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

COURT (CHAMBER)

CASE OF FINDLAY v. THE UNITED KINGDOM

(Application no. 22107/93)

JUDGMENT

STRASBOURG

25 February 1997

In the case of Findlay v. the United Kingdom[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. DE MEYER,
Mrs E. PALM,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr D. GOTCHEV,
Mr P. JAMBREK,
Mr K. JUNGWIERT,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 27 September 1996 and 21 January 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 December 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 22107/93) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Mr Alexander Findlay, a British citizen, on 28 May 1993.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the

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[1] The case is numbered 110/1995/616/706. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 8 February 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. De Meyer, Mrs E. Palm, Mr A.N. Loizou, Mr J.M. Morenilla, Mr D.Gotchev, Mr P. Jambrek and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 28 June 1996 and the Government's memorial on 4 July 1996.

On 29 August 1996 the President decided to admit to the Court file an additional memorial submitted by the applicant which had been received by the Registrar on 7 August 1996 (Rule 37 para. 1).

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 September 1996. The Court had held a preparatory meeting beforehand. There appeared before the Court:

(a) for the Government
Ms S. DICKSON, Foreign and Commonwealth Office, *Agent*,
Mr P. HAVERS QC,
Mr J. EADIE, Barrister-at-Law, *Counsel*,
Mr G. ROGERS, Ministry of Defence,
Ms J. MURNANE, Ministry of Defence,
Mr D. WOODHEAD, Ministry of Defence, *Advisers*;

(b) for the Commission
Mr N. BRATZA, *Delegate*,

(c) for the applicant
Mr J. MACKENZIE, Solicitor, *Counsel*,
Mr G. BLADES, Solicitor,
Mr D. SULLIVAN, Solicitor, *Advisers*.

The Court heard addresses by Mr Bratza, Mr Mackenzie and Mr Havers.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. The applicant, Alexander Findlay, is a British citizen who was born in 1961 in Kilmarnock, Scotland, and now lives in Windsor, England.

7. In 1980 he joined the British army and became a member of the Scots Guards. His service was due to terminate in October or November 1992 when he would have received a resettlement grant and, at the age of sixty, an army pension.

8. In 1982 Mr Findlay took part in the Falklands campaign. During the battle of Mount Tumbledown he witnessed the death and mutilation of several of his friends and was himself injured in the wrist by a mortar-shell blast. According to the medical evidence prepared for his court martial (see paragraphs 11-13 below), as a result of these experiences he suffered from post-traumatic stress disorder ("PTSD"), which manifested itself by flashbacks, nightmares, feelings of anxiety, insomnia and outbursts of anger. This disorder was not diagnosed until after the events of 29 July 1990 (see paragraph 10 below).

9. In 1987 he sustained an injury during training for service in Northern Ireland when a rope which he was climbing broke and he fell to the ground, severely damaging his back. This injury was extremely painful and affected his ability to perform his duties, which, again according to the medical evidence, led him to suffer from feelings of stress, guilt and depression.

10. In 1990 the applicant, who had become a lance-sergeant, was sent with his regiment to 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 some of his colleagues. He fired two shots, which were not aimed at anyone and hit a television set, and subsequently surrendered the pistol. He was then arrested.

1. The medical evidence

11. On 31 July 1990 an ex-naval psychiatrist, Dr McKinnon, examined Mr Findlay and found that he was responsible for his actions at the time of the incident. However, a combination of stresses (including his back injury and posting to Northern Ireland) together with his heavy drinking on the day, had led to an "almost inevitable" event. Dr McKinnon recommended "awarding the minimum appropriate punishment".

Following this report, the decision was taken to charge Mr Findlay with a number of offences arising out of the incident on 29 July (see paragraph 14 below).

12. In order to establish that he was fit to stand trial, at the request of the army he was examined on two occasions by Dr Blunden, a civilian

consultant psychiatrist who had been employed by the Ministry of Defence since 1980.

In her report of January 1991, Dr Blunden confirmed that Mr Findlay was fit to plead and knew what he was doing at the time of the incident. However, his chronic back problem (which caused him to be frustrated and depressed at not being fit for duty in his Northern Ireland posting) together with "his previous combat stresses and a very high level of alcohol ... combined to produce this dangerous behaviour".

