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

Case of GRIEVES v. the United Kingdom

(Application no. 57067/00)

Judgment

Strasbourg, 16 December 2003

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GRAND CHAMBER

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(Application no. 57067/00)

JUDGMENT

STRASBOURG

16 December 2003

This judgment is final but may be subject to editorial revision.

In the case of Grieves v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mrs V. STRÁŽNICKÁ,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr A. KOVLER,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 1 October and on 3 December 2003,

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

PROCEDURE

1. The case originated in an application (no. 57067/00) against the United Kingdom of Great Britain and Northern Ireland lodged on 26 April 2000 with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mark Anthony Grieves ("the applicant").

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 that he did not receive a fair trial by an independent and impartial tribunal established by law in violation of Article 6 § 1 of the Convention. In particular, he complained that the structure of his court-martial was such that it violated the independence and impartiality requirements, and consequently the fairness requirement, of that Article. He also complained about unfairness based on the particular facts of his case.

4. The application was allocated to the Fourth Section. On 4 June 2002 a Chamber of that Section declared inadmissible the applicant's specific complaint of unfairness under Article 6 and gave notice to the Government of his main complaint concerning the independence and impartiality of the court-martial (Rule 54 § 2 (b)). On 6 May 2003 a Chamber of that Section (composed of Mr M. Pellonpää, Sir Nicolas Bratza, Mrs V. Strážnicka, Mr R. Maruste, Mr S. Pavlovschi, Mr L. Garlicki, Mr J. Borrego Borrego, and also of Mr M. O'Boyle, Section Registrar) relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to such relinquishment (Article 30 of the Convention and Rule 72 of the Rules of Court).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

6. Pursuant to Article 29 § 3 of the Convention and Rule 54A § 3 of the Rules of Court, the Grand Chamber notified the parties that it might decide to examine the merits of the complaint before it at the same time as its admissibility and decided to put an additional question to the parties.

7. The applicant and the Government each filed written observations on the admissibility and merits together with separate submissions on the applicable domestic law and practice.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 October 2003 (Rule 59 § 3 of the Rules of Court). There appeared before the Court:

(a) *for the Government*
Mr J. GRAINGER, *Agent*,
Mr P. HAVERS, Q.C., *Counsel*,
Ms T. JONES,
Mr H. MORRISON,
Mr E. LATHAM,
Air Vice-Marshal R. CHARLES,
Commodore J. BLACKETT,
Commander S. TAYLOR,
Brigadier T. PAPHITI, *Advisers*;

(b) *for the applicant*
Mr G. BLADES, Solicitor, *Representative*,
Mr J. MACKENZIE, Solicitor, *Adviser*.

The Court heard addresses by Mr Havers and by Mr Blades.

9. The Grand Chamber subsequently decided to examine the merits of the complaint before it at the same time as its admissibility (Article 29 § 3 of the Convention and Rule 54A § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1968 and lives in Devon. At the relevant time he was a serving member of the Royal Navy.

11. On 18 June 1998 he was convicted, pursuant to section 42 of the Naval Discipline Act 1957, by a naval court-martial of unlawfully and maliciously wounding with intent to do grievous bodily harm contrary to the Offences Against the Person Act 1861. He was sentenced to, *inter alia*, three years' imprisonment and to be dismissed from the service and reduced in rank. He was also ordered to pay GBP 700 compensation.

12. The court-martial comprised a President (a Captain of the Royal Navy), four naval officers (a Commander, 2 Lieutenant Commanders and a Lieutenant) and a Judge Advocate (Commander Flanagan). The Judge Advocate was a naval barrister who was working as the naval legal advisor to FLEET (the command responsible for the organisation and deployment of all ships at sea). His rank was lower than that of the President of the court-martial. The prosecution was conducted by a Lieutenant Commander of the staff of the Prosecuting Authority. The applicant chose to be represented by a naval barrister. The defending and prosecuting officers were junior in rank to the Judge Advocate and the defending officer was senior in rank to the prosecuting officer.

13. At the beginning of the court-martial the Judge Advocate directed the members of the court-martial as follows:

> "As Judge Advocate it's my role to ensure that the trial is conducted in accordance with the law and I am here to advise and guide you. I will have no role in the finding on the facts. You must accept what I say on matters of law and procedures [as] being correct. If you have any questions of me during the trial ... they must be asked of me in open Court in the presence of the accused, his friend and the prosecutor and any such questions should pass through you ... as President. That means ... that now that this trial has commenced, you and your court can have no direct communication with me except in open Court and therefore if I seem to avoid you outside the environs of the Court ... that's the reasoning behind that and please don't think I am being rude ...
>
> Now you and your colleagues may discuss the case when you are together and in private if you so wish, but my strong advice to you at this stage is to resist the temptation until you've heard all the evidence and indeed my own summing up. You must be particularly rigorous in not discussing the case at all during adjournments in the trial when you could be overheard by others such as during lunch in the Ward room where a room has been set aside for you and particularly overnight since you must not be influenced by anything said to you or which you observe which is not evidence in the trial. I will warn you of this ... each time we adjourn and particularly when we adjourn at the end of the days' proceedings."

14. On 29 September 1998 the Navy Board decided not to vary the court-martial's verdict and sentence. In his advice to the Navy Board, the Judge Advocate of the Fleet commented that the trial had been "well conducted by all concerned", that the main directions of law in the Judge Advocate's summing up were "impeccable" and that any errors were, in any event, favourable to the applicant.

15. On 30 June 1999 a single judge of the Courts-Martial Appeal Court rejected his appeal, as did the full court on 20 January 2000.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General

16. The Armed Forces Act 1996 ("the 1996 Act") came into effect on 1 April 1997 and amended, *inter alia*, the Naval Discipline Act 1957 (references below to "the 1957 Act" are to that Act as amended). Naval courts-martial are regulated, *inter alia*, by the 1957 Act, by the Courts-Martial (Royal Navy) Rules 1997, as amended ("the 1997 Rules") and by the Queen's Regulations for the Royal Navy ("QRRN").

17. Section 42 of the 1957 Act provides that any person subject to naval law who commits a civilian offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against that section.

18. Section 43(1) of the 1957 Act lists the punishments available to a court-martial following conviction and establishes, as a matter of law, the relative positions of each punishment in the hierarchy of punishments available (the "Coda" to section 43(1) of the 1957 Act).

