EUROPEAN COMMISSION OF HUMAN RIGHTS

FIRST CHAMBER

Application No. 27772/95

Nigel David Gooch

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 4 March 1998)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a British citizen, born in 1964 and resident in Mid Glamorgan. He was represented before the Commission by Mr Gilbert Blades, a solicitor practising in Lincoln.

3. The application is directed against the United Kingdom. The respondent Government were represented by Mr Eaton, Agent, Foreign and Commonwealth Office.

4. The case raises issues under Article 6 para. 1 of the Convention and mainly concerns the independence and impartiality of the court-martial convened to try a charge against the applicant. The applicant also argues that the court-martial proceedings were unfair and not public and that the court-martial was not "established by law" within the meaning of Article 6 para. 1 of the Convention.

B. The proceedings

5. The application was introduced on 23 June 1995 and registered on 30 June 1995.

6. On 18 October 1995 the Commission (First Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to adjourn the application pending the outcome of two similar cases before the Commission. The Commission had adopted its Report in the first case in September 1995 and it adopted its Report in the second case in June 1996 (Eur. Court HR, Findlay v. the United Kingdom judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, Comm. Report dated 5 September 1995 and Coyne v. the United Kingdom judgment of 24 September 1997, to be published in Reports of Judgments and Decision 1997, Comm. Report dated 25 June 1996). Accordingly, on 2 July 1996 the Commission decided to invite the parties to submit written observations on the admissibility and merits of the applicant's complaints under Article 6 para. 1 of the Convention and those observations were requested by letter dated 12 July 1996.

7. By letter dated 31 October 1996 the Government stated that they did not wish to submit observations on the admissibility of the application and that, should the application be admissible, they would wish to have the opportunity to submit any observations on the merits they considered necessary. On 4 March 1997 the Commission decided not to grant legal aid to the applicant.

8. Further to the judgment of the Court in the Findlay case (Eur. Court HR, Findlay v. the United Kingdom judgment, loc. cit.), the Commission declared the application admissible on 9 April 1997.

9. The text of the Commission's decision on admissibility was sent to the parties on 24 April 1997 and they were invited to submit such further information or observations on the merits as they wished. No such further submissions were made by either party.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission (First Chamber) in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM	M.P. PELLONPÄÄ, President
	N. BRATZA
	E. BUSUTTIL
	A. WEITZEL
	C.L. ROZAKIS
Mrs	J. LIDDY
MM	L. LOUCAIDES
	B. CONFORTI
	I. BÉKÉS
	G. RESS
	A. PERENI?
	C. BÎRSAN
	K. HERNDL
	M. VILA AMIGÓ
Mrs	M. HION
Mr	R. NICOLINI

12. The text of this Report was adopted on 4 March 1998 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. The Commission's decision on the admissibility of the application is annexed hereto.

15. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

16. On 6 May 1994 the applicant, who was at the time a Lance Corporal in the army of the United Kingdom, was convicted by a general court-martial (pursuant to section 70 of the Army Act 1955) of the civilian criminal offence of buggery

contrary to the Sexual Offences Act 1956. He was sentenced to imprisonment for three years, to dismissal from the army and to be reduced to the ranks.

17. On 20 May 1994 the applicant petitioned the Confirming Officer in relation to his conviction and sentence. On 20 June 1994 the Confirming Officer confirmed the applicant's conviction and sentence. On 25 August 1994 the applicant petitioned the Defence Council against conviction and sentence. By letter dated 11 October 1994 the applicant's then representative was informed that the Army Board (who took the decision on the petition on behalf of the Defence Council) had rejected the petition.

18. On 16 October 1994 the applicant applied to a single judge of the Courts-Martial Appeal Court for leave to appeal to that court against his conviction and for an extension of time to do so. On 6 January 1995 the application was rejected by a single judge of that court. Though the applicant had been out of time in lodging his application, the single judge considered the merits of the application for leave to appeal but rejected the application. On 17 March 1995 the full Courts-Martial Appeal Court, having also considered the merits of the application for leave to appeal, refused leave to appeal.

