CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38784/97
by Dean MORRIS
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 3 July 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 31 October 1997 and registered on 26 November 1997,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is a British national, born in 1975 and living in Colchester, England. He is represented before the Court by Mr J. Mackenzie, a lawyer practising in London. The respondent Government are represented by their agent, Mr C.A. Whomersley, of the Foreign and Commonwealth Office.

A. The circumstances of the case

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

In September 1991, at the age of 16, the applicant became a member of the British Army, joining the Life Guards regiment of the Household Cavalry. In November 1992 the applicant was posted to the Household Cavalry Mounted Regiment ("HCMR") where he was taught to ride a horse. The applicant alleges that during riding lessons he became the target of bullying by other soldiers, including a Lance Corporal. According to the applicant, towards the end of November 1992 the Lance Corporal hit him on the side of the head with his fist, causing him to fall and strike his head on the ground. On 30 November 1992, several days after the attack, the applicant reported sick and told the medical officer that the injury to his face had been caused by falling off a horse. On 26 February 1993 the applicant, who alleges to have feared a further physical attack, went absent without leave. On 17 March 1993, he wrote to the Commanding Officer ("CO") of the HCMR (a Lieutenant Colonel), stating, *inter alia,* that "my inability to express sufficient enthusiasm during training sometimes resulted in physical abuse by certain NCOs", and asking to terminate his service. He received no reply to this letter.

The applicant was arrested by the civilian police on 16 October 1996 and taken to the HCMR barracks at Hyde Park, London. The following day he was charged with being absent without leave contrary to section 38(a) of the Army Act 1955. On 18 October 1996 he was remanded in close arrest to the CO by Major Kelly, acting as subordinate Commanding Officer. On the "Eight Day Delay Report" dated 24 October 1996, the reason for the detention is stated: "Likely to absent himself ... – has already offered bribe to JNCO on guard to release him". On 31 October 1996 he appeared before the CO and was remanded by him in close arrest for an abstract of evidence. He was subsequently released by the CO into open arrest on 11 November 1996. The CO remanded him for trial by district court martial on 13 March 1997.

In a statement dated 4 November 1996 to the Ministry of Defence Police the applicant stated that the attack by the Lance Corporal had occurred in the week prior to his going absent without leave, and in a statement dated 29 January 1997 he stated that the attack occurred sometime in February 1993. The police found that the Lance Corporal had left the army and took statements from other soldiers who had been on the same riding course as the applicant. They found that there was no evidence to support his complaint. The applicant subsequently signed a statement saying, *inter alia*: "I have come to the conclusion that I just want to get out of the Army and get on with my life ... . Even though this assault happened, I do not want the Ministry of Defence Police ... to take any further action concerning the incident".

Following the applicant's remand for trial, the CO appointed Captain A as "defending officer". Captain A was an army officer with no legal training, serving as a troop commander with the HCMR. The applicant applied to the Army Criminal Legal Aid Authority ("ACLAA") for legal aid to enable him to be represented by a solicitor. On the application form he stated that his weekly income after deduction of tax, rent and national insurance was GBP 158.13 and that he had no savings or other property of value. The form was counter-signed by his CO. By a letter dated 26 March 1997, the ACLAA wrote that a charge of absence without leave did not normally warrant legal representation but that either the CO or the applicant should write setting out his reasons if he considered that, exceptionally, legal aid should be granted. The applicant's solicitor wrote to the ACLAA on 18 April 1997 pointing out that the applicant faced a custodial sentence and needed to be represented. The ACLAA then offered the applicant legal aid subject to a down-payment of GBP 240. The Government submit that he could have paid in 10 weekly instalments of GBP 24 each, but this is disputed by the applicant. On 30 April 1997 the applicant's solicitor wrote asking the ACLAA to reconsider the down-payment, but on 2 May 1997, before the ACLAA had replied, the applicant refused the offer of legal aid and was not, therefore, represented by a solicitor at the court martial.