B. The court-martial – participants and procedure

1. The Commanding Officer ("CO")

19. An allegation that a person subject to naval law has committed an offence must be reported to the CO of the accused. The CO must investigate the charge after which the CO may dismiss the charge, refer it to the Higher Authority or try the accused summarily.

2. The Higher Authority

20. The Higher Authority is a senior naval officer. Although he is not legally qualified, he is legally advised by a barrister. He must decide, in respect of cases referred to him by a CO, whether to refer the matter back to that CO to be dealt with summarily (unless the accused has already elected trial by court-martial); to refer the matter to the Prosecuting Authority for a

decision as to whether the accused should be prosecuted; or to drop the charges. The Higher Authority's decision is essentially a command decision, the Higher Authority being required to ask himself whether there are service reasons for prosecuting or not. Once the Higher Authority has taken this decision, he has no further involvement in the case.

3. The Prosecuting Authority

21. The role of prosecutor is performed by the Prosecuting Authority of the Royal Navy. The Prosecuting Authority is appointed by Her Majesty the Queen (section 52H of the 1957 Act) and is accountable to the Attorney-General for the performance of his prosecuting functions.

22. In almost all cases (88% of cases prosecuted in 2002 and up to mid-2003) the Prosecuting Authority appoints barristers to prosecute cases from his own staff, which barristers work exclusively for the Prosecuting Authority. On occasion, however, the Prosecuting Authority appoints prosecutors from a list of uniformed naval barristers who are eligible to act as prosecutors but who do not, in their general duties, work directly for the Prosecuting Authority (unlike in the army and air force where prosecutions are carried out exclusively by prosecutors on the staff of the relevant Prosecuting Authority). Such an officer may be working in a legal or non-legal post, but will always be outside the chain of command of the accused and will always be answerable for his duties as a prosecutor to the Prosecuting Authority.

23. Naval barristers appointed to act as prosecutors are members of the Bar of England and Wales and are consequently subject to the professional arrangements and ethical duties of the Bar Code of Conduct (including a duty to act with independence and in the interests of justice). The Prosecuting Authority and all acting prosecutors also apply the Code for Service Prosecutors which has been endorsed by the Attorney General and which sets out how their duties should be carried out.

24. Following the Higher Authority's decision to refer a case to it, the Prosecuting Authority has an absolute discretion, applying similar criteria as those applied in civilian cases by the Crown Prosecution Service, to decide whether or not to prosecute and, if so, to determine precisely what charges should be brought. The Prosecuting Authority conducts the prosecution (Part II, Schedule I to the 1996 Act), which is brought on behalf of the Crown.

4. The Naval Court Administration Officer ("NCAO")

25. The NCAO is a civilian and a civil servant, working in "one of the secretariats dealing with naval service discipline policy issues". The NCAO is 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 selecting members of the court. The NCAO is appointed by the Defence Council. Before commencement of the court-martial hearing, the power to dissolve it is vested in the responsible NCAO.

26. Naval courts-martial consist of a President, four to eight serving naval officers of at least three years' military experience and a Judge Advocate (since the entry into force of the Armed Forces Act 2001 - "the 2001 Act" - warrant officers may also sit as members). The distinction made between district and general courts-martial in the army and air force does not exist in the Royal Navy. Contrary also to the position in the army and air force, the Royal Navy does not appoint, and has never appointed, Permanent Presidents of courts-martial ("PPCMs").

5. Naval Judge Advocates

27. In the Royal Navy the role undertaken by the Judge Advocate General ("JAG") for the army and air force is divided between two appointments: the Judge Advocate of the Fleet ("JAF") and the Chief Naval Judge Advocate ("CNJA").

28. The JAF is an experienced civilian lawyer. The current JAF has been a circuit judge since 1992. He was appointed as JAF in 1995 by Her Majesty the Queen on the recommendation of the Lord Chancellor, to whom the JAF is responsible. Section 73 of the 1957 Act provides:

> "Nothing in this part of the Act shall prejudice the exercise by the [JAF] of his functions of considering and reporting on the proceedings of courts-martial and disciplinary courts, or any other of his functions in relation to such courts."

The prime responsibility of the JAF is to review all naval courts-martial, save for those in which the accused pleads guilty, so as to be able to advise the Reviewing Authority whether or not they have been properly conducted according to law. If, in the opinion of the JAF, they have not been so conducted, he has the power to recommend to the Reviewing Authority that the conviction be quashed or that the finding of guilt or the sentence be altered.

29. The CNJA, on the other hand, is a service appointment. He is appointed by the First Sea Lord (Chief of Naval Staff) on the advice of the Naval Secretary and must be a barrister of suitable experience and rank. Save for his judicial role, he is responsible to the Second Sea Lord (Chief of Naval Personnel), who is the senior Admiral responsible for personnel policy. His judicial role is described as part of his "ancillary duties" for which he is solely responsible to the JAF.

The CNJA's primary purpose is to be the principal advisor within the Royal Navy on all matters of law, including naval, criminal, employment, maritime and international law. His secondary purpose is to "ensure that sufficient naval officers are trained as barristers and thereafter appropriately appointed to legal billets to provide the legal services required by commands, including headquarters". Among his "principal" tasks" is to assist the JAF and consult with him on matters of law and legal policy, to select officers for legal training and to supervise their duties. Sitting as Judge Advocate at complex courts-martial and appointing barristers to sit as Judge Advocates are among his "ancillary tasks" (section 53B(1) of the 1957 Act).

30. Any Judge Advocate sitting in a court-martial must have been qualified for at least five years (section 53B(2) of the 1957 Act). In addition, as a matter of policy, reflected in the CNJA's terms of reference, the Royal Navy has for many years appointed only serving officers as Judge Advocates. The reasons for this policy have been described by the current CNJA (Commodore Jeffrey Blackett) as follows:

> "... because they understand the particular and unique way of life of the Royal Navy, gained through their own operational experience. They can advise and direct the court in terms which reflect their detailed knowledge of the Service, and which therefore enhances the credibility of their role in the eyes of all the parties involved."