In her second report, of March 1991, she explained that the applicant had reacted to the stress caused by his back problems in the way he did on 29 July 1990 because of his experiences in the Falklands war. Whilst she did not clearly state that he suffered from PTSD, she confirmed that similar patterns of behaviour frequently occurred at a late stage in those who experienced this disorder. She confirmed that the consumption of alcohol on the relevant day was a result of his condition and not a cause of it.

13. Mr Findlay was also examined by Dr Reid, at the request of his (Mr Findlay's) solicitor. Dr Reid diagnosed him as suffering from PTSD as a result of his service in the Falklands.

2. The composition of the court martial

14. The position of "convening officer" (see paragraphs 36-41 below) for the applicant's court martial was assumed by the General Officer Commanding London District, Major General Corbett. He remanded Mr Findlay for trial on eight charges arising out of the incident of 29 July 1990 and decided that he should be tried by general court martial.

15. By an order dated 31 October 1991, the convening officer convened the general court martial and appointed the military personnel who were to act as prosecuting officer, assistant prosecuting officer and assistant defending officer (to represent Mr Findlay in addition to his solicitor) and the members of the court martial (see paragraph 37 below).

16. The court martial consisted of a president and four other members:

(1) the president, Colonel Godbold, was a member of London District staff (under the command of the convening officer: see paragraph 14 above). He was appointed by name by the latter and was not a permanent president;

(2) Lieutenant-Colonel Swallow was a permanent president of courts martial, sitting in the capacity of an ordinary member. He had his office in the London District Headquarters. He was appointed by name by the convening officer;

(3) Captain Tubbs was from the Coldstream Guards, a unit stationed in London District. His reporting chain was to his officer commanding, his commanding officer and the Brigade Commander, after which his report could, in exceptional circumstances, go to the convening officer; he was a member of a footguard unit and the convening officer, as

General Officer Commanding, was responsible for all footguard units. He was appointed to the court martial by his commanding officer;

(4) Major Bolitho was from the Grenadier Guards, also a footguard unit stationed in London District. The convening officer was his second superior reporting officer. He was appointed to the court martial by his commanding officer;

(5) Captain O'Connor was from the Postal and Courier Department, Royal Engineers (Women's Royal Army Corps), which is under the direct command of the Ministry of Defence and is administered by the London District. She was appointed by her commanding officer.

In summary, all of the members of the court martial were subordinate in rank to the convening officer and served in units stationed within London District. None of them had legal training.

17. The assistant prosecuting and defending officers were both officers from the Second Scots Guards stationed in the London District and had the same reporting chain as Captain Tubbs (see paragraph 16 (3) above).

18. The judge advocate for the general court martial was appointed by the Judge Advocate General (see paragraphs 42-45 below). He was a barrister and assistant judge advocate with the Judge Advocate General's Office.

3. The court martial hearing

19. On 11 November 1991, Mr Findlay appeared before the general court martial, at Regent's Park Barracks in London. He was represented by a solicitor.

He pleaded guilty to three charges of common assault (a civilian offence), two charges of conduct to the prejudice of good order and military discipline (a military offence) and two charges of threatening to kill (a civilian offence).

20. On 2 November 1991, his solicitor had made a written request to the prosecuting authorities to ensure the appearance of Dr Blunden at the court martial and on 5 November 1991 the prosecuting officer had issued a witness summons requiring her attendance. However, the defence was informed on the morning of the hearing that Dr Blunden would not be attending. Mr Findlay claims that her absence persuaded him to plead guilty to the above charges. However, his solicitor did not request an adjournment or object to the hearing proceeding.

21. The defence put before the court martial the medical reports referred to above (paragraphs 11-13) and called Dr Reid to give evidence. The latter confirmed his view that the applicant suffered from PTSD, that this had been the principal cause of his behaviour, that he had not been responsible for his actions and that he was in need of counselling. During cross-examination, Dr Reid stated that this was the first time he had dealt with battle-related PTSD.