B. Relevant domestic law and practice

19. The principal law and procedures applicable are contained in the Army Act 1955 ("the 1955 Act") prior to its amendment by the Armed Forces Act 1996 ("the 1996 Act"), which latter Act came into force on 1 April 1997. Accordingly, and apart from section (g) below, the following is an outline of the pre-1996 Act law and practice.

(a) General

20. Many civilian offences are also offences under the 1955 Act (section 70(1)). Although the final decision on jurisdiction lay with the civilian authorities, army personnel who were accused of such offences were usually tried by the army authorities unless, for example, civilians had been in some way involved.

21. Depending on their gravity, charges under the 1955 Act could be tried by district, field or general court-martial. These were not standing courts: they came into existence in order to try a single offence or group of offences.

22. At the time of the events in question, a general court-martial consisted of a President (normally a brigadier or colonel in the army), appointed by name by the Convening Officer, and at least four other officers, either appointed by name by the Convening Officer or, at the latter's request, by their commanding officer.a) Each member of the court-martial had to 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."

(b) The Convening Officer

23. Before the coming into force of the 1996 Act, a Convening Officer of a general court-martial had to be a "qualified officer" or an officer not below the rank of Colonel to whom the qualified officer had delegated his or her powers. To be a "qualified officer", an officer had to be not below the rank of Field Officer or corresponding rank who was in command of a body of the regular forces or of the command within which the person to be tried was serving.

24. The Convening Officer assumed responsibility for every case to be tried by court-martial. He or she would decide upon the nature and detail of the charges to be brought and was responsible for convening the court-martial.

25. He would draw up a convening order, which would specify, inter alia, the date, place and time of the trial, the name of the President and the details of the other members all of whom he could appoint. He ensured that a judge advocate was appointed by the Judge Advocate General's Office and failing such appointment, could appoint one. He also appointed, or directed a commanding officer to appoint, the prosecuting officer.

26. Prior to the hearing, the Convening Officer was responsible for sending an abstract of the evidence to the prosecuting officer and to the judge advocate, and could indicate the passages which might be inadmissible. He procured the attendance at trial of all witnesses to be called for the prosecution. When charges were withdrawn, the Convening Officer's consent was normally obtained, although it was not necessary in all cases, and a plea to a lesser charge could not be accepted from the accused without it. He had also to ensure that the accused had a proper opportunity to prepare his defence, legal representation if required and the opportunity to contact the defence witnesses, and he was responsible for ordering the attendance at the hearing of all witnesses "reasonably requested" by the defence.

27. The Convening Officer could dissolve the court-martial either before or during the trial, when required in the interests of the administration of justice (section 95 of the 1955 Act). The Convening Officer usually also acted as Confirming Officer.

(c) The Judge Advocate General and judge advocates

28. The Judge Advocate General was appointed by the Queen in February 1991 for five years. He was answerable to the Queen and was removable from office by her for inability or misbehaviour. He had the role of adviser to the Secretary of State for Defence on all matters touching and concerning the office of Judge Advocate General, including advice on army law and the procedures and conduct of the court-martial system. He was also responsible for advising the confirming and reviewing authorities following a court-martial.

29. Judge advocates are appointed to the Judge Advocate General's Office by the Lord Chancellor. They must have at least seven and five years experience respectively as an advocate or barrister.

30. At the time of the events in question, a judge advocate was appointed to each court-martial, either by the Judge Advocate General's Office or by the Convening Officer. He or she was responsible for advising the court-martial on all questions of law and procedure arising during the hearing and the court had to accept this advice unless there were weighty reasons for not doing so. In addition, in conjunction with the President, he was under a duty to ensure that the accused did not suffer any disadvantage during the hearing. At the close of the hearing, the judge advocate would sum up the relevant law and evidence.