31. The manner of appointment of a naval Judge Advocate is also different to the process in the army and the RAF. The appointment process is known as "ticketing", a process which involves both the CNJA and the JAF. The CNJA regularly assesses the experience and qualities of those who are appropriately qualified, using the same criteria for judicial qualities as are applied by the Lord Chancellor for civilian judicial appointments. He then consults with the JAF as to suitability for appointment. The JAF will have had an opportunity to assess the qualities of such candidates and their suitability for ticketing since his review of the court-martial proceedings may also involve an assessment of the qualities of the prosecuting and defending barristers. With the JAF's agreement, the CNJA then writes to inform a successful candidate of his or her appointment or "ticketing". Such an appointment is for an undefined period of time. A Judge Advocate, once ticketed, remains on the list until he or she leaves the service or voluntarily resigns from the list. No Judge Advocate has ever been removed from office, although some have voluntarily withdrawn because they have decided to concentrate on operational appointments within the Royal Navy. If the question ever arose, grounds for removal would be precisely the same as those for a civilian judge, and the decision would be taken by the JAF.

Once "ticketed", these officers gain experience by assisting at a court-martial with an experienced Judge Advocate. They then proceed to cases where they sit as Judge Advocate where the accused pleads guilty, so that sentencing is the only matter at issue. It is then for the CNJA to assess when

the Judge Advocate in question is ready to officiate in contested cases. At that point Judge Advocates are appointed to individual cases by the CNJA, by his letter of appointment, but the practice is that there is no selection as the Judge Advocate is appointed by *rota* on a "cab rank" basis, the only criteria being that the Judge Advocate is not excluded by section 53C(4) of the 1957 Act or Rule 15 of the 1997 Rules. Accordingly, a list is kept by the NCAO of "ticketed" Judges Advocates, and the name at the top of the list is appointed to the next court-martial. That Judge Advocate's name then goes to the bottom of the list and such persons will not be appointed until his or her name rises to the top of the list again. Such ticketed barristers may be serving in either legal or non-legal appointments: those serving in legal appointments sit as Judge Advocates on average for about 20-30 days each year and those serving in non-legal appointments will normally sit for less.

There are currently four practising Judge Advocates one of whom is serving in a Ministry of Defence appointment and is not therefore reported on by his Royal Navy superiors.

32. Judge Advocates are responsible solely to the JAF for the performance of their professional duties at courts-martial while in office. As noted above, the JAF reviews all contested courts-martial which result in a conviction. In advising the Reviewing Authority, the JAF will comment on the Judge Advocate's handling of the proceedings and his summing up. He may also pass "professional comments about the judicial performance to the CNJA". At the time of the applicant's court-martial, there was a haphazard practice whereby the CNJA might provide a Judge Advocate's reporting officer, at that latter officer's request, with a synopsis of the JAF's comments on the Judge Advocate's performance. The Judge Advocate who officiated at the applicant's court-martial was not so reported upon and that practice has since ceased. The CNJA does not sit on any promotion board of any officer who has served as a Judge Advocate and has no control over or effect upon their promotion. Judge Advocates receive no additional or separate pay for duties in such office and their pay and promotion cannot be affected by their performance or status as a Judge Advocate.

QRRN 3630, which came into force after the present court-martial, provides as follows:

> "3. It follows that Judge Advocates must be free from any supervision or restraint in order to carry out independently the duties required of them by law. In the conduct of their professional duties at courts-martial Judge Advocates are accountable, only in so far as the standard and performance of their duties is concerned, to the [JAF].
>
> 4. The [JAF] is solely responsible for reporting on the professional performance of Judge Advocates in the conduct of their duties in court-martial trials. No other personal report, assessment or other document is to be prepared or used to determine whether an officer conducting Judge Advocate duties is qualified to be promoted, or is qualified or suited for particular appointments or training. Where Judge Advocates are appointed to general appointments, or whilst carrying out their general duties, nothing

in this article shall prevent the appropriate reports being prepared on them concerning their conduct of those duties, for promotion, appointing or training purposes."

6. The President and ordinary members of the court-martial

33. The appointment of the members of the court-martial proceeds by way of a random selection: the NCAO requests ships and establishments to nominate officers to serve as court-martial members. There was also a list of volunteers who had put their name forward as being available and prepared to sit as a court-martial member. (Since the entry into force of the 2001 Act, the appointment of members has been by way of a random selection from a computer generated database of eligible personnel).

Section 53C(4)(b) of the 1957 Act excludes from selection for courts-martial the CAOs, the COs of the accused, members of the Higher Authority, investigating officers and all other officers involved in inquiring into the charges concerned. Rule 15 of the 1997 Rules also excludes an officer serving under the command of the Higher Authority referring the case, the Prosecuting Authority or the CAOs. The members of the court-martial are not legally qualified although most will have attended a previous court-martial as an observer. They will also have attended a Divisional Officer's Course where they will have received instruction on summary trials and many will have attended the Junior Staff Course which includes a lecture on Naval Discipline.

34. The members of a court-martial remain subject to naval discipline in the general sense since they remain naval officers, but this is subject to their not being reported on in relation to the carrying out by them of their duties as members of the court-martial and, in particular, in relation to their judicial decision-making. Attempting to influence, or influencing, a member of a court-martial amounts to the common law offence of perverting the course of justice and/or to the offence of conduct to the prejudice of good order and naval discipline (section 39 of the 1957 Act).

35. The President is responsible for conducting the trial in a manner befitting a court of justice and in accordance with the traditions of the Royal Navy (Rule 28(1) of the 1997 Rules). The post of Permanent President of Courts-Martial ("PPCM"), which existed in the air-force and army (the *Cooper* judgment, §§ 30-32) was never created in the Royal Navy.

7. The court-martial hearing

36. When the members have been nominated and the court-martial has been convened, the members are sent the NCAO Briefing Notes for court-martial members (paragraphs 47-62 below) along with a list of prosecution witnesses. The members are required to examine the list and to inform the NCAO if any of the witnesses is known to them. They are also advised that,

should they subsequently discover that they do know someone, they should advise the Judge Advocate.

37. At the outset of the court-martial, the names of the members of the court-martial (of the Judge Advocate, the President and of the ordinary members) are read out and an accused can object to any member of the court-martial.

38. The President and each ordinary member of a court-martial take the following oath:

> "I swear by almighty God that I will duly administer justice according to the law and without partiality, favour or affection; and I do further swear that I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of this court-martial, unless thereunto required in due course of law."

The Judge Advocate takes the following oath:

> "I swear by almighty God that I will to the best of my ability carry out the duties of judge advocate according to law and without partiality, favour or affection; and I do further swear that I will not on any account at any time whatsoever disclose the vote or opinion of the President or [of] any member of this court-martial unless thereunto required in due course of law."

