedings through the prosecuting officer, and point out that the applicant was represented by an experienced lawyer. The Government also refer to the fact that the conduct of the Judge Advocate was considered and found acceptable by the Divisional Court, and submit that the prosecuting officer did all that was possible to ensure the attendance of the relevant witness, including issuing a witness summons. The applicant has, according to the Government, no right to an appeal under the Convention and, in any event, the post-hearing reviews are not, according to the Government, designed to be full appeals, but rather further pleas in mitigation.

In respect of the sentencing regime, the Government submit that the question of whether the accused is tried by the civilian or military authorities is a decision for the civilian authorities, though by agreement the military authorities do not have to report certain matters to the civilian authorities. A wider sentencing regime is not possible due to the lack of facilities in the armed forces and to the fact that some sentences would be inappropriate to pass upon a serving member of the armed forces and inconsistent with his duties. The Government further submit that the decision of the court-martial was reasonable in view of, inter alia, the importance of discipline in army life, the context in which the offences were committed and the seriousness of the charges.

The Government therefore conclude that all of the applicant's complaints under Article 6 para. 1 (Art. 6-1) of the Convention should be deemed manifestly ill-founded, or that the case does not disclose a violation of the Convention.

The Commission finds, in light of the parties' submissions, that the applicant's complaints under Article 6 para. 1 (Art. 6-1) of the Convention raise serious and complex issues of fact and law which require determination on their merits. It follows that the application cannot be dismissed as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H.C. KRUGER) — (C.A. NØRGAARD)