31. Prior to the coming into force of the 1996 Act, the judge advocate did not take part in the court-martial's deliberations on conviction or acquittal, although he could advise it in private on general principles in relation to sentencing. He was not a member of the court-martial and had no vote in the decision on conviction or sentence.

(d) The court-martial hearing

32. At the commencement of the trial, the accused could object to individual members of the court-martial, such objection being considered in closed court.

33. The accused was then asked to plead in respect of the charge. If a plea of not guilty was entered the procedure was similar to that followed in the (civilian) Crown Court. After the prosecution had made its case, the defence could enter a submission of no case to answer. If this submission was not accepted, the judge advocate would advise the accused on the alternatives open to him and the defence would proceed with its case. Witnesses could be called for the prosecution and the defence and both sides could make a closing submission, the defence submission being the last. During the trial the court-martial could adjourn to consult the Convening Officer on points of law; the

latter then had to take legal advice from the Judge Advocate General. The members of the court-martial retired (without the judge advocate) to deliberate on their findings, returned and pronounced those findings. Their votes and opinions were private and it was not disclosed whether the decision had been by a majority.

34. In the event of a conviction or a plea of guilty, the prosecuting officer put in evidence the defendant's service record and other evidence having a bearing on the sentence to be imposed. The defence made a plea in mitigation and could call witnesses in support. The members of the court-martial then retired (with the judge advocate) to consider the sentence. The sentence was announced in open court. There was no provision for the giving of reasons by the court-martial for its decision on guilt or sentence.

(e) Confirmation and post-hearing reviews

35. Until the amendments introduced by the 1996 Act, the findings of a court-martial were not effective until confirmed by a "Confirming Officer". Prior to confirmation, the Confirming Officer used to seek the advice of the Judge Advocate General's Office, where a judge advocate different from the one who acted at the hearing would be appointed. The Confirming Officer could withhold confirmation or substitute, postpone or remit in whole or in part any sentence.

36. Once the sentence had been confirmed, the defendant could present a petition of appeal against conviction and/or sentence to the "reviewing authority", which was usually the Army Board in cases involving army personnel. It had the power to quash a finding and to exercise the same powers as the Confirming Officer in relation to substituting, remitting or commuting the sentence.

37. A petitioner was not informed of the identity of the Confirming Officer or of the reviewing authority. No statutory or formalised procedures were laid down for the conduct of the post-hearing reviews and no reasons were given for decisions delivered subsequent to them. Neither the fact that advice had been received from the Judge Advocate General's Office nor the nature of that advice was disclosed.

(f) Courts-Martial Appeal Court

38. The Courts-Martial Appeal Court ("CMAC") was established by the Courts-Martial (Appeals) Act 1951 and was confirmed by the Courts-Martial (Appeals) Act 1968. The CMAC had the same status and, in essence, the same procedure as the (civilian) Court of Appeal, Criminal Division. Its judges included ordinary and ex officio judges of the Court of Appeal and judges of the High Court nominated by the Lord Chief Justice.

39. If an appeal petition was rejected by the Army Board, an appellant could apply to a single judge of the CMAC (and, if necessary, also to the full court) for leave to appeal against conviction. There was no provision for an appeal against sentence only, although certain powers of revising sentences, pursuant to an appeal against conviction, were available to the CMAC.

40. The hearing of the substantive appeal did not constitute a full rehearing on all points of fact and law. However, the CMAC was empowered to consider any question required for the doing of justice and could order a retrial. It also had power, inter alia, to order the production of documents or exhibits connected with the proceedings, order the attendance of witnesses, receive evidence, obtain reports from members of the court-martial or from the judge advocate and order a reference of any question to a special commissioner for inquiry.

41. The CMAC had to allow an appeal against conviction if it considered that the finding of the court-martial was, in all the circumstances, unsafe or unsatisfactory or involved a wrong decision on a question of law. The appeal had also to be allowed if there was a material irregularity in the course of the trial. In any other case, the appeal had to be dismissed.