39. Once the court-martial hearing has commenced, the power to dissolve it is vested in the Judge Advocate. At the court-martial the Judge Advocate sits apart from the court-martial members and has no contact with them (either during or outside the hours of sitting) other than appears on the record of the court-martial. A Judge Advocate's rulings on points of law are binding on the court-martial members and he or she delivers a summing up in open court before the court martial retires to consider its verdict.

40. Deliberations of the court-martial members are confidential, members being forbidden to reveal any opinion or vote. The Judge Advocate does not deliberate in private with the court-martial members on verdict and has no vote on this. The Judge Advocate will, however, sit in private with the court-martial members to deliberate on sentence and to give any advice on sentence required and he has a vote. Decisions on verdict and sentence are reached by majority vote (section 62 of the 1957 Act). 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 members of the court are required to speak, and at the close of deliberations to vote, on verdict and sentence in ascending order of seniority.

8. The Reviewing Authority

41. All guilty verdicts reached, and sentences imposed by, a court-martial must be reviewed by the "Reviewing Authority" within prescribed time limits (section 70 of the 1957 Act). The Reviewing Authority is the Defence Council which has delegated its functions to the Navy Board (also

known as the Admiralty Board) which in turn has delegated that task to the Naval Secretary.

42. Contested cases resulting in a conviction are (as noted above) scrutinised by the JAF who provides written advice to the Reviewing Authority as to the safety of the conviction and the conduct of the trial. For guilty pleas resulting in conviction, legal advice is provided to the Reviewing Authority by a senior naval barrister who is himself an experienced Judge Advocate but who does not continue to practice as a Judge Advocate for the duration of his tenure as advisor to the Reviewing Authority, for reasons concerning his independence from the "naval judiciary". The accused may also petition the Reviewing Authority within 28 days following sentencing and the Reviewing Authority's procedure does not begin until after receipt of that petition or after the 28 day time-limit for its receipt. Post-trial advice to the Reviewing Authority (either from the JAF or the experienced naval barrister) is disclosed to the accused. Account will be taken of the petition, where one is submitted, in the advice given to the Reviewing Authority.

43. The Reviewing Authority gives a reasoned decision (Rule 75 of the 1997 Rules) and its verdict and sentence are treated for all purposes as if they were reached or imposed by the court-martial.

The Reviewing Authority may substitute a finding of guilt which could have been made by the court-martial and if the court-martial must have been satisfied of the facts which would justify making that finding (section 71(2) of the 1957 Act). It may also "pass any such sentence (not being, in the opinion of the authority, more severe than the sentence originally passed) open to a court-martial on making such a finding as appears proper" (section 71(2) and (4) of the 1957 Act).

According to section 71A of the 1957 Act, the Reviewing Authority can also quash any guilty verdict and associated sentence and make an order authorising a re-trial under the same conditions as the Courts-Martial Appeal Court (see paragraphs 44-46 below). It is then for the Prosecuting Authority to decide whether to seek a re-trial. While the individual concerned is not heard by the Reviewing Authority specifically on the question of a re-trial, the decision of the Prosecuting Authority to seek a re-trial can be challenged as an abuse of process. If convicted on re-trial, the individual also retains his access on verdict and sentence to the Court-Martial Appeal Court.

9. The Courts-Martial Appeal Court ("CMAC")

44. The CMAC is a civilian court composed of judges from the criminal division of the Court of Appeal. A convicted person has a right of appeal to the CMAC against both conviction and sentence (section 8 of the Courts-Martial (Appeals) Act 1968 as amended - "the 1968 Act").

45. An appeal against conviction will be allowed where the CMAC finds that the conviction is unsafe, but dismissed in all other cases. The test of what is "unsafe" is the same as that applied in appeals against convictions from the civilian criminal courts. An appeal against sentence may be allowed where the CMAC considers that the sentence is not appropriate for the case (section 16A of the 1968 Act). The CMAC has power, *inter alia*, to call for the production of evidence and witnesses whether or not produced at the court-martial (section 28 of the 1968 Act).

46. In the case of *R. v. McKendry* (judgment of the CMAC of 20 February 2001), the appellant pleaded guilty to a charge of absence without leave and was sentenced to, *inter alia*, 265 days' detention. The Reviewing Authority rejected his petition and Mr Justice Ouseley gave the judgment of the CMAC on appeal. Having noted in detail the advice of the JAG to the Reviewing Authority, he quoted as follows from a prior judgment of the CMAC (*R. v. Pattinson*, judgment of 25 January 1999):

> "In our judgment, the court has to bear in mind, in dealing with an appeal of this kind, ... the somewhat "hybrid jurisdiction" which [the CMAC] exercises; in that it is clearly free to correct any injustice, but it nonetheless has to be mindful that those imposing and confirming sentences, particularly, it is to be said ... in relation to an offence of desertion, are particularly well placed and indeed better placed than [the CMAC] in assessing the seriousness of offending in the context of service life".

Mr Justice Ouseley continued:

> "The offence of going absent without leave, as indeed the offence of desertion, is not one in respect of which any civilian parallel exists. The sentencing considerations involve factors that are particular to the armed services, in respect of which their judgment and experience are entitled to great weight. A court should be reluctant to interfere with such courts-martial sentencing decisions, particularly where the [JAG] has reviewed the matter and has dismissed the petition in the terms in which he did here. The considerations particular to this sort of military offence relate to the significance of the offence for the maintenance of military discipline and efficiency, the need for deterrence, the significance of rank and the availability of other measures from dismissal to loss of rank and pay, which are in many ways not available or not paralleled in the civilian sphere. Indeed some of those factors would also be of particular weight when the [CMAC] is dealing with offences which do have parallels in the civilian sphere, and would justify caution in interfering with courts-martial sentences; even more so do they justify caution when dealing with offences which have no parallel in the civilian sphere."

The case of *R. v. Holtby-Smith* (judgment of the CMAC of 26 February 2003) concerned a re-trial following a decision of the Reviewing Authority. Lord Justice Kennedy in the CMAC stated as follows:

> "The Reviewing Authority directed ... that the Prosecuting Authority consider whether there should be a re-trial. That was an inappropriate direction on the part of the Reviewing Authority because under section 113A of the [1955 Act] the decision whether or not to order a re-trial must be one for the Reviewing Authority itself and not for the Prosecuting Authority, though of course the Reviewing Authority could, if so disposed, canvas the views of the Prosecuting Authority, and of the proposed defendant, as to whether or not there should be a retrial. Following that, the Reviewing

Authority was advised of the error of its approach and ... directed a retrial in the interests of justice. ... If [such a] decision of the Reviewing Authority was to be challenged, it could only be challenged by means of judicial review... .".