The applicant's court martial took place at Chelsea Barracks on 28 May 1997. The court was comprised as follows: a President, Lieutenant Colonel A.D. Hall of the Corps of Royal Electrical and Mechanical Engineers, who was a Permanent President of Courts Martial (appointed to his post in January 1997 and due to remain as such until his retirement in 2001); Captain R. Reid of Royal Army Medical Corps, Aldershot; Captain W.D. Perks of the Second Battalion, Royal Gloucestershire, Berkshire and Wiltshire Regiment (Volunteers), Reading, and a legally qualified civilian judge advocate (see below). All three officers were outside the command area in which the applicant was serving.

Captain A represented the applicant, who pleaded guilty to the charge of being absent without leave between 25 February 1993 and 16 October 1996. The applicant's letter of 17 March 1993 to his CO was handed to the court, but no other mention was made of the bullying allegedly suffered by him. The applicant was sentenced to dismissal from the army and nine months' detention.

After the hearing, Captain A erroneously advised the applicant that if he appealed against the sentence he risked the commencement date for his sentence being put back to the date of dismissal of the appeal. On 31 May 1997 the applicant instructed a solicitor to represent him. On 19 June 1997 the solicitor lodged a petition with the Defence Council in its role as "reviewing authority" (see below), relying on the facts that the applicant had had no legal representation before the court martial and that his allegations of assault were not presented to the court, either by way of a defence of duress (which applies when a person charged with a criminal offence can show that, at the relevant time, he reasonably believed that he would be killed or seriously injured if he did not commit the offence) or in mitigation of sentence. On the same day, the solicitor wrote to Captain A asking for his comments on the petition and reminding him that he was subject to the rules of client privilege and should not disclose details of his dealings with the applicant to any third party. Despite this, however, Captain A provided a statement to the Defence Council, in which he stated *inter alia*:

> "As [the applicant's] Troop Leader I was asked to represent him at Court Martial, this was the first Court Martial I have attended in any capacity. Although I have had experience in civil cases at both Magistrates' and Crown Courts'. ...
>
> [The applicant] had indicated to me that he had gone absent from the Army for more than one reason. As expressed in his letter of 17 March 1993. He was showing reservations about his enthusiasm, commitment and devotion to duty. ...
>
> [T]he petition states that I assumed the petitioner had no choice but to plead guilty, as he had been Absent Without Leave. I was unaware that he could have entered a plea of not guilty to the charge on the basis of duress. [The applicant] and I did not discuss the allegations of bullying in any great detail. This was because these allegations had been withdrawn by him under interview by MOD Police.
>
> [The applicant] indicated to me that he wanted to drop all the references to the violence by the NCO during his training. This was in order that the trial date would be set significantly earlier and that the trial would be substantially shorter. This led me to advise [the applicant] to plead guilty as charged, as I had felt that this gave him his best opportunity to be discharged from the Army at the earliest date which was, after all, his overall aim. ...
>
> I discussed with the Adjutant my role as the Defending Officer. We talked about the procedural steps of the court martial and my conduct leading up to the trial. It was confirmed to me that a guilty plea would produce an earlier trial date than that of not guilty.

I advised [the applicant] that references to his allegations of bullying could prolong and complicate his court martial. The mention of bullying would be introduced as part of his letter to his commanding officer dated 17 March 1993, which he agreed could be put forward for the court as mitigation. [The applicant] agreed that he did not wish to answer questions about his previous allegations, which he HAD dropped.

I therefore advised him to refer such questions to me and I would state to the court that this was an avenue down which he did not wish to proceed. ..."

The petition was refused by the reviewing authority on 14 July 1997, in the following terms:

"The Reviewing Authority has considered the petition submitted by your above-named client, and has denied it for the following reasons.