The prosecution did not call any medical evidence in rebuttal or adopt any of the evidence prepared by the army-instructed psychiatrists, Drs McKinnon and Blunden (see paragraphs 11-13 above).

22. In the course of his speech in mitigation, Mr Findlay's solicitor urged the court martial that, in view of the fact that his client had been suffering from PTSD at the time of the incident and was extremely unlikely to reoffend, he 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.

23. Having heard the evidence and speeches, the court martial retired to consider their decision on sentence, accompanied by the judge advocate. On their return they sentenced the applicant to two years' imprisonment, reduction to the rank of guardsman and dismissal from the army (which caused him to suffer a reduction in his pension entitlement). No reasons were given for the sentence (see paragraph 46 below).

4. The confirmation of sentence and review process

24. Under the Army Act 1955, the decision of the court martial had no effect until it was confirmed by the "confirming officer" (see paragraph 48 below). In Mr Findlay's case, as was usual practice, the confirming officer was the same person as the convening officer. Mr Findlay petitioned him for a reduction in sentence.

Having received advice from the Judge Advocate General's Office, the confirming officer informed the applicant on 16 December 1991 that the sentence had been upheld.

25. The applicant, who had been under close arrest since the morning before the court martial hearing, was removed on 18 November 1991 to a military prison and thereafter to a civilian prison on 21 December 1991.

26. He appealed by way of petition to the first of the "reviewing authorities" (see paragraph 49 below), the Deputy Director General of Personal Services, as delegate of the Army Board, a non-legally qualified officer who obtained advice from the Judge Advocate General's Office. By a letter dated 22 January 1992, Mr Findlay was informed that this petition had been rejected.

27. He then petitioned the second of the reviewing authorities, a member of the Defence Council who also was not legally qualified and who also received advice from the Judge Advocate General's Office. This petition was rejected on 10 March 1992.

28. The advice given by the Judge Advocate General's Office at each of these three stages of review was not disclosed to the applicant, nor was he given reasons for the decisions confirming his sentence and rejecting his petitions.

29. On 10 March 1992, the applicant applied to the Divisional Court for leave to challenge by judicial review the validity of the findings of the court

martial. He claimed that the sentence imposed was excessive, the proceedings were contrary to the rules of natural justice and that the judge advocate had been hostile to him on two occasions during the hearing.

On 14 December 1992 the Divisional Court refused leave on the basis that the court martial had been conducted fully in accordance with the Army Act 1955 and there was no evidence of improper conduct or hostility on the part of the judge advocate (R. v. General Court Martial (Regent's Park Barracks), ex parte Alexander Findlay, CO/1092/92, unreported).

5. Civil proceedings

30. Mr Findlay commenced a civil claim in negligence against the military authorities, claiming damages in respect of his back injury and PTSD. In a report dated 16 January 1994 prepared for these purposes, Dr Blunden confirmed her previous opinion (see paragraph 12 above) and clearly diagnosed PTSD.

31. In March 1994 the civil action was settled by the Secretary of State for Defence, who paid the applicant £100,000 and legal costs, without any admission of liability. The settlement did not differentiate between the claims in respect of PTSD and the back injury.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. The law in force at the time of Mr Findlay's court martial

(a) General

32. The law and procedures which applied to the applicant's court martial were contained in the Army Act 1955 ("the 1955 Act"), the Rules of Procedure (Army) 1972 ("the 1972 Rules") and the Queen's Regulations (1975). Since the Commission's consideration of the case, certain provisions in the 1955 Act have been amended by the Armed Forces Act 1996 ("the 1996 Act"), which comes into force on 1 April 1997 (see paragraphs 52-57 below).

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

Depending on their gravity, charges against army law can be tried by district, field or general court martial. A court martial is not a standing court: it comes into existence in order to try a single offence or group of offences.

34. 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 (see paragraphs 36-41 below), and at least four other army officers, either appointed by name by the convening officer or, at the latter's request, by their commanding officer.

35. 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

36. Before the coming into force of the 1996 Act, a convening officer (who had to be a field officer or of corresponding or superior rank, in command of a body of the regular forces or of the command within which the person to be tried was serving) assumed responsibility for every case to be tried by court martial. He or she would decide upon the nature and detail of the charges to be brought and the type of court martial required, and was responsible for convening the court martial.

37. The convening officer would draw up a convening order, which would specify, inter alia, the date, place and time of the trial, the name of the president and the details of the other members, all of whom he could appoint (see paragraph 15 above). He ensured that a judge advocate (see paragraph 43 below) 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.

38. 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.

39. He had also to ensure that the accused had a proper opportunity to prepare his defence, legal representation if required and the opportunity to contact the defence witnesses, and was responsible for ordering the attendance at the hearing of all witnesses "reasonably requested" by the defence.

40. 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). In addition, he could comment on the

"proceedings of a court martial which require confirmation". Those remarks would not form part of the record of the proceedings and would normally be communicated in a separate minute to the members of the court, although in an exceptional case "where a more public instruction [was] required in the interests of discipline", they could be made known in the orders of the command (Queen's Regulations, paragraph 6.129).

41. The convening officer usually acted as confirming officer also (see paragraph 48 below).

(c) The Judge Advocate General and judge advocates

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

At the time of the events in question, the Judge Advocate General 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 military 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 (see paragraph 49 below).

43. 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.

44. 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. For example, if the latter pleaded guilty, the judge advocate had to ensure that he or she fully understood the implications of the plea and admitted all the elements of the charge. At the close of the hearing, the judge advocate would sum up the relevant law and evidence.

45. 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) Procedure on a guilty plea

46. At the time of the events in question, on a plea of guilty, the prosecuting officer outlined the facts and put in evidence any circumstance which might have made the accused more susceptible to the commission of the offence. The defence made a plea in mitigation and could call witnesses

(rules 71 (3) (a) and 71 (5) (a) of the 1972 Rules). The members of the court martial then retired with the judge advocate to consider the sentence, which was pronounced in open court. There was no provision for the giving of reasons by the court martial for its decision.

47. Certain types of sentence were not available to courts martial at the time of the applicant's trial, even in respect of civilian offences. For example, a court martial could not suspend a prison sentence, issue a probation order or sentence to community service.

(e) Confirmation and post-hearing reviews

48. Until the amendments introduced by the 1996 Act, a court martial's findings 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 to 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.

49. Once the sentence had been confirmed, the defendant could petition the "reviewing authorities". These were the Queen, the Defence Council (who could delegate to the Army Board), or any officer superior in command to the confirming officer (section 113 of the 1955 Act). The reviewing authorities could seek the advice of the Judge Advocate General's Office. They 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.

50. A petitioner was not informed of the identity of the confirming officer or of the reviewing authorities. 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.

51. A courts martial appeal court (made up of civilian judges) could hear appeals against conviction from a court martial, but there was no provision for such an appeal against sentence when the accused pleaded guilty.

2. The Armed Forces Act 1996

52. Under the 1996 Act, the role of the convening officer will cease to exist and his functions will be split among three different bodies: the "higher authorities", the prosecuting authority and court administration officers (see 1996 Act, Schedule I).

53. The higher authority, who will be a senior officer, will decide 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 or she will have no further involvement in the case.

54. The prosecuting authority will be the Services' legal branches. Following the higher authority's decision to refer a case to them, the prosecuting authority will have 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 precisely what charges should be brought. They will then conduct the prosecution (1996 Act, Schedule I, Part II).

55. Court administration officers will be appointed in each Service and will be independent of both the higher and the prosecuting authorities. They will be 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 selection of members. Officers under the command of the higher authority will not be selected as members of the court martial (1996 Act, Schedule I, Part III, section 19).

56. Each court martial will in future include a judge advocate as a member. His advice on points of law will become rulings binding on the court and he will have a vote on sentence (but not on conviction). The casting vote, if needed, will rest with the president of the court martial, who will also give reasons for the sentence in open court. The Judge Advocate General will no longer provide general legal advice to the Secretary of State for Defence (1996 Act, Schedule I, Part III, sections 19, 25 and 27).

57. Findings by a court martial will no longer be subject to confirmation or revision by a confirming officer (whose role is to be abolished). A reviewing authority will be established in each Service to conduct a single review of each case. Reasons will be 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 (who will be different from the one who officiated at the court-martial) will be disclosed to the accused. A right of appeal against sentence to the (civilian) courts martial appeal court will be added to the existing right of appeal against conviction (1996 Act, section 17 and Schedule V).

PROCEEDINGS BEFORE THE COMMISSION

58. In his application to the Commission (no. 22107/93) of 28 May 1993, Mr Findlay made a number of complaints under Article 6 para. 1 of

the Convention (art. 6-1), inter alia that he had been denied a fair hearing before the court martial and that it was not an independent and impartial tribunal.

59. The Commission declared the application admissible on 23 February 1995. In its report of 5 September 1995 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 6 para. 1 of the Convention (art. 6-1), in that the applicant was not given a fair hearing by an independent and impartial tribunal, and that it was unnecessary to examine the further specific complaints as to the fairness of the court-martial proceedings and the subsequent reviews or the reasonableness of the decisions taken against him and the available sentencing options. The full text of the Commission's opinion is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

60. At the hearing, the Government said that it did not contest the Commission's conclusions but asked the Court to take note of the changes to the court-martial system to be effected by the Armed Forces Act 1996 which, they submitted, more than satisfactorily met the Commission's concerns.

On the same occasion, the applicant asked the Court to find a violation of Article 6 para. 1 (art. 6-1) and to award him just satisfaction under Article 50 of the Convention (art. 50).

AS TO THE LAW

I. SCOPE OF THE CASE

A. The complaints concerning Article 6 para. 1 of the Convention (art. 6-1)

61. In his written and oral pleadings before the Court, Mr Findlay complained that the court martial was not an "independent and impartial

[3] For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-I), but a copy of the Commission's report is obtainable from the registry.

tribunal", that it did not give him a "public hearing" and that it was not a tribunal "established by law".

62. The Government and the Commission's Delegate both observed at the hearing that since the latter two complaints had not been expressly raised before the Commission, the Court should decline to entertain them.

63. The Court recalls that the scope of its jurisdiction is determined by the Commission's decision on admissibility and that it has no power to entertain new and separate complaints which were not raised before the Commission (see, inter alia, the Singh v. the United Kingdom judgment of 21 February 1996, Reports of Judgments and Decisions 1996-I, p. 293, para. 44).

However, while Mr Findlay in his application to the Commission may not expressly have invoked his rights under Article 6 para. 1 of the Convention (art. 6-1) to a "public hearing" and a "tribunal established by law", he does appear to have raised in substance most of the matters which form the basis of his complaints in relation to these two provisions. Thus, in the Commission's decision on admissibility, he is reported as referring in particular to the facts that the members of the court martial were appointed ad hoc, that the judge advocate's advice on sentencing was not disclosed, that no reasons were given for the decisions taken by the court-martial board and the confirming and reviewing officers, and that the post-hearing reviews were essentially administrative in nature and conducted in private (see the Commission's decision on admissibility, application no. 22107/93, pp. 32-35).

It follows that these are not new and separate complaints, and that the Court has jurisdiction to consider these matters (see, inter alia and mutatis mutandis, the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, p. 46, para. 80).

B. The complaint concerning Article 25 of the Convention (art. 25) and Article 2 of the European Agreement

64. In his additional memorial (see paragraph 4 above) the applicant asserted that, in correspondence with the Solicitors' Complaints Bureau (a professional disciplinary body) concerning a matter of no relevance to the present case, the Judge Advocate General had complained that, during the course of Mr Findlay's application to the Commission, his solicitor had made allegations concerning a lack of impartiality in the advice given by the Judge Advocate General's Office. The Judge Advocate General, Judge Rant, had commented: "These are extremely serious allegations ...".

In a later letter, Judge Rant wrote:

> "I wish to make it clear that, at this stage and without prejudice to any action which might have to be taken in the future, I am making no formal complaint about the passage [from the applicant's submission to the Commission] quoted in that letter. The

reason for this is that the case of Findlay is to be argued before the European Court of Human Rights in September 1996 and therefore it is only proper for me to defer action until the end of those proceedings."

The applicant alleged that his solicitor felt constrained in presenting his arguments to the Court in the knowledge that they might subsequently form the basis of disciplinary proceedings and he invoked his rights under Article 25 of the Convention (art. 25) and Article 2 of the European Agreement relating to Persons Participating in Proceedings before the European Commission and Court of Human Rights.

65. Since this issue was not pursued by the applicant at the hearing or referred to by the Government or the Delegate of the Commission at any time, the Court does not find it appropriate to examine it.

C. The new legislation

66. In their written and oral pleadings, the Government asked the Court to take note in its judgment of the changes to be effected in the court-martial system by the Armed Forces Act 1996 (see paragraphs 52-57 above).

67. The Court recalls that this new statute does not come into force until April 1997, and thus did not apply at the time of Mr Findlay's court martial. It is not the Court's task to rule on legislation in abstracto and it cannot therefore express a view as to the compatibility of the provisions of the new legislation with the Convention (see, mutatis mutandis, the Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 31, para. 79). Nonetheless, it notes with satisfaction that the United Kingdom authorities have made changes to the court-martial system with a view to ensuring the observance of their Convention commitments.

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

68. The applicant claimed that his trial by court martial failed to meet the requirements of Article 6 para. 1 of the Convention (art. 6-1), which provides (so far as is relevant):

"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 ..."

The Commission found that there had been a violation, in that the applicant was not given a fair hearing by an independent and impartial tribunal, and the Government did not contest this conclusion.

A. Applicability

69. In the view of the Court, Article 6 para. 1 (art. 6-1) is clearly applicable to the court-martial proceedings, since they involved the determination of Mr Findlay's sentence following his plea of guilty to criminal charges; indeed, this point was not disputed before it (see the Engel and Others v. the Netherlands judgment of 18 June 1976, Series A no. 22, pp. 33-36, paras. 80-85, and the Eckle v. Germany judgment of 15 July 1982, Series A no. 51, pp. 34-35, paras. 76-77).

B. Compliance

70. The applicant complained that the court martial was not an "independent and impartial tribunal" as required by Article 6 para. 1 (art. 6-1), because, inter alia, all the officers appointed to it were directly subordinate to the convening officer who also performed the role of prosecuting authority (see paragraphs 14-17 and 36-41 above). The lack of legal qualification or experience in the officers making the decisions either at the court martial or review stages made it impossible for them to act in an independent or impartial manner.

In addition, he asserted that he was not afforded a "public hearing" within the meaning of Article 6 para. 1 (art. 6-1), in that the judge advocate's advice to the court-martial board, the confirming officer and the reviewing authorities was confidential; no reasons were given for the decisions made at any of these stages in the proceedings; and the process of confirming and reviewing the verdict and sentence by the confirming officer and reviewing authorities was carried out administratively, in private, with no apparent rules of procedure (see paragraphs 42-46 and 48-51 above).

Finally, he claimed that his court martial was not a tribunal "established by law", because the statutory framework according to which it proceeded was too vague and imprecise; for example, it was silent on the question of how the convening officer, confirming officer and reviewing authorities were to be appointed.

71. The Government had no observations to make upon the Commission's conclusion that there had been a violation of Article 6 para. 1 of the Convention (art. 6-1) by reason of the width of the role of the convening officer and his command links with members of the tribunal. They asked the Court to take note of the changes to the court-martial system to be effected by the Armed Forces Act 1996 which, in their submission, more than satisfactorily met the Commission's concerns.

72. The Commission found that although the convening officer played a central role in the prosecution of the case, all of the members of the court-martial board were subordinate in rank to him and under his overall command. He also acted as confirming officer, and the court martial's

findings had no effect until confirmed by him. These circumstances gave serious cause to doubt the independence of the tribunal from the prosecuting authority. The judge advocate's involvement was not sufficient to dispel this doubt, since he was not a member of the court martial, did not take part in its deliberations and gave his advice on sentencing in private. In addition, it noted that Mr Findlay's court-martial board contained no judicial members, no legally qualified members and no civilians, that it was set up on an ad hoc basis and that the convening officer had the power to dissolve it either before or during the trial. The requirement to take an oath was not a sufficient guarantee of independence.

Accordingly, it considered that the applicant's fears about the independence of the court martial could be regarded as objectively justified, particularly in view of the nature and extent of the convening officer's roles, the composition of the court martial and its ad hoc nature. This defect was not, moreover, remedied by any subsequent review by a judicial body affording all the guarantees required by Article 6 para. 1 (art. 6-1), since the confirming officer was the same person as the convening officer, and the reviewing authorities were army officers, the second of whom was superior in rank to the first. The ineffectiveness of the post-hearing reviews was further underlined by the secrecy surrounding them and the lack of opportunity for Mr Findlay to participate in a meaningful way.

73. The Court recalls that in order to establish whether a tribunal can be considered as "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 the question whether the body presents an appearance of independence (see the Bryan v. the United Kingdom judgment of 22 November 1995, Series A no. 335-A, p. 15, para. 37).

As to the question of "impartiality", there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see the Pullar v. the United Kingdom judgment of 10 June 1996, Reports 1996-III, p. 792, para. 30).

The concepts of independence and objective impartiality are closely linked and the Court will consider them together as they relate to the present case.

74. The Court observes that the convening officer, as was his responsibility under the rules applicable at the time, played a significant role before the hearing of Mr Findlay's case. He decided which charges should be brought and which type of court martial was most appropriate. He convened the court martial and appointed its members and the prosecuting and defending officers (see paragraphs 14-15 and 36-37 above).

Under the rules then in force, he had the task of sending an abstract of the evidence to the prosecuting officer and the judge advocate and could indicate passages which might be inadmissible. He procured the attendance at trial of the witnesses for the prosecution and those "reasonably requested" by the defence. His agreement was necessary before the prosecuting officer could accept a plea to a lesser charge from an accused and was usually sought before charges were withdrawn (see paragraphs 38 and 39 above).

For these reasons the Court, like the Commission, considers that the convening officer was central to Mr Findlay's prosecution and closely linked to the prosecuting authorities.

75. The question therefore arises whether the members of the court martial were sufficiently independent of the convening officer and whether the organisation of the trial offered adequate guarantees of impartiality.

In this respect also the Court shares the concerns of the Commission. It is noteworthy that all the members of the court martial, appointed by the convening officer, were subordinate in rank to him. Many of them, including the president, were directly or ultimately under his command (see paragraph 16 above). Furthermore, the convening officer had the power, albeit in prescribed circumstances, to dissolve the court martial either before or during the trial (see paragraph 40 above).

76. In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court martial which decided Mr Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr Findlay's doubts about the tribunal's independence and impartiality could be objectively justified (see, mutatis mutandis, the Sramek v. Austria judgment of 22 October 1984, Series A no. 84, p. 20, para. 42).

77. In addition, the Court finds it significant that the convening officer also acted as "confirming officer". Thus, the decision of the court martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit (see paragraph 48 above). This is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal" and can also be seen as a component of the "independence" required by Article 6 para. 1 (art. 6-1) (see, mutatis mutandis, the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 16, para. 45).

78. The Court further agrees with the Commission that these fundamental flaws in the court-martial system were not 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 (see paragraphs 45-46 above), or the oath taken by the members of the court-martial board (see paragraph 35 above).

79. Nor could the defects referred to above (in paragraphs 75 and 77) be corrected by any subsequent review proceedings. Since the applicant's hearing was concerned with serious charges classified as "criminal" under both domestic and Convention law, he was entitled to a first-instance tribunal which fully met the requirements of Article 6 para. 1 (art. 6-1) (see the De Cubber v. Belgium judgment of 26 October 1984, Series A no. 86, pp. 16-18, paras. 31-32).

80. For all these reasons, and in particular the central role played by the convening officer in the organisation of the court martial, the Court considers that Mr Findlay's misgivings about the independence and impartiality of the tribunal which dealt with his case were objectively justified.

In view of the above, it is not necessary for it to consider the applicant's other complaints under Article 6 para. 1 (art. 6-1), namely that he was not afforded a "public hearing" by a tribunal "established by law".

In conclusion, there has been a violation of Article 6 para. 1 of the Convention (art. 6-1).

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

81. The applicant claimed just satisfaction pursuant to Article 50 of the Convention (art. 50), which states:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

82. The applicant claimed compensation for loss of income totalling 440,200 pounds sterling (GBP), on the basis that, had he not been convicted and sentenced as he was, he would have completed a twenty-two year engagement in the army, eventually attaining the rank of Colour Sergeant, with entitlement to a pension from the age of forty.

83. The Government submitted that a finding of a violation would constitute sufficient satisfaction, or, in the alternative, that only a very modest amount should be awarded. First, there were no grounds for believing that the applicant would not have been convicted, sentenced to a term of imprisonment and dismissed from the army following his trial (at which he pleaded guilty), even if the court martial had been differently organised. Secondly, it was in any case unlikely that he would have enjoyed a long career in the army, in view of the post traumatic stress disorder and

back injury from which he suffered (see paragraphs 8, 9 and 30 above); he had already received GBP 100,000 in settlement of his civil claim against the Ministry of Defence, a large part of which related to loss of earning capacity.

84. At the hearing, the Commission's Delegate observed that no causal link had been established between the breach of the Convention complained of by the applicant and the alleged pecuniary damage, and submitted that it was not possible to speculate as to whether the proceedings would have led to a different outcome had they fulfilled the requirements of Article 6 para. 1 (art. 6-1).

85. The Court agrees; it cannot speculate as to what the outcome of the court-martial proceedings might have been had the violation of the Convention not occurred (see, for example, the Schmautzer v. Austria judgment of 23 October 1995, Series A no. 328-A, p. 16, para. 44). It is therefore inappropriate to award Mr Findlay compensation for pecuniary damage.

B. Non-pecuniary damage

86. The applicant claimed compensation of GBP 50,000 for the distress and suffering caused by the court-martial proceedings and for the eight months he spent in prison. He also asked that his conviction be quashed.

87. The Government pointed out that it was beyond the power of the Court to quash the applicant's conviction.

88. The Court reiterates that it is impossible to speculate as to what might have occurred had there been no breach of the Convention. Furthermore, it has no jurisdiction to quash convictions pronounced by national courts (see the above-mentioned Schmautzer judgment, loc. cit.).

In conclusion, the Court considers that a finding of violation in itself affords the applicant sufficient reparation for the alleged non-pecuniary damage.

C. Costs and expenses 89.

The applicant claimed GBP 23,956.25 legal costs and expenses, which included GBP 1,000 solicitor's costs and GBP 250 counsel's fees for the application before the Divisional Court.

90. The Government expressed the view that the costs of the application to the Divisional Court should be disallowed, and submitted that a total of GBP 22,500 would be a reasonable sum.

91. The Court considers that, in the circumstances of the present case, it was reasonable to make the application to the Divisional Court, in an attempt to seek redress for the violation of which Mr Findlay complains. It therefore decides to award in full the costs and expenses claimed, less the

amounts received in legal aid from the Council of Europe which have not already been taken into account in the claim.

D. Default interest

92. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 6 para. 1 of the Convention (art. 6-1);

2. Dismisses the claim for pecuniary damage;

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

4. Holds
   (a) that the respondent State is to pay to the applicant, within three months, in respect of costs and expenses, GBP 23,956.25 (twenty-three thousand, nine hundred and fifty-six pounds sterling and twenty-five pence) less 26,891 (twenty-six thousand, eight hundred and ninety-one) French francs, to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;
   (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 February 1997.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the concurring opinion of Mr De Meyer is annexed to this judgment.

R. R.
H. P.

CONCURRING OPINION OF JUDGE DE MEYER

To this judgment, the result of which I fully approve, I would add a brief remark.

Once again reference is made in its reasoning to "appearances" (paragraphs 73 and 76).

First of all, I would observe that the Court did not need to rely on "appearances", since there were enough convincing elements to enable it to conclude that the court-martial system, under which Lance-Sergeant Findlay was convicted and sentenced in the present case, was not acceptable.

Moreover, I would like to stress that, as a matter of principle, we should never decide anything on the basis of "appearances", and that we should, in particular, not allow ourselves to be impressed by them in determining whether or not a court is independent and impartial. We have been wrong to do so in the past, and we should not do so in the future.