In the cases of *R .v. Ball and R. v. Rugg* (judgment of the CMAC, 12 February 1998), the sentence of the court-martial was one year's detention and the Reviewing Authority substituted a sentence of one year's imprisonment. The CMAC quashed the latter sentence and replaced it with a sentence of nine months' detention.

C. NCAO Briefing Notes entitled "Notes for Guidance of Presidents and Members of Naval Courts-Martial"

47. At the relevant time, the Briefing Notes described below were sent by the NCAO to the members (including the President) selected for a court-martial.

48. The introduction to the Briefing Notes provided as follows (The Order of Procedure booklet referred to in this introduction was not submitted by the Government to the Court):

"1. These notes provide a guide to the roles and duties of Presidents and Members of the Court at naval courts-martial trials. They are not mandatory and officers must continue to exercise their judgement and discretion during the course of the trial. The purpose of these notes is to explain procedures and formalities, so that officers taking part for the first time can better understand their role and concentrate on the issues in the trial.

2. Officers selected to officiate will also find it useful to acquaint themselves with the Court-Martial Order of Procedure booklet (a copy of which is enclosed with these notes) although it is the Judge Advocate's responsibility to ensure that the procedures are followed. He will lead the President and the Members on matters of procedure throughout the trial, and will prompt them as required in the observance of the traditional formalities."

49. Paragraph 1 of the Briefing Notes provided that:

"The President is "responsible for conducting the trial in a manner befitting a court of justice and in accordance with the traditions of the Royal Navy" (Rule 28(1) [of the 1997 Rules]). Whilst these notes and the procedure booklet will prepare and arm Presidents to discharge this task, it is upon the Judge Advocate (who is also a member of the court) that Presidents should rely for advice and guidance on the discharge of this duty, and all matters associated with the trial. Judge Advocates are selected from the ranks of experienced naval barristers by the [CNJA]. It is their responsibility to ensure that the trial is conducted in accordance with the law, and they are trained and experienced in all matters concerning evidence and procedure and are accustomed to dealing with the many unforeseen difficulties inevitably faced by courts-martial."

50. The Notes continued at paragraphs 2, 3 and 5 as follows:

"2. Experience has shown that it is of paramount importance that Presidents confine themselves to their particular duty laid down in [1997 Rules], and do not allow themselves or their Court Members to treat the proceedings as a board of inquiry into

any aspect of omission, neglect or wrong-doing by any person not charged and brought before the Court as an Accused. ...

3. Without exception such matters can be dealt with internally, without the need to draw attention to them outside the Service by pronouncement made in open court. The preferred course for dealing with such matters which may come to light during the trial ... is therefore for the Presidents to raise them with the appropriate Service authority after the trial has finished. ...

5. Presidents and Court Members should bear in mind that their duties in court can be exacting, onerous and require considerable patience; they should not therefore underestimate the demands that will be made of them. They must be prepared to concentrate on the issues in the trial without any distraction by their normal duties and responsibilities. ..."

51. Paragraphs 8-10 covered the opening procedure describing how the members of the court-martial would enter (indicating that the President would return the salutes of the uniformed personnel as appropriate) and how the parties could object to any member of the court-martial (which matter would be resolved, if necessary by the Judge Advocate), after which the sitting members would take their oaths.

52. Paragraph 11 dealt with the procedure in the case of a plea of not-guilty. It covered the Prosecutor's opening statement, the examination in chief, cross-examination and re-examination of witnesses, questions of witnesses by the Judge Advocate and the President, closing addresses by the prosecution and defence. It also indicated that, at the discretion of the President, it would be permissible and often helpful (particularly to the uniformed advocates) to relax swords during the course of the trial. It went on to advise that:

"(i) The Judge Advocate will then direct the Court on the legal issues they must consider, and will summarise the evidence in a neutral way. He will define the elements of the offences and any other relevant law, give the Court simple guidance on how it applies to the issues in the case, and usually invite them to approach their consideration of the case by addressing a number of questions that will direct their minds to the issue of innocence or guilt. The Court will find it helpful to make a note of any questions the Judge Advocate poses.

(j) The Court will then retire to consider its verdict. They must not separate nor communicate with anyone whilst doing so. If they have further questions about any aspect of the case, then the President must re-open the Court and put those questions to the Judge Advocate on the record. Having come to their finding, and having completed the Finding Sheet which has been left with them (and which the Judge Advocate will have explained in his summing up) the President re-opens the Court, the Clerk collects the Finding Sheet and the Judge Advocate reads the finding. In the event of any finding of guilt, the Court hears mitigation and then retires (this time with the Judge Advocate present to advise them) to consider their sentence. ..."

53. Paragraph 12 dealt with questions to witnesses by the members (other than the President and the Judge Advocate) and pointed out that if

they were in doubt about a question then the President could seek the Judge Advocate's advice in open court before any question was asked.

54. Paragraphs 13 and 14 dealt with the Judge Advocate's rulings on the admissibility of evidence and on any submission by the accused that there was no case to answer in the absence of the other members of the court-martial. Paragraph 14 concluded that "like all of the Judge Advocate's rulings on matters of law, the Court are bound to follow his direction."

55. Paragraph 15 of the Notes provided:

> "The Court are the sole judges of the facts and weigh the evidence to establish innocence or guilt. They are bound by the Judge Advocate's directions on the law and must take any advice on the law and procedure exclusively from him. During the trial, the Court may find that they have questions which they wish to address to the Judge Advocate; such questions must be asked in open court in the presence of the Accused (and his Accused Friend and the Prosecutor) and the Judge Advocate's reply must also be on the record. This means that once the trial has commenced, the Court can have no direct communication with the Judge Advocate except in open court."

56. Paragraph 16 of the Notes further stated:

> "As the sole judges of the facts the Court must appear to be, and remain throughout, impartial. It is important that not only is justice done, but that it is seen to be done."

57. Paragraph 17 of the Notes warned members that:

> "The Court must not be tempted to reach a decision before they have heard all the evidence for both prosecution and defence. ..."

58. Paragraph 18 of the Briefing Notes recalled that:

> "... [The members' notes] should be left behind and will be destroyed by the Clerk once the trial is over."

59. Paragraph 19 of the Notes contained the following guidance:

> "The Court should not be tempted to discuss the case amongst themselves until they have heard all the evidence and the Judge Advocate's summing up. They must be rigorous in not discussing the case outside their number at all during the adjournments, particularly overnight, since they may be influenced, even subconsciously, by anything said to them which is not evidence in the trial. The Judge Advocate is required, as a matter of law, to remind them of this before any adjournment of any length."

60. Paragraph 21 of the Briefing Notes provided:

> "After a plea of Guilty or a finding of Guilt, the Judge Advocate will retire with the remainder of the Court to advise on and consider sentence with them in closed court. The Judge Advocate will advise the Court of the sentencing options available in the case. Sentencing is a matter for the court's discretion and judgment, but the Judge Advocate will advise them on the appropriate level and type of sentence, based on naval sentencing practice and (where appropriate in more serious cases) Court of Appeal sentencing guidelines, as well as his experience. The Court will be invited to consider and, if necessary, vote on the sentence to be awarded, in which case the normal tradition of the Service should be followed: the junior member should vote first, followed by the other Members of the Court and the President, in ascending order of seniority. The Judge Advocate is a member of the Court, and if necessary, has

the penultimate vote on sentence before the President, who himself has an additional casting vote in the event of an equal division of votes. That said, it is the customary and proper practice for naval courts-martial to try and achieve a consensus opinion on the appropriate sentence in the first instance."

61. Paragraph 22 of the Briefing Notes added that:

"Following pleas or findings of Guilt in the case of officers, the Clerk of the Court (at the Judge Advocate's prompting) will observe the tradition of the Service by turning the point of the Accused's sword to face him."

62. Paragraph 23 concerned announcing and giving reasons for a sentence and read as follows:

"Increasingly it is the practice of the civil court judges to announce in open court the reasons behind any particular sentence they have awarded. This has been the practice of naval courts-martial for some time and is now a statutory requirement. The procedure is as follows:

(a) The Court, with the assistance and advice of the Judge Advocate, will determine the appropriate sentence in closed court. ...

(c) The Judge Advocate will also, together with the President, draft a statement of the reasons why the Court has awarded the particular sentence, which will be designed for public consumption. This statement of the reasons for sentence will be included in the signal publishing the result of the court-martial which receives a navy-wide distribution."

D. Statistics

63. In 2002 the naval Higher Authority referred 103 cases to the Prosecuting Authority for a decision whether or not to prosecute and 26 of those cases were discontinued before trial.

64. In the year 2002 the rate of acquittals in contested naval courts-martial was 59%. The rate of acquittals in contested Crown Court trials has been:

Year end to March 1999 – 42.8%
Year end to March 2000 – 42.8
Year end to March 2001 – 44.3%
Year end to March 2002 – 42%
Year to December 2002 – 37.4%

THE LAW

65. The applicant complained under Article 6 § 1 of the Convention that his court-martial, structured as it was under the 1996 Act, lacked independence and impartiality and that the proceedings before it were consequently unfair. Article 6 § 1, in so far as relevant, reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...."

I. ADMISSIBILITY OF THE COMPLAINT

66. Other than arguing that the complaint was manifestly ill-founded, the Government did not raise any other objection to its admissibility.

67. It is not disputed that the final decision in the proceedings was that of the CMAC of 20 January 2000. The complaint was introduced on 26 April 2000 and, therefore, within the six-month time-limit set down by Article 34 of the Convention. Moreover, the Court considers that, given the nature of the charge (unlawfully and maliciously wounding with intent to do grievous bodily harm contrary to the Offences Against the Person Act 1861) together with the nature and severity of the penalty imposed (three years' imprisonment), the court-martial proceedings constituted the determination of a criminal charge against the applicant (*Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, §§ 82-83 and, more recently, *Ezeh and Connors v. the United Kingdom* [GC], Nos. 39665/98 and 40086/98, §§ 69-130, ECHR- ..).

68. The Court considers that the applicant's complaint raises questions of law which are sufficiently serious that its determination should depend on an examination of the merits and no other grounds for declaring it inadmissible have been established. The Court therefore declares the complaint admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraphs 6 and 9 above), the Court will immediately consider the merits of this complaint.

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

A. The relevant case-law

69. The Court recalls that 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, the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.

In this latter respect, the Court also recalls that 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 (*Findlay v. the United Kingdom*, judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, § 73 and *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, § 71).

It is further recalled that 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 (the above-cited *Findlay* judgment, at § 73). The Court notes that 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 (also at § 73 of the *Findlay* judgment).

70. In the case of *Cooper v. the United Kingdom*, in which judgment has been delivered on the same date as the present, the applicant also complained under Article 6 § 1 of the Convention that his air-force court-martial, structured as it was under the 1996 Act, lacked independence and impartiality and that the proceedings before it were consequently unfair.

71. The Court rejected his general submission that service tribunals could not, by definition, try criminal charges against service personnel consistently with the independence and impartiality requirements of Article 6 § 1 of the Convention (the *Cooper* judgment, at §§ 108-110).

72. The Court also rejected his complaint that his own court-martial lacked independence and impartiality (the *Cooper* judgment, at §§ 111-134).

It found that his submissions concerning the Higher Authority, the Prosecuting Authority and the Court Administration Officer ("CAO") did not cast any doubt on the genuineness of the separation of the prosecuting, convening and adjudicating roles in the court-martial process. It further considered that there was no reason to doubt the independence of the decision-making of those bodies from chain of command, rank or other service influence (the *Cooper* judgment, § 115).

As to the Judge Advocate, the Court concluded that there was no ground upon which to question the independence of the air-force Judge Advocate since he was a civilian appointed to the staff of the JAG by the Lord Chancellor (a civilian) and to a court-martial by the JAG (also a civilian). It was also found that the presence of a civilian with such qualifications and such a central role in court-martial proceedings constituted "one of the most significant guarantees" of the independence of those proceedings (the *Cooper* judgment, § 117). As to the Permanent President of courts-martial ("PPCM"), the Court not only found the PPCM appointed to the court-martial in the *Cooper* case to be independent but also that the PPCM constituted an "important contribution" to the independence of an otherwise *ad hoc* tribunal (the *Cooper* judgment, § 118).