The down payment for Legal Aid was carefully calculated, and was well in line with the amount the petitioner would have had to pay under the civil system. The certificate signed by him shows clearly that he had decided not to proceed with his application for legal representation. We cannot accept that [the applicant] was in any way forced to accept this decision. He also appears to have been content to accept Captain [A] as his defending officer.

The complaints about the petitioner being bullied were investigated by the SIB and the allegations could not be substantiated. Indeed it came to light during this investigation that that the petitioner had told [another soldier] that he planned to go absent because he was merely tired of the training and the long hours being worked. In view of the SIB report, the Reviewing Authority must accept that the allegation that the petitioner was subjected to violence by a Non-Commissioned Officer cannot be substantiated, and cannot be regarded as a mitigating factor.

In considering your complaint that, had the petitioner been advised by a qualified solicitor, he would have been able to plead not guilty on the basis of duress, we had to rely on the advice given by the Judge Advocate General. He stated that a person is subject to duress when words or conduct from another person cause him to fear that he will be killed or seriously injured, if he does not commit the offence. Clearly, the petitioner could never have reasonably believed that he had cause to fear that he would be killed or seriously injured.

The Reviewing Authority notes that the petitioner had dropped his allegations of being subjected to violence by the time he appeared in Court. All Captain [A] intended to do was to inform the Court that the petitioner did not wish to proceed with these allegations. In fact the Court was made aware of them because the letter from [sic] the Commanding Officer was read out to them.

We accept that Captain A was mistaken in referring the petitioner to the booklet 'Appeals and Petitions after conviction by Army Court Martial', which was out of date after 1 April 1997. In addition the wrong paragraph was used in his advice to the petitioner. However as we have now received a petition, in spite of this mistaken advice, we believe that no harm has been done. ..."

On 26 July 1997 the applicant lodged an application for leave to appeal against conviction and sentence to the Court Martial Appeal Court. Leave to appeal was refused by the single judge on 22 October 1997, on the grounds

that the defence of duress had not been open to the applicant, that he had been properly advised to plead guilty, and that the sentence was not manifestly excessive.

B. Relevant domestic law and practice

The Armed Forces Act 1996 (the "1996 Act") came into effect on 1 April 1997, amending the Armed Forces Act 1955.

Under the 1996 Act, the initial decision whether or not to bring a prosecution is taken by the "higher authority", who is a senior officer who must decide whether any case referred to him by the accused's commanding officer should be dealt with summarily, referred to the prosecuting authority, or dropped. Once the higher authority has taken this decision, he has no further involvement in the case.

Where the accused is a member of the army, the role of prosecutor is performed by the Army Prosecuting Authority ("APA"). Following the higher authority's decision to refer a case to it, the prosecuting authority has 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. In addition, it conducts the prosecution (1996 Act, Schedule I, Part II). The prosecution is brought on behalf of the Attorney General. The current APA is also Director of Army Legal Services ("DALS") and as such is answerable to the Adjutant General (a member of the Army Board). One role of the DALS is the provision of military legal advice to the Army chain of command (save in relation to disciplinary cases).

The Army Criminal Legal Aid Authority ("ACLAA") is also the responsibility of the Adjutant General.

Court administration officers, independent of both the higher and the prosecuting authorities, are 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. They are appointed by the Defence Council. Before commencement of the court martial hearing, the power to dissolve it is vested in the court administration officer.

A District Court Martial consists of a permanent president of courts martial, not less than two serving military officers of at least two years' military experience and a judge advocate (section 84D of the 1955 Act as amended by the 1996 Act). The court administration officer, commanding officers of the accused, members of the higher authority, investigating officers and all other officers involved in inquiring into the charges concerned are all barred from selection to the court martial (section 84C(4) of the 1955 Act as amended by the 1996 Act). The Courts Martial (Army)

Rules 1997 further provide that an officer serving under the command of: (i) the higher authority referring the case; (ii) the prosecuting authority; or (iii) the court administration officer are ineligible for selection. The Queen's Regulations provide that a court martial is, so far as practicable, to be composed of officers from different units.

