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***221 Findlay v United Kingdom**

Application No. 22107/93

Before the European Court of Human Rights

President Ryssdal, De Meyer, Palm, Loizou, Morenilla, Freeland, Gotchev, Jambrek, and Jungwiert

25 February 1997

The applicant was a member of the British Army. As a result of his participation in the Falklands campaign, he developed behaviour which was later diagnosed as post traumatic stress disorder (PTSD). This condition, combined with a severe service-related injury, led him to create an incident in which he threatened to shoot both himself and a number of his colleagues, and fired some shots in the air. He was arrested and brought before a court-martial.

A single officer (the “convening officer”) was responsible for the convening of the court-martial, the appointment of all participants in the court-martial, and the confirmation of the sentence. The applicant, in spite of evidence of his condition, was sentenced to a term of imprisonment, a reduction in rank, and dismissal, causing a reduction in his pension entitlement. The sentence was confirmed, and the applicant's requests for review were rejected. An application to the Divisional Court for leave to challenge by judicial review was also unsuccessful. The applicant did obtain a settlement from the Secretary of State for Defence as a result of a civil action in respect of his injury and PTSD, but with no admission of liability.

The applicant invoked Article 6 , arguing that he had been denied a fair hearing before the court-martial, and that it was not an independent and impartial tribunal.

unanimously:(1) there has been a violation of Article 6(1) ; (2)the claim for pecuniary damage be dismissed;(3)the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;(4)the United Kingdom authorities pay the applicant costs and expenses plus interest. 1. Scope of the case. (a) The Court recalls that the scope of its jurisdiction is determined by the Commission's decision on admissibility and that it has no power to entertain new and separate complaints which were not raised before the Commission. However, while the applicant may not expressly have invoked each aspect of his rights under Article 6(1) before the Commission, he does appear to have raised in substance most of the matters which form the basis of his complaints. It follows ***222** that these are not new and separate complaints, and that the Court has jurisdiction to consider them. [63] (b) The Court does not find it appropriate to examine an issue which was not pursued by the applicant at the hearing or referred to by the Government or the Delegate of the Commission at any time. [65] (c) It is not the Court's task to rule on legislation in abstracto and it cannot therefore express a view as to the compatibility of provisions of new legislation with the Convention. [67] 2. Article 6: fair hearing by an independent and impartial tribunal; applicability.Article 6(1) is clearly applicable to the court-martial proceedings, since they involved the determination of the applicant's sentence following his plea of guilty to

criminal charges. [69] 3. Article 6: fair hearing by an independent and impartial tribunal; general interpretation. (a) The Court recalls that in order to establish whether a tribunal can be considered as “independent” , regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. [73] (b) As to the question of “impartiality” , there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. [73] (c) The concepts of independence and impartiality are closely linked and the Court will consider them together as they relate to the present case. [73] 4. Article 6: fair hearing by an independent and impartial tribunal; compliance. (a) The Court observes that the convening officer played a significant role before the hearing of the applicant's case. Upon examination of the particulars of this role, the Court considers that the convening officer was central to the applicant's prosecution and closely linked to the prosecuting authorities. [74] (b) The question therefore arises whether the members of the court-martial were sufficiently independent of the convening officer and whether the organisation of the trial offered adequate guarantees of impartiality. In this respect, the Court finds it noteworthy that all the members of the court-martial, appointed by the convening officer, were subordinate in rank to him. Furthermore, the convening officer had the power, in prescribed circumstances, to dissolve the court-martial either before or during the trial. [75] (c) In order to maintain confidence in the independence of the court, appearances may be of importance. Since all the members of the court-martial fell within the chain of command of the convening officer, the applicant's doubts about the tribunal's independence and impartiality could be objectively justified. [76] (d) The Court finds it significant that the convening officer also acted as “confirming officer” , so that the decision of the court-martial was not effective until ratified by him, and he had the power to vary the sentence. This is contrary to the well-established principle that the power to give a binding decision which may not be altered by a ***223** non-judicial authority is inherent in the very notion of “tribunal” , and can also be seen as a component of the “independence” required by Article 6(1) . [77] (e) These flaws in the court-martial system were not remedied by the presence of safeguards. Nor could the defects be corrected by any subsequent review proceedings. Since the applicant's hearing was concerned with serious charges classified as “criminal” under both domestic and Convention law, he was entitled to a first instance tribunal which fully met the requirements of Article 6(1) . [78]–[79] (f) For all these reasons, and in particular the central role played by the convening officer in the organisation of the court-martial, the Court considers that the applicant's misgivings about the independence and impartiality of the tribunal which dealt with his case were objectively justified. In conclusion, there has been a violation of Article 6(1) . 5. Article 50: claim for just satisfaction. (a) The Court agrees with the Commission's Delegate that no causal link has been established between the breach of the Convention complained of and the alleged pecuniary damage, and that it is not possible to speculate as to what the outcome of the court-martial proceedings might have been had the violation