Turning then to the ordinary members, the Court found that there was no reason to doubt their independence by reason of the position and role of the CAO or because of the manner in which the CAO appointed them. However, their *ad hoc* appointment and their relatively junior rank, while not sufficient of themselves to undermine their independence, emphasised the need for the existence of particularly convincing safeguards against outside pressure being brought to bear on those officers. The Court concluded that there were in place sufficient safeguards of the independence of the ordinary members of the court-martial notably the presence of the PPCM and the Judge Advocate, the prohibition reporting on members' judicial decision-making and the Briefing Notes distributed to the members (the *Cooper* judgment, §§ 119-126).

Finally, the Court found that the role of the Reviewing Authority did not undermine the independence of the court-martial because the final decision in the proceedings would lie with a judicial body, the CMAC (at §§ 127-133 of the *Cooper* judgment).

73. Accordingly, the Court concluded that Mr Cooper's misgivings about the independence and impartiality of his air-force court-martial, convened under the 1996 Act, had not been objectively justified and that the court-martial proceedings could not consequently be said to have been unfair. It found therefore that there had not been a violation of Article 6 § 1 of the Convention.

B. Application to the present case

74. The present applicant raised the same complaint as in the *Cooper* case but in relation to a naval court-martial. Naval courts-martial differ in certain important respects from the air-force system examined in the *Cooper* case and the Court has considered whether those distinctions are such as to lead to a conclusion in the present case different from that in the *Cooper* judgment.

75. The first distinction concerns the naval Prosecuting Authority: in contrast to the other services, the naval Prosecuting Authority can appoint a prosecutor for a court-martial from a list of uniformed naval barristers outside his own staff. The applicant did not comment specifically on how this bears on the compliance of his court-martial with Article 6 apart from noting that "*ad hoc*" prosecutors are involved in naval courts-martial. The Government emphasised that the prosecutor for the vast majority of naval courts-martial is, in fact, from the staff of the Prosecuting Authority as was the prosecutor in the applicant's case (see paragraph 12 above). In any event, they did not consider that the appointment of a prosecutor from outside of that Authority's staff affected the independence of the court-martial process.

76. The Court considers that the essential point is that the prosecutor in the applicant's case came from the staff of the Prosecuting Authority, as was the case in court-martial at issue in the *Cooper* case.

77. Secondly, the NCAO (carrying out the same duties as the CAO in the air-force) is a civilian and not a serving officer as in the air force. The applicant did not directly address the point. The Government considered that the fact that the NCAO fell outside of the naval disciplinary chain was a further guarantee of the independence of the naval court-martial process. In any event, just as the air-force CAO operates independently, so too does the NCAO.

78. The Court considers it plain that the involvement of a civilian in a service court-martial process contributes to its independence and impartiality. In any event, the NCAO's duties and functions are sufficiently similar to those of the air-force CAO as to allow the conclusion that the former operates independently of the Higher and Prosecuting Authorities and of chain of command, rank or other service influence (the *Cooper* judgment, § 114-115).

79. Thirdly, there is a single type of naval court-martial whereas the air-force can convene both district and general courts-martial. The parties do not suggest, and the Court does not consider, that the fact that a naval court-martial can only sit in a single formation has any bearing on the independence and impartiality of such tribunals.

80. Fourthly, the post of PPCM does not exist in the naval system, the President of a naval court-martial being appointed for each court-martial as it is convened. The applicant pointed out that, as a result, the entire court-martial was convened on an *ad hoc* basis. The Government explained that, since there were less naval courts-martial, there was no need for a group of officers with the sole task of acting as PPCMs and considered that the naval court-martial complied with Article 6 § 1 even without PPCMs.

81. The Court considers that the absence of a full-time PPCM, with no hope of promotion and no effective fear of removal and who was not subject to report on his judicial decision-making (the *Cooper* judgment, § 118)

deprives naval courts-martial of what was considered, in the air-force context, to be an important contribution to the independence of an otherwise *ad hoc* tribunal.

82. Fifthly, and most importantly, the Judge Advocate in a naval court-martial is a serving naval officer who, when not sitting in a court-martial, carries out regular naval duties. In contrast, the Judge Advocate in the air-force is a civilian working full-time on the staff of the Judge Advocate General, himself a civilian.

83. The applicant considered this distinction sufficient of itself to conclude as to the lack of independence of naval courts-martial. He maintained that it was inevitable that the JAF's comments on the Judge Advocate's conduct of the court-martial would be taken into account in the wider service evaluation of that officer for promotion. Whether or not there was at the time a regulation excluding reporting in the service on a Judge Advocate's judicial decision-making, he submitted that it was unreal to consider that the service would genuinely separate his judicial and other service functions. The CNJA, who appointed the Judge Advocate, is a service appointment. The JAF is not responsible for the appointment of the Judge Advocate, has no iNput into the court-martial itself and his essential task is to report on the court-martial to the Reviewing Authority.

84. The Government maintained that a service Judge Advocate is no less a safeguard than the civilian one sitting in air-force courts-martial because, *inter alia*, of the following matters: the Judge Advocate is ticketed only with the consent of the JAF (a civilian judge), he can only be removed by the JAF and on the same grounds as those for a civilian judge; he is responsible solely to the JAF in the performance of his duties as Judge Advocate; he receives no extra pay for acting as Judge Advocate and neither his pay nor promotion are affected by his performance as a Judge Advocate; the Judge Advocate in the applicant's court-martial was not reported on as regards his performance as Judge Advocate (a practice now enshrined in Queen's Regulation 3630) and any comments made by the JAF to the CNJA do not and cannot affect the naval careers of Judge Advocates; a Judge Advocate is first selected by the "ticketing process" and then for a particular court-martial on a rota basis and, in the latter case, only if he is not excluded by section 53C(4) of the 1957 Act or Rule 15 of the 1997 Rules; there is *de facto* security of tenure since a ticketed Judge Advocate remains as such indefinitely; a Judge Advocate takes a particular form of oath; he sits apart from court-martial members and his only contact with them (apart from deliberations on sentence) is in open court; and the JAF reviews the court-martial as does the Reviewing Authority and the CMAC.

85. The Court notes that, as in the air-force, the naval Judge Advocate fulfils a pivotal role in the court-martial but that, unlike his air-force equivalent, he is a serving naval officer in a post which may or may not be a legal one and who, although "ticketed" indefinitely, sits in courts-martial

only from time to time. As to the Government's reliance on the involvement of a civilian JAF, the Court observes that the JAF has no input into naval court-martial proceedings, his principal role being to report to the Reviewing Authority on those proceedings. Further, it is not the JAF but the CNJA (a naval officer) who is responsible for the initial "ticketing" of a Judge Advocate (albeit with the agreement of the JAF).

86. Moreover, the Court notes with some concern certain reporting practices as regards Judge Advocates which applied at the relevant time. The JAF could pass comments about a Judge Advocate's court-martial performance to the CNJA (see paragraph 32 above). It may be that the CNJA had no control over promotions but the CNJA remained a senior service officer whose main functions included the appointment of legally trained service officers to legal posts in the service and who was answerable as regards those duties to the senior Admiral responsible for personnel policy. In addition, at the relevant time the JAF's report on a Judge Advocate's judicial performance could be forwarded to the Judge Advocate's service reporting officer. While this may not actually have happened in the present case, the Judge Advocate took up his duties in the applicant's court-martial at a time when his performance in those proceedings could, in principle, have been the subject of a report to his evaluating service officer. It is not submitted that QRRN 3630 was in force at the time of the present applicant's court-martial (see paragraph 32 above)

87. For these reasons, the Court considers that, even if the naval Judge Advocate appointed to the applicant's court-martial could be considered to have been independent despite the reporting matters highlighted in the preceding paragraph, the position of naval Judge Advocates cannot be considered to constitute a strong guarantee of the independence of a naval court-martial.

88. Moreover, the Court finds unconvincing the Government's explanations as to why a serving officer was to be preferred as Judge Advocate in naval courts-martial whereas the JAG and the Judge Advocates involved air-force courts-martial were civilians.

The Government referred, in the first place, to the relatively small number of naval courts-martial. However, the Court considers that this only means that fewer naval Judge Advocates would be required. They also relied upon the knowledge a naval officer would have of the unique language, customs and environment of the Royal Navy. However, since the essential function of the Judge Advocate is to ensure the lawfulness and fairness of the court-martial and to direct the court on points of law, it is difficult to understand why a detailed knowledge of the way of life and language of the navy should be called for, particularly where, as in the present case, the offence with which the applicant was charged was the ordinary criminal offence of malicious wounding. In any event, the Court is not persuaded that a civilian Judge Advocate would have more difficulty in

following naval language or customs than a trial judge would have with complex expert evidence in a civilian case.

The Government further relied on the need for the naval court-martial system to be "flexible" and "portable" because of the particularly mobile nature of the navy. Naval Judge Advocates were therefore preferable as, *inter alia*, they would have "ready access" to the area in question and would be better prepared for the difficulties and dangers of working at sea. However, the Court does not find this relevant given the Government's clarification (in response to questions at the oral hearing) that naval courts-martial have in fact been held on land since 1986 in two trial centres (Portsmouth and Plymouth) regardless of the part of the world in which the offence was alleged to have been committed.

89. Accordingly, the lack of a civilian in the pivotal role of Judge Advocate deprives a naval court-martial of one of the most significant guarantees of independence enjoyed by other services' courts-martial (army and air-force court-martial systems being the same for all relevant purposes – the *Cooper* judgment, § 107), for the absence of which the Government have offered no convincing explanation.

90. Sixthly and finally, the Court considers the Briefing Notes sent to members of naval courts-martial to be substantially less detailed and significantly less clear than the CMAU (RAF) Briefing Notes examined in detail in the above-cited *Cooper* case (see paragraphs 45-62 of that judgment). The Court considers that they are consequently less effective in safeguarding the independence of the ordinary members of courts-martial from inappropriate outside influence.

91. The Court accordingly finds that the distinctions between the air-force court-martial system assessed in the above-cited *Cooper* case and naval court-martial system at issue in the present case are such that the present applicant's misgivings about the independence and impartiality of his naval court-martial, convened under the 1996 Act, can be considered to be objectively justified. His court-martial proceedings were consequently unfair *(*see, for example, *Smith and Ford v. the United Kingdom*, nos. 37475/97 and 39036/97, § 25, 29 September 1999 and *Moore and Gordon v. the United Kingdom*, nos. 36529/97 and 37393/97, § 24, 29 September 1999).

There has therefore been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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."

93. The applicant made no claim in respect of pecuniary or non-pecuniary damage and the Court sees no reasons to make any such award.

A. Costs and expenses

94. The applicant claimed reimbursement of his legal costs and expenses. He requested a total amount of 21,100 pounds sterling ("GBP") in respect of both the present and the above-cited *Cooper* case (the legal representative being the same in both cases). These costs are said to represent legal work of some 134 hours costed at GBP 150 per hour together with certain travel and accommodation expenses related to the hearing held in the present and the *Cooper* cases.

95. The Government noted that few details concerning, or documentation substantiating, the costs and expenses claimed to have been incurred have been submitted. They did not accept that the costs and expenses, even if incurred, were necessarily incurred or reasonable as to quantum. They suggested that the Court should award no more than GBP 5000 in respect of costs and expenses.

96. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX).

97. It notes that it has found a violation of Article 6 § 1 in the present case and considers it appropriate to make an award in respect of the applicant's reasonable legal costs and expenses.

On the one hand, the Court observes that the applicant referred generally to various aspects of the legal work completed without indicating in any way how much time was spent on which aspect. Neither was there any indication as to the division of legal work between the present case and the *Cooper* case to which cases the total legal costs and expenses' claim related. Further, there is, in the Court's opinion, considerable overlap between these two related cases. Moreover, the applicant did not clarify whether the sums claimed were inclusive or exclusive of value-added-tax ("VAT"). On the other hand, the present case required an examination in the Grand Chamber as well as an oral hearing (together with the above-cited *Cooper* case) on the admissibility and merits of the applicant's complaint.

98. Making its assessment on an equitable basis, the Court awards the sum of 8000 euros ("EUR") in respect of costs and expenses (which sum is to be converted into pounds sterling at the rate applicable on the date of settlement and which is inclusive of any VAT which may be chargeable) less the legal aid amount to be paid by the Council of Europe.

B. Default interest

99. 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 application admissible;

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, EUR 8000 (eight thousand euros) in respect of costs and expenses (a sum to be converted into pounds sterling at the rate applicable on the date of settlement and which is inclusive of any VAT which may be chargeable) less the legal aid amount to be paid by the Council of Europe; and
   (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 in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 December 2003.

Luzius WILDHABER
President

Paul MAHONEY
Registrar