Judge advocates are appointed by the Lord Chancellor and are civilians who must have at least seven years' experience as an advocate or five years' experience as a barrister. A judge advocate's rulings on points of law are binding on the court and he delivers a summing up in open court before the court martial retires to consider its verdict. Once the court martial hearing has commenced, the power to dissolve it is vested in the judge advocate. He has a vote on sentence, but not on verdict. The Judge Advocate General no longer provides general legal advice to the Secretary of State for Defence (1996 Act, Schedule I, Part III, sections 19, 25 and 27).

Decisions on verdict and sentence are reached by majority vote (section 96 of the Army Act 1955). In the event of an equal number of votes as to verdict the accused is acquitted. The casting vote on sentence, if needed, rests with the president of the court martial, who also gives reasons for the sentence in open court. The board is required to vote on verdict and sentence in ascending order of seniority.

All guilty verdicts reached, and sentences imposed by, a court martial must be reviewed by the "reviewing authority" (section 113 of the 1955 Act as substituted by the 1996 Act). Although the ultimate responsibility rests with the Defence Council, the review is as a matter of practice generally delegated via the Army Board to an officer not below the rank of Colonel. Post-trial advice received by the reviewing authority from a judge advocate (different from the one who officiated at the court-martial) is disclosed to the accused, who has the right to present a petition to the authority. The reviewing authority may quash any guilty verdict and associated sentence or make any finding of guilt which could have been made by the court martial, in which case it may substitute any sentence (not being, in the authority's opinion, more severe than that originally passed) which was open to the court martial (section 113AA of the 1955 Act as substituted by the 1996 Act). The reviewing authority gives a reasoned decision and its verdict and sentence are treated for all purposes as if they were reached or imposed by the court martial.

There is a right of appeal against both conviction and sentence to the Courts Martial Appeal Court (the civilian Court of Appeal) (1996 Act, section 17 and Schedule V).

COMPLAINTS

The applicant complains, under Article 5 § 3 of the Convention, that the officer who decided to detain him on remand in close arrest was a direct subordinate of the CO who was conducting the proceedings against him and that he was not given any reasons in support of the decision to detain him in close arrest or any opportunity to contest this decision. Under Article 5 § 4 of the Convention, the applicant complains that he was unable to apply to a court for a review of the decision to detain him in close arrest. In addition, he complains, under Article 5 § 5, that he had no enforceable right to compensation in connection with his detention in close arrest.

Under Article 6 § 1 of the Convention, the applicant complains of a number of structural defects in the court martial system. Thus, the commanding officer of an accused soldier, the higher authority, the CMAO, ACLAA and the prosecuting authority are all directly subordinate to the Defence Council. The judge advocate general cannot be considered an independent agency given its functions prior to 1 April 1997 under the Army Act 1955. A court made up solely of army officers trying charges brought by the army does not, in his submission, constitute an "independent and impartial tribunal", particularly in the case of offences against the efficiency of the army, such as absence without leave. Furthermore, in view of the fact that the Defence Council has the power to set aside a court martial's findings on conviction or sentence, it cannot be said that a court martial has the characteristic of making a binding decision necessary to be a "tribunal established by law" and its independence is brought further into doubt.

In addition, the applicant complains under Article 6 § 1 of a number of particular defects which arose in his case to deprive him of a fair hearing. First, he maintains that the prosecution was aware of the reason given by the applicant for going absent but allowed the court martial to proceed in ignorance of the full facts. Secondly, the officer appointed to defend the applicant was patently unable to act in the latter's best interests: he failed to advise him to plead not guilty, did not present to the court martial the full reasons for the applicant's absence, and disclosed privileged information about the applicant to the Army Board in the face of specific instructions not to do so.

Finally, the applicant complains under Article 6 § 3(c) about the failure to provide him with legal representation for his court martial.

THE LAW

1. Articles 5 §§ 3 and 5 of the Convention

The applicant complains, under Articles 5 §§ 3 and 5 of the Convention, that the officer who initially decided to detain him was a direct subordinate of the CO who was conducting the proceedings against him, that he was not given any reasons in support of the decision to detain him or any opportunity to contest that decision and that he had no enforceable right to compensation in connection with his detention.

Article 5 § 3 provides (as relevant):

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ..."

Article 5 § 5 provides:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

The Government deny that the applicant suffered any violation of Articles 5 §§ 3 or 5.

The Court recalls that, in accordance with Article 35 § 1 of the Convention, it can only deal with a complaint if it is introduced within six months of the final relevant domestic decision. It notes that the applicant was remanded in close arrest by the subordinate officer on 18 October 1996, and again by the CO for an abstract of evidence on 31 October 1996. He was released into open arrest on 11 November 1996 and remanded for court martial by the CO on 13 March 1997, though it is unclear whether he was again detained at that time. In any event, whether the final domestic decision within the meaning of Article 35 § 1 was reached on 31 October 1996 or 13 March 1997 in the context of the Article 5 § 3 complaint, it is clear that the decision was reached more than six months before the date on which the application was submitted to the Court. It follows that the application so far as it relates to Article 5 § 3 has been submitted too late and must be rejected in accordance with Article 35 § 4.

It follows also that the applicant's complaint under Article 5 § 5 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4.

2. Article 5 § 4 of the Convention

The applicant next complains that he was unable to apply to a court for a review of the decision to detain him in close arrest, contrary to Article 5 § 4 of the Convention, which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Court recalls that English law allows a detained person, including one in military custody, to make an application to the High Court for habeas corpus in order to secure his release from custody on the basis that his detention is unlawful. Such applications are dealt with by the court promptly. The court considering the application will examine the legal validity of the detention and whether there is sufficient evidence to detain and, if the power to detain depends on the prior establishment of an objective fact, the court will decide whether that fact exists (see the Hood v. the United Kingdom judgment of 18 February 1999, *Reports of Judgments and Decisions* 1999-I, §§ 40 and 41). The applicant failed to make any such application.

It follows that this aspect of the applicant's complaint is also manifestly ill-founded and must be rejected, in accordance with Article 35 §§ 3 and 4.

3. Articles 6 §§ 1and 3(c) of the Convention

The applicant makes a number of complaints under Article 6 § 1 relating to the general structure of the court martial system in the United Kingdom following the 1996 Act and to a number of specific defects which arose in his particular case.

Article 6 § 1 provides (as relevant):

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

The applicant also complains that the failure to provide him with legal representation for the court martial violates Article 6 § 3(c), which provides:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require …"

On the Article 6 § 3(c) aspect of his complaint, the applicant argues that he was entitled to legal representation at the court martial proceedings but that this was denied him due to the unfairness of the Army's legal aid system. He points to differences between that system and the civil legal aid system in the United Kingdom (which are refuted by the Government) which disadvantaged his application for legal aid. In particular, he highlights the fact that the Army system required the applicant to make a down-payment amounting to ten times his weekly disposable income whereas the civil system would probably have required only weekly or

monthly payments out of that income. He indicates that he was unable to afford the lump sum required and was thus denied legal representation.

The Government submit in reply that the down-payment of GBP 240 was requested by the ACLAA only following careful assessment of the applicant's means. They state that the applicant was manifestly able to pay that sum. They highlight the fact that payment by instalments was an option (although this is disputed by the applicant) and that the applicant chose to decline the offer before a reply had been received to the letter of 30 April 1997 seeking reconsideration of the terms of the offer.