not occurred. It is therefore inappropriate to award the applicant compensation for pecuniary damage. [84]–[85] (b) In response to the applicant's claim for distress caused by his time in prison, and the request that his conviction be quashed, the Court reiterates that it is impossible to speculate as to what might have occurred had there been no breach. Furthermore, it has no jurisdiction to quash convictions pronounced by the national courts. [86]–[88] (c) The Court considers that in the circumstances of the present case, it was reasonable to attempt to seek redress for the violation complained of. It therefore decides to award in full the costs and expenses claimed. [91]

Representation

• Ms S. Dickson , Foreign and Commonwealth Office, (Agent), Mr P. Havers , Queen's Counsel, Mr J. Eadie , Barrister-at-Law, (Counsel), Mr G. Rogers , Ministry of Defence, Ms J. Murnane , Ministry of Defence, Mr D. Woodhead , Ministry of Defence (Advisers) for the Government.
• Mr N. Bratza (Delegate) for the Commission.
• Mr J. Mackenzie , solicitor (Counsel), Mr G. Blades , solicitor, Mr D. Sullivan , solicitor (Advisers) for the applicant.

The following cases are referred to in the judgment:

• 1.Bryan v. United Kingdom (A/335A): (1996) 21 E.H.R.R. 342 .
• 2.De Cubber v. Belgium (A/86): (1985) 7 E.H.R.R. 236 .
• 3.Eckle v. Germany (A/51): (1983) 5 E.H.R.R. 1 .
• 4. Engel and Others v. Netherlands (A/22): 1 E.H.R.R. 647 .
• 5.James and Others v. United Kingdom (A/98): (1986) 8 E.H.R.R. 123 .
• 6.Pullar v. United Kingdom, Reports and Decisions 1996: (1996) 22 E.H.R.R. 391 .
• 7.Schmautzer v. Austria (A/328A): (1996) 21 E.H.R.R. 511 . ***224**
• 8.Silver and Others v. United Kingdom (A/61): (1983) 5 E.H.R.R. 347 .
• 9. Singh v. United Kingdom, Reports and Decisions 1996 .
• 10.Sramek v. Austria (A/84): (1985) 7 E.H.R.R. 351 .
• 11.Van de Hurk v. Netherlands (A/288): (1994) 18 E.H.R.R. 481 .

The following additional cases are referred to in the Report of the Commission:

• 12.Campbell and Fell (A/80): (1985) 7 E.H.R.R. 165 .
• 13.Demicoli v. Malta (A/210): (1992) 14 E.H.R.R. 47 .
• 14.Holm (A/279A): (1994) 18 E.H.R.R. 79 .
• 15. Le Compte, Van Leuven and de Meyere (A/43): (1982) 4 E.H.R.R. 1 .
• 16. Mitap and Müftüoglu v. Turkey-Comm. Rep. 8.12.94 , .
• 17. Padovani (A/257B) .
• 18. Application No. 8289/78, Decision 5.3.80, 18 DR 166 .

The FactsI.

The circumstances of the case

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

7.In 1980 he joined the British Army and became a member of the Scots Guards. His service was due to terminate in October or November 1992 when he would have received a Resettlement Grant and, at the age of 60, an army pension.

8. In 1982 Mr Findlay took part in the

Falklands campaign. During the battle of Mount Tumbledown he witnessed the death and mutilation of several of his friends and was himself injured in the wrist by a mortar shell blast. According to the medical evidence prepared for his court-martial, 1 as a result of these experiences he suffered from post traumatic stress disorder ("PTSD"), which manifested itself by