CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF MARTIN v. THE UNITED KINGDOM

(Application no. 40426/98)

JUDGMENT

STRASBOURG

24 October 2006

FINAL

24/01/2007

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

In the case of Martin v. the United Kingdom,

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

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 3 October 2006,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 40426/98) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Alan Martin ("the applicant"), on 10 March 1998.

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

3. The applicant complained under Articles 3 and 6 § 1 about his trial by court-martial.

4. The application was submitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of the Court). Within the Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 29 February 2000, a Chamber of the Section decided to communicate the case to the Government and the parties each filed observations on the admissibility and the merits of the complaints.

7. By letters to the parties of 12 April 2002, the Section Registrar requested the parties to submit additional comments in light of the Court's judgment in *Morris v. the United Kingdom*, no. 38784/97, ECHR 2002-I.

8. On 17 December 2002, the Chamber elected to re-communicate the application to the Government under Rule 54 § 2 (b) Rules of Court and adjourned the case pending the judgment of the Grand Chamber in *Grieves v. the United Kingdom* [GC], no. 57067/00, ECHR 2003-XII. The Chamber also decided that under the provisions of Article 29 § 3 of the Convention and Rule 54A, it would examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The facts of the case, as submitted by the parties, may be summarised as follows.

10. The applicant was born in 1976 and, at the time of the introduction of his application, was serving a sentence of life imprisonment in England.

11. In February 1994 the applicant was living with his family in Germany, where his father was an Army Corporal serving in the Support Unit of the Rhine Garrison. On 8 February 1994 the applicant was charged with the murder of a young civilian woman who had been working in the Support Unit and whose body had been found in woods near to the army base.

12. As a family member residing with a member of the Armed Forces, the applicant was subject to military law (see paragraph 25 below). The German authorities waived jurisdiction pursuant to the NATO Status of Forces Agreement 1951 (see paragraph 21 below).

13. On 8 February 1994 the Commander of the Support Unit was appointed to act as the applicant's Commanding Officer. The latter decided to refer the case to the Higher Authority with a view to the applicant being tried by general court-martial. The Higher Authority submitted the case for trial by general court-martial, and the court-martial was convened by the Commanding Officer (henceforth, "the Convening Officer"). The applicant obtained military legal aid on 10 February 1994.

14. In the meantime, the applicant's father was posted to England and returned there on 24 March 1994. Despite his father's return, the applicant remained subject to military law as the proceedings had already commenced (see paragraph 26 below). The applicant returned to England in April 1994 where he was detained. His father was discharged from the army in November 1994.

15. The applicant was returned to Germany in time for his court-martial which commenced on 21 April 1995. The court-martial board was

composed of a President, who was not a permanent president, and six ordinary members. Four of the members were senior officers, all of whom were subordinate in rank to the Convening Officer and the President and one of whom was within the Convening Officer's chain of command. Two members were civilian civil servants, who came from the United Kingdom solely for the purpose of the trial, and were placed under the Convening Officer's command while in Germany, although they were not in his reporting chain.

16. The applicant's representative submitted, *inter alia*, that the trial of a young civilian by court-martial was inherently unfair and oppressive and thus an abuse of process. The atmosphere in a military court would be very different from that of a civilian court and the applicant would not do himself justice. In particular, it was unfair and oppressive that he should be returned to stand trial in Germany after he had spent many months in detention in England and after his father had ceased to be subject to military law. Lastly, if tried by jury, a majority of 10 to 2 votes would be necessary to convict him, whereas a simple majority vote would suffice in a trial by court-martial.

17. These submissions were considered by the Vice-Judge Advocate General and were rejected, as was an application for an adjournment to allow proceedings for judicial review to commence. The trial ended with the applicant's conviction on 3 May 1995. In accordance with the provisions of the Army Act 1995, the verdict of the court-martial was confirmed by a Confirming Officer (see paragraph 28 below).

18. The applicant appealed to the Courts-Martial Appeal Court, which had the power to quash the conviction if it considered it unsafe. The Lord Chief Justice, Lord Bingham of Cornhill, giving judgment on 30 July 1996, held, dismissing the appeal:

> "... We have some considerable sympathy with the appellant's complaint. With the benefit of hindsight, it seems plain that the trial could have been conducted in England without undue difficulty. It would in our view have been preferable if this young appellant, whose subjection to military law was purely vicarious and involuntary, had been tried here with all the procedural safeguards which procedure in the ordinary criminal courts affords. We cannot, however, stigmatise these proceedings as abusive. They were strictly in accordance with a procedure prescribed by Parliament to apply in such cases. There was not, as is accepted, any attempt to over reach or oppress or prejudice the appellant. He had all the safeguards which a defendant in any court-martial is entitled to enjoy. Steps were taken to ensure that all members of the tribunal save one were not under the command of the convening officer, and also to ensure that the convening officer and the confirming officer were not the same person. Had the appellant been held in Germany to await trial, as he could have been, his claim to trial in England would have appeared weaker. Whether or not it proved necessary in the event to adduce the oral evidence of German factual witnesses, the greater availability of such witnesses as a trial in Germany was a legitimate reason for favouring trial there.
>
> We are satisfied that these proceedings were not an abuse of process."

19. The appeal court certified a question of law for the House of Lords as to whether proceedings conducted in accordance with the 1955 Act could be considered abusive. On 9 July 1997 the House of Lords granted leave to appeal. Having heard the applicant's legal representatives, on 16 December 1997 the House of Lords unanimously dismissed the appeal. Lords Slynn of Hadley and Hope of Craighead expressed the view that at first sight the decision to prosecute the applicant—a civilian aged only 17 at the time of the murder—by court-martial had been inappropriate. However, as Lord Hope explained:

> "It is not difficult to understand the utility of [section 209 of the Army Act 1955: see paragraph 24 below], in view of the greatly increased opportunities which were by then available for families and other civilian personnel to accompany the forces when serving overseas. Had the law not been changed in this respect, civilians and followers would have had to have been brought to trial in the local civil courts in the language and according to the procedures in use in those courts and, if sentenced to imprisonment, to serve the sentence in a local prison. ...
>
> Fundamental to the appellant's argument in the present case is the proposition that the purpose of [the extension of jurisdiction in section 9 of the 1861 Act: see paragraph 29 below] was to extend to murders committed abroad the right of every person in this country who is accused of murder to have his or her guilt declared by means of a jury trial. ... It seems to me that another, and more likely, explanation is that the legislation was enacted to ensure that the grave offences with which it deals should not go unpunished when committed abroad by a British citizen. ...
>
> In view of what I have said above I do not believe that the proceedings by way of court-martial in this case can be said in themselves to have been an abuse of process. ... The question to which I now turn is whether there is any basis in the information which is available to us for describing any of the decisions taken by those in authority at the various stages in this case as so unfair and wrong as to show that the conviction in this case was unsafe. ..."

20. Lord Hope went on to examine the factors which would have had to have been taken into account when considering whether to prosecute the applicant by court-martial in Germany or by jury trial in England:

> "The timing of any consideration of the matter by the Director of Public Prosecutions would, in my view, have been of critical importance to a decision as to whether there was any unfairness in this case which might be said to render the conviction unsafe. It cannot be assumed that the Director would have been willing to take proceedings in England without knowing more about the factors which he would have wished to take into account. One obvious factor, I would have thought, was the availability of witnesses. In his letter of 14 June 1994 to the Attorney General the Director of Army Legal Services had stated that many of the witnesses were German and that they could not be forced to attend a trial in England. Further details were provided at the request of the Attorney General in a letter by the Director of Army Legal Services dated 25 November 1994. In this letter it is stated that there were 13 German witnesses who could be divided into three categories—those who saw the appellant in the woods near the scene of the murder, those concerned with the finding of the body and police and forensic experts. The defence had not yet indicated what evidence would be agreed. The Director thought that, while some of their evidence

might be agreed, it was unlikely that this would include the police and forensic experts. He believed that they were the witnesses who would be most unlikely to cause difficulties if asked to travel to England to give evidence. He added that one of the forensic scientists who was responsible for examining secretions and bloodstains—a matter which was of crucial importance in this case as there were no eyewitnesses—was being difficult to deal with and would only attend meetings if they were arranged through the German public prosecutor in the nearest large town. He explained that these witnesses were German because the police investigation was commenced by the German civil police as it was initially assumed that a German civilian had committed the crime. ...

I have not forgotten that Lord Bingham of Cornhill CJ [see paragraph 18 above] said in his judgment that it was clear, with the benefit of hindsight, that the trial could have been conducted in England without due difficulty. But the Director of Public Prosecutions would have had to have taken his decision well before the trial, in view of the arrangements which would have had to have been made for the appellant to be transferred into the hands of the civil authorities in England and for the attendance of the witnesses. In the event, as the respondent has recorded in his written case, no agreement was reached, despite several written requests and reminders, about any of the evidence until the commencement of the trial when the evidence of the witnesses was agreed piecemeal during the opening days. This account of what happened strongly suggests that at the stage when the Director of Public Prosecutions would have had to have taken his decision he would have had to assume that the important evidence of the German witnesses would not be agreed before the trial and that the attendance of the German witnesses would be necessary. ...

Conclusion

... The proceedings were conducted within the rules laid down by Parliament. There is no sound basis for thinking that, at the time when a decision about this would have had to have been taken, a prosecution in the English courts within a reasonable time would have been seen to be practicable. The alternatives lay between taking proceedings by way of court-martial in Germany, leaving the matter in the hands of the German public prosecutor or taking no proceedings at all. ...”

II. RELEVANT NON-CONVENTION LAW AND PRACTICE

A. The NATO Status of Forces Agreement 1951

21. The 1951 agreement, as supplemented by the Supplementary Agreement of 1959 (subsequently amended in 1971, 1981 and 1993) provides in Article VII(1):

“1. Subject to the provisions of this Article,

the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.

22. Article VII(3)(a) provides:

"3. In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or a civilian component in relation to

(i) offences solely against property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that state or of a dependent;

(ii) offences arising out of an act or omission done in the performance of official duty."

B. The Army Act 1955

23. Section 70 of the 1955 Act provides:

"(1) Any person subject to military law who commits a civil offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against this section. ...

A person shall not be charged with an offence against this section committed in the United Kingdom if the corresponding civil offence is ... murder."

24. Section 209(2) of the Act states:

"Subject to the modifications hereinafter specified, Part II of this Act shall at all times apply to a person of any description specified in the Fifth Schedule to this Act who is within the limits of the command of any officer commanding a body of the regular forces outside the United Kingdom, and is not subject to military law ... apart from this section ... as the said Part II applies to persons subject to military law ..."

25. The Act identifies in its Fifth Schedule the civilians outside the United Kingdom who are subject to Part II of the Act when not on active service. They include, at paragraph 5:

"Persons forming part of the family of members of any of Her Majesty's Naval, Military, or Air Forces and residing with them or about to reside or departing after residing with them."

26. The trial of those who have ceased to be subject to military law is expressly provided for by section 131 of the Act:

"Subject to the provisions of the next following section, where an offence under this Act triable by Court-Martial has been committed ... by any person while subject to military law, then in relation to that offence he shall be treated, for the purposes of the provisions of the Act relating to ... trial and punishment by Court-Martial ... as continuing subject to military law and notwithstanding his ceasing at any time to be subject thereto."

27. Since the Armed Forces Act 1976, where a civilian defendant is to be tried, civilian Crown servants can be detailed as members of the court-martial. In practice, most criminal offences allegedly committed by a civilian dependent would be tried by a Standing Civilian Court (similar to a Magistrates' Court), with trial by court-martial reserved for the most serious offences.

28. The law and procedures which applied generally to the applicant's court-martial were contained in the Army Act 1955, the Rules of Procedure (Army) 1972 and the Queen's Regulations 1975 (for which, see *Findlay v. the United Kingdom,* judgment of 25 October 1997, *Reports of Judgments and Decisions* 1997-I, §§ 32-51). From 1 April 1997 (after the conclusion of the applicant's court-martial) the Armed Forces Act 1996 came into force which modified certain provisions of the Army Act 1955 (see, generally, *Cooper v. the United Kingdom* [GC], no. 48843/99, § 104, ECHR 3003-XII; *Grieves v. the United Kingdom* [GC], no. 57067/00, § 69, ECHR 2003-XII).

C. The Offences against the Person Act 1861

29. The basic rule of the common law is that the jurisdiction of the criminal courts in the United Kingdom is confined to crimes committed within the territory of each court. An exception is provided by section 9 of the 1861 Act, which gives jurisdiction to British courts in respect of alleged murders and manslaughters committed by British citizens anywhere in the world.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

30. The applicant complained that, in all the circumstances of the case, he had been subjected to degrading treatment in violation of Article 3. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

31. The Government asked the Court to find this complaint manifestly ill-founded.

32. The Court finds that the applicant has failed to substantiate his complaint. In particular, there is no evidence that the applicant, who had his eighteenth birthday one week after the trial had begun, was subjected to any treatment in the procedure or conduct of the court-martial that attained the minimum level of severity required under Article 3 (cf. *T. v. the*

United Kingdom [GC], no. 24724/94, ECHR 1999, §§ 60-78). Accordingly, the Court considers the applicant's complaint under Article 3 to be manifestly ill-founded and inadmissible pursuant to Article 35 § 3 of the Convention.

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

33. The applicant complained that his trial by court-martial had been unfair, contrary to under Article 6 § 1 of the Convention, which provides as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Admissibility

34. The Government contended that the complaint should be declared manifestly ill-founded, but did not raise any other specific objection to its admissibility.

35. The Court considers that the complaint raises questions of law which are sufficiently serious that its determination should depend on the merits, and no other grounds for declaring it inadmissible have been established. The Court therefore declares the complaint admissible and considers the merits below in accordance with its decision to apply Rule 29 § 3 (see paragraph 8 above).

B. The Merits

1. The Government's submissions

36. The Government contended that Article 6 does not guarantee the right for a civilian to be tried by a civilian criminal court, but simply the right to trial by an independent and impartial tribunal. The applicant's case should be distinguished from *Incal v. Turkey*, (judgment of 9 June 1998, *Reports* 1998-IV), where the applicant had been charged with an offence directly concerning a threat to the security of the country, and was tried by a national security court specifically set up to deal with cases affecting Turkey's territorial integrity. In the present applicant's case the charge was an ordinary offence of murder, not an offence specially created to combat a threat to the Government, nor one which affected the military any more than the civilian population. The offence did not contain any special

characteristics which might encourage the military members of the court-martial to take into account irrelevant considerations.

37. There were sound reasons for trying the applicant on German territory under court-martial, in particular the fact that a majority of the witnesses were German and it might have been difficult to secure their attendance to give evidence in England. A court-martial avoided the possibility that the applicant would have to undergo trial in the German domestic courts with proceedings in a foreign language and with only German legal counsel to assist him, in addition to having to serve his sentence in a foreign jail. The applicant was tried by court-martial pursuant to the 1951 NATO Agreement (see paragraph 21 above). Moreover, the applicant was familiar with the military system, its structure and its terminology, having spent his life in the military community.

38. In relation to the procedural aspects and constitution of the court-martial, the Government submitted that the applicant's case was clearly distinguishable from *Findlay*. Two of the members of the court-martial were civilians who were not in any way subordinate to the Convening Officer and had been posted from the United Kingdom to Germany specifically to enable them to sit as members of the court-martial. Only one of the military personnel on the board was directly under the Convening Officer's command. Steps were taken to ensure that the Convening Officer was not the same individual as the Confirming Officer. Although the Convening Officer had power to dissolve the court-martial, as in *Findlay*, he could do so only in prescribed circumstances. The applicant did not complain that his conviction was unsafe or that the court-martial had conducted itself unfairly in any way. The applicant's plea of abuse of process had been addressed to the Vice-Judge Advocate General alone, in public but in the absence of the court-martial members. The Vice-Judge Advocate General was a senior judge appointed by the Lord Chancellor with the same guarantees of independence as any judge in a civilian British court. The abuse of process argument was, moreover, reviewed and dismissed by the Courts-Martial Appeal Court and the House of Lords.

2. The applicant's submissions

39. The applicant contended that, as in *Incal*, he was tried by a military tribunal for a non-military offence. There were no sound reasons for trying him by military court and no evidence that the Convening Officer even considered whether it was necessary to proceed by way of court-martial or instead to arrange for a civilian trial in England.

40. Concerning the independence and impartiality of the court-martial, the applicant did not accept that the facts of his case were significantly different to those of *Findlay*. The first instance tribunal was an *ad hoc* court. The Convening Officer played a central role, which included deciding the charge, selecting the members of the court and appointing the prosecutor.

All the military members of the court-martial board were subordinate in rank to the Convening Officer and the two civilians were civil servants who were subordinate in rank to the Convening Officer and, having been posted to the Convening Officer's jurisdiction, were subject to military discipline and under his command while in Germany. Although the Confirming Officer was not the same person as the Convening Officer, it was significant that the role of "Confirming Officer" was abolished by the Army Act 1995 because it was not a judicial body. The Vice-Judge Advocate General was not a member of the tribunal. All submissions of law were made to him alone and he gave his advice on sentencing to the board in private. Rather than providing an adequate guarantee of impartiality, he effectively prevented the court-martial from considering the abuse issue at all. The Court of Appeal and House of Lords were bound by domestic law and could not stigmatise the court-martial proceedings because they were conducted in accordance with that law.

3. The Court's assessment

41. In order to establish whether a tribunal can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence. In this latter respect, what is at stake is the confidence which such tribunals in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacked independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (*Cooper,* § 104; *Grieves,* § 69).

42. There are two aspects to the question of "impartiality": the tribunal must be subjectively free of personal prejudice or bias, and must also be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect (ibid.). The present applicant did not suggest that anyone involved in his court-martial process was subjectively biased against him. Since the concepts of independence and objective impartiality are closely linked, the Court will consider them together in the present case (ibid.).

43. It recalls, by way of preliminary remark, that there is nothing in the provisions of Article 6 to exclude the determination by service tribunals of criminal charges against service personnel. The question to be answered in each case is whether the individual's doubts about the independence and impartiality of a particular court-martial can be considered to be objectively justified and, in particular, whether there were sufficient guarantees to exclude any such legitimate doubts (see *Cooper*, § 110).

44. It is, however, a different matter where the national legislation empowers a military court to try civilians on criminal charges (*Ergin v. Turkey (No. 6)*, no. 47533/99, § 41, 5 May 2006). While it cannot be contended that the Convention absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated, the existence of such jurisdiction should be subjected to particularly careful scrutiny, since only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6 (*op. cit.,* §§ 42 and 44). The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto* (*op. cit.*, § 47).

45. In the present case, the power to try the applicant by court-martial had a clear and foreseeable legal basis, namely section 209(2) of the 1955 Act (see paragraphs 24-26 above). Together with the Judge Advocate at first instance and the Court Martial Appeal Court, the House of Lords examined in detail whether such proceedings would be fair and appropriate, and found, generally, that the law permitting for the civilian members of a military entourage stationed abroad to be tried by court-martial was of utility. Moreover, the House of Lords found that in the applicant's particular case there were sound practical reasons militating, at the time the Director of Public Prosecutions made his decision, in favour of his trial by court-martial in Germany (see paragraphs 19-20 above). While the Court has considerable doubts whether such considerations were sufficiently "compelling" to justify the trial of a civilian before a military tribunal, it is not necessary for it finally to decide the point since it considers, for the reasons set out below, that the composition, structure and procedure of the applicant's court-martial were in themselves sufficient to raise in him a legitimate fear as to its lack of independence and impartiality.

46. In *Findlay*, the Court held that Mr Findlay's fears about the independence and impartiality of a court-martial established under the provisions of the Army Act 1955 were objectively justified. The Court considered that the members of the court-martial were not sufficiently independent of the Convening Officer, who was central to the prosecution and closely linked to the prosecuting authorities. In particular, the Court referred to the Convening Officer's powers to decide the charge, convene the court-martial and appoint the members and the prosecuting and defending officers as well as to provide abstracts of evidence, procure the attendance of witnesses and dissolve the court-martial before or during the trial when required in the interests of the administration of justice (see *Findlay*, § 74). The Court held that these fundamental flaws were not remedied by the presence of safeguards, such as the involvement of the

Judge Advocate, who was not himself a member of the court-martial and whose advice to it was not made public.

47. As in *Findlay*, the applicant's court-martial was established under the provisions of the Army Act 1955. Neither party contends that the functions and powers of the Convening Officer differed significantly from that described in *Findlay*.

48. In expressing concern in *Findlay* at the lack of independence of the members of the court-martial from the Convening Officer, the Court emphasised in particular three factors. First, all military members of the tribunal were subordinate in rank to the Convening Officer; secondly, three out of five members were directly or ultimately under his command and all served in units that were under his command; and thirdly, the Convening Officer had the power to dissolve the tribunal in prescribed circumstances (*Findlay*, § 75).

49. In the present applicant's case, all six members of the tribunal were subordinate in rank to the Convening Officer, and the senior member was under his ultimate command. The two civilian members of the court-martial who came from the United Kingdom solely for the purposes of the trial were under the Convening Officer's command for the purpose of offences committed while they were in Germany. It has not been contended that the Convening Officer's powers to dissolve the tribunal differed from those in *Findlay*.

50. The Government assert that it was central to the Court's conclusion in *Findlay* that many of the court–martial members were directly or ultimately under the command of the Convening Officer and in the absence of this key factor, the Court should conclude that the applicant's court-martial was sufficiently independent for the purposes of Article 6. The Court does not accept this submission. It notes that in *Cooper*, none of the ordinary members was serving under the command of the convening authority, prosecuting authority or higher authority (these three authorities had been created by the Army Act 1996 to replace the role of Convening Officer and separate the convening, prosecuting and referral functions of the court-martial). The Grand Chamber nonetheless considered the junior rank of the ordinary members (who were subordinate to the permanent president and may have been subordinate to other participants in the court-martial including the prosecuting authority) and the *ad hoc* nature of their appointment, might give rise to concern as to their independence and required "particularly convincing safeguards against outside pressures being brought to bear on those officers" (*Cooper*, § 120).

51. The Court notes that two out of the six ordinary members sitting on the applicant's tribunal were civilians and recalls the opinion expressed in previous judgments that the involvement of civilians in the court-martial process contributes to its independence and impartiality (see *Grieves* § 78 and *Cooper* § 117). However, the mere presence of civilians during the

proceedings will not of itself provide adequate guarantees of independence and impartiality; the role that the civilians play in the court-martial process must also be taken into account. Thus, in *Grieves,* the presence of a civilian Court Administration Officer was found to contribute to the independence and impartiality of the tribunal (*Grieves* § 78), but was not sufficient in itself to ensure that the court-martial process as a whole conformed with Article 6. Conversely, in *Cooper* the Court considered that the civilian post of Judge Advocate provided "one of the most significant guarantees of the independence of the court-martial proceedings". In reaching this conclusion, significant emphasis was placed on the pivotal role played by the Judge Advocate, including his ability to give binding rulings and directions on points of law to the ordinary members of the court-martial (*Cooper* § 117). In the present case, while the participation of civilians as ordinary members of the court-martial may have contributed somewhat to its independence, they did not have sufficient influence over the proceedings as a whole, including over the military members of the court-martial, to satisfy the independence and impartiality requirements of Article 6.

52. Furthermore, the Court rejects the Government's submission that the presence of the civilian Vice-Judge Advocate General offered an adequate guarantee of impartiality in this case. As previously mentioned, the Court in *Cooper* accepted that the presence of a Judge Advocate offered a significant safeguard of independence and impartiality. In addition to his civilian status and legal training, emphasis was placed on the Judge Advocate's influence over the proceedings, including his status as a member of the tribunal, his ability to give binding directions and his participation in the deliberations on sentencing. By contrast, the role of Judge Advocate in *Findlay* did not constitute such a valuable safeguard and could not remedy the "fundamental flaws" in the court-martial system prior to the coming into force of the Army Act 1996. In particular, the Court noted that the Judge Advocate was not a member of the tribunal and his advice on sentencing was not made public. The Government do not present any evidence that the Vice-Judge Advocate General's role in the proceedings was different from or more extensive than that of the Judge Advocate in *Findlay*. Notwithstanding that the Vice-Judge Advocate General was a senior judge appointed by the Lord Chancellor, the Court concludes that his influence and involvement in the tribunal proceedings was not sufficient to guarantee the independence and impartiality of the applicant's court-martial.

53. Finally, the Government emphasise that the Convening Officer did not take on the role of Confirming Officer as he did in *Findlay*, although they do not seek to argue that the role of the Confirming Officer *per se* was in any way different. Concerns about the fact that the court-martial's verdict was not final and binding, but was instead subject to review by a non-judicial body, were expressed *Findlay* (§ 78) and also in *Cooper* (§§ 130–131). However, given that the present applicant's case was in fact

reviewed by the Courts-Martial Appeal Court, the Court considers that the role of Confirming Officer, although an unfortunate and unnecessary feature of the proceedings, did not have a prejudicial effect on the independence of the court-martial in this case.

54. For the reasons stated above, the Court considers that the distinctions between the court-martial in the present case and that in *Findlay* are not sufficiently material to persuade it to reach a different conclusion. The essential safeguards that were lacking in *Findlay* were also absent in the present case and, as in *Findlay*, the Judge Advocate did not provide the same guarantees of independence and impartiality as in Co*oper*. The Court considers the applicant's concerns about the independence and impartiality of his tribunal to be objectively justified. Accordingly it finds that there has been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. Article 41 of the Convention provides:

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

A. Damage

56. The applicant did not claim any compensation for non-pecuniary or pecuniary damage.

B. Cost and Expenses

57. Under this head, the applicant claimed GBP 6,797.66, comprised mainly of solicitor's fees for the preparation of the application, perusal of the Government's submissions and preparation of written replies to the Court.

58. The Government contended that this sum was excessive, both by reference to the hourly rate of GBP 160 and the number of hours claimed. They submitted that an award of EUR 4,000 would be reasonable.

59. The Court notes that the parties were requested to make submissions on three separate occasions between 2000 and 2002 (see paragraphs 6-8 above). It awards EUR 9,000, less EUR 630 which the applicant has already received in legal aid from the Council of Europe.

C. Default Interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Article 6 admissible and the remainder of the application inadmissible;

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

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,370 (eight thousand three hundred and seventy euros) in respect of costs and expenses, to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 24 October 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

J. CASADEVALL
President