On Article 6 § 1, the Government submit that the new court martial system, which has been in place since the entry into force of the 1996 Act, meets all of the objections to the previous system identified by the Court in the *Findlay* case and complies in full with the requirements of Article 6 § 1. They indicate that the fact that the Defence Council have certain functions as to command and administration of the armed forces and appointments in those forces or that certain of their functions may be discharged by the Army Board does not mean that the applicant was not tried by an independent and impartial tribunal. Nor does the fact that members of the applicant's court martial were Army officers since all were outside the command area in which the applicant was serving and were entirely independent of both him and the prosecuting authorities. In respect of the APA in particular, the Government highlight that they are entirely independent of the Army Board and bring prosecutions on behalf of the Attorney General. They argue that the current APA's co-existing role as DALS, in which capacity he is answerable to a member of the Army Board, does not prejudice his independence or impartiality as a prosecutor, especially since advice on disciplinary matters is no longer given by the DALS to the chain of command. They point out that the present Courts Martial Administration Officer is a civilian and that his subordinate officers are independent of both the higher and prosecuting authorities. They comment also that the PPCM at the applicant's court martial is in his last post before retiring from the Army, thus being appointed as such for a likely term of 4 years 8 months. He was also outside the chain of command. The Government conclude that the proceedings as a whole were both subjectively and objectively impartial.

As to the applicant's complaints about the role of the defending officer, the Government observe that that officer was never intended to be a substitute for a legal representative (which the applicant would have benefited from separately had he taken up the offer of legal aid). Indeed, the defending officer provided a second layer of assistance which would not have been available to the applicant had he similarly refused legal aid in criminal proceedings. They point out that the applicant could have selected a defending officer from outside his own unit.

As to the applicant's complaints about his own defending officer's conduct, the Government submit that there was no basis for him to advise the applicant to plead not guilty to the charge since the defence of duress was bound to fail in the circumstances as the applicant had withdrawn his allegations of bullying and assault and had agreed that he did not want to answer questions about them at the hearing. That withdrawal and agreement limited the extent to which the defending officer could be expected to present the allegations as a reason for the applicant going absent. In any event, say the Government, the allegations were brought to the court martial's attention, and full reasons for the applicant's absence were thus given, because the defending officer handed to the board the applicant's letter to his CO of 17 March 1993. The Government maintain that the defending officer was entitled to disclose the previously privileged information to the Army Board following the court martial in view of the allegations which the applicant made about that officer in his petition to the Defence Council.

In the context of his general structural complaints, the applicant argues that decisions on all key aspects of a court martial are in the hands of the Army hierarchy answerable to the Defence Council, which delegates many of its functions to the Army Board. He comments that a court martial made up mainly of Army officers could not provide the applicant with an independent and impartial hearing, particularly since the charges themselves were brought by other Army officers and concerned an offence against Army discipline. He highlights the requirement under the 1996 Act that the Defence Council review every finding of guilt reached, and sentence imposed, by a court martial and the wide powers of the Council in carrying out that review and concludes that these factors deprive the court martial of any status as a "tribunal established by law" for the purposes of Article 6.

Insofar as his specific complaints arising out of the facts of his case are concerned, the applicant argues that the defending officer was patently unable to act in his best interests since he was appointed by the CO from within his own unit and was thus subordinate to the very officer who had remanded the applicant for trial by court martial. He states that he was not consulted about the choice of defending officer. He comments that the defending officer failed to advise him properly on the possibility of lodging a "not guilty" plea based upon the defence of duress and to inform the court martial adequately of the reasons for the applicant going absent. He complains in particular about the officer's disclosure to the Army Board following the hearing of instructions given in confidence by the applicant, and of advice given to him, notwithstanding the applicant's specific requests that he should not do so.

The Court considers that this part application raises complex issues of law and fact, the determination of which should depend on an examination of the merits. It concludes, therefore, that this aspect of the application is not

manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints under Article 6 §§ 1 and 3(c) of the Convention;

Declares inadmissible the remainder of the application.

S. DOLLÉ
Registrar

J.-P. COSTA
President