42. An appellant required the leave of the CMAC to attend any hearing in relation to the appeal. Leave would only be granted where the CMAC considered that his presence would serve some useful purpose or was necessary in the interests of justice. Legal aid for an appeal to the CMAC was available under certain conditions and the appellant could obtain an order for costs in his favour if his appeal was allowed.

43. A further appeal, on a point of law of general public importance, could be made to the House of Lords with the leave of the CMAC or of the House of Lords itself.

(g) The Armed Forces Act 1996

44. Under the 1996 Act, the role of the Convening Officer ceases to exist and its functions are split among three different bodies: the higher authority, the prosecuting authority and court administration officers (Schedule I to the 1996 Act).

45. The higher authority, a senior officer, decides whether any case referred to him by the accused's commanding officer should be dealt with summarily, referred to the new prosecuting authority, or dropped. Once the higher authority has taken this decision, he has no further involvement in the case. The prosecuting authority is the legal branch of the relevant Service. Following the higher authority's decision to refer a case to it, the prosecuting authority has an absolute discretion, applying similar criteria to 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. It also conducts the prosecution (the 1996 Act, Schedule I, Part II). Under the new legislation, court administration officers have been appointed in each Service. They are independent of both the higher and the prosecuting authorities and are responsible for making the arrangements for courts-martial, including arranging venue and timing, ensuring that a judge advocate and any court officials required are available, securing the attendance of witnesses and selection of members. Officers under the command of the higher authority will not be selected as members of the court-martial (the 1996 Act, Schedule I, Part III).

46. Each court-martial now includes a judge advocate as a member. His advice on points of law is binding on the court and he has a vote on sentence (but not on conviction). The casting vote, if needed, rests with the president of the court-martial, who gives reasons for the sentence in open court. The Judge Advocate General no longer provides general legal advice to the Secretary of State for Defence (the 1996 Act, Schedule I, Part III, sections 35, 41 and 43).

47. Findings by a court-martial are no longer subject to confirmation or revision by a Confirming Officer (whose role is abolished). A reviewing authority has been established in each Service to conduct a single review of each case. Reasons are now given for the decision of the reviewing authority. As part of this process, post-trial advice received by the reviewing authority from a judge advocate (different from the one who officiated at the court-martial) is disclosed to the accused. A right of appeal against sentence to the CMAC has been added to the existing right of appeal against conviction (the 1996 Act, section 17 and Schedule V).

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

48. The Commission has declared admissible the applicant's complaints that, in respect of the court-martial proceedings against him, he did not have a fair and public hearing by an independent and impartial tribunal established by law.

B. Points at issue

49. Accordingly, the points at issue in the present case are:

- whether the applicant was given a fair hearing before an independent and impartial tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention; and

- whether the applicant was afforded a "public" hearing by a tribunal "established by law" and whether the proceedings in other specific respects complied with the requirement of fairness in Article 6 para. 1 (Art. 6-1) of the Convention.

C. As regards Article 6 para. 1 (Art. 6-1) of the Convention

50. Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads as follows:

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

51. The Government made no observations on the applicant's complaints.

(a) Applicability of Article 6 para. 1 (Art. 6-1) of the Convention

52. The Commission notes the nature of the charge of which the applicant was found guilty (buggery contrary to the Sexual Offences Act 1956) and the penalty imposed, which included three years detention. Accordingly, the Commission considers that the proceedings involved the determination of a "criminal charge" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (Eur. Court HR, Garyfallou AEBE v. Greece judgment of 24 September 1997, to be published in Reports of Judgments and Decisions 1997, paras. 32-33, with further references).

(b) The independence and impartiality of the court-martial

53. The main complaint of the applicant is that the court-martial was neither independent nor impartial within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention mainly because of the role of the Convening Officer. In particular, the applicant points to, inter alia, that officer's connection with the members of the court-martial and with the prosecution of the case.

54. The Commission recalls that, in the Findlay judgment (Eur. Court HR, Findlay v. the United Kingdom judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I), the Court found that a general court-martial convened pursuant to the Army Act 1955 did not meet the requirements of independence and impartiality set down by Article 6 para. 1 (Art. 6-1) of the Convention in view, in particular, of the central part played in its organisation by the Convening Officer. In this latter respect, the Court considered that the Convening Officer was central to the applicant's prosecution and was closely linked to the prosecution authorities; the Court expressed some concern that the members of the court-martial were subordinate (either directly or indirectly) to the Convening Officer; and the Court found it significant that the Convening Officer also acted as Confirming officer.

55. The Court has also found a district court-martial convened pursuant to the Air Force Act 1955 to have similar deficiencies (Eur. Court HR, Coyne v. the United Kingdom judgment of 24 September 1997, to be published in Reports of Judgments and Decisions 1997). In particular, it considered that there were no significant differences between the part played by the Convening Officer in Mr Coyne's court-martial, under the Air Force Act 1955, and in that of Mr Findlay, under the Army Act 1955. While an appeal to the Courts-Martial Appeal Court was open to Mr Coyne, the Court concluded that the organisational defects in the court-martial could not be corrected by any subsequent review procedure because an accused faced with a serious criminal charge is entitled to a first instance tribunal which meets the requirements of Article 6 para. 1 (Art. 6-1) of the Convention.

56. The Commission recalls that in the present case a general army court-

martial was convened pursuant to the Army Act 1955 to try the applicant on the charge. The Commission is of the view that there were no significant differences between the part played by the Convening Officer in the organisation of the applicant's court-martial and Mr Coyne's or Mr Findlay's courts-martial. Accordingly, the Commission considers that the applicant's court-martial did not meet the independence and impartiality requirements of Article 6 para. 1 (Art. 6-1) of the Convention. The Commission also considers that, since the applicant was faced with a serious charge of a criminal nature and was therefore entitled to a first instance tribunal complying with the requirements of Article 6 para. 1 (Art. 6-1), such organisational defects in his court-martial could not be corrected by any subsequent review procedure including an appeal to the Courts-Martial Appeal Court.

57. Accordingly, and for the reasons expressed in detail in the above-cited judgment of the Court in Mr Findlay's case, the Commission concludes that the court-martial which dealt with the applicant's case was not independent and impartial within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

58. The Commission is further of the opinion that since the court-martial has been found to lack independence and impartiality, it could not guarantee a fair trial to the applicant (Eur. Court HR, Findlay v. the United Kingdom judgment, loc. cit., Comm. Report, para. 108).

CONCLUSION

59. The Commission concludes, unanimously, that in the present case there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in that the applicant was not given a fair hearing by an independent and impartial tribunal.

(c) Remaining points at issue

60. The applicant also makes specific complaints of the unfairness of the court-martial proceedings on the grounds, inter alia, that he was denied a trial by jury and that he had no right to an appeal against sentence only to the Courts-Martial Appeal Court. In addition, he complains that the court-martial gave no reasons for its decision against him and that the advice of the judge advocate to the court-martial members on sentencing and of the Judge Advocate General's office to the reviewing authority was given in private. The applicant further complains that the court-martial proceedings were not "public" and that the court-martial was not "established by law" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

61. In view of its conclusion above, the Commission finds that it is unnecessary to examine further these complaints of the applicant.

CONCLUSION

62. The Commission concludes, unanimously, that in the present case it is not necessary to examine the applicant's complaints that he was not afforded a "public" hearing by a tribunal "established by law" and that in other specific respects the proceedings did not comply with the requirement of fairness in Article 6 para. 1 (Art. 6-1) of the Convention.

D. Recapitulation

63. The Commission concludes, unanimously, that in the present case there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in that the applicant was not given a fair hearing by an independent and impartial tribunal (para. 60).

64. The Commission concludes, unanimously, that in the present case it is not necessary to examine the applicant's complaints that he was not afforded a "public" hearing by a tribunal "established by law" and that in other specific respects the proceedings did not comply with the requirement of fairness in Article 6 para. 1 (Art. 6-1) of the Convention (para. 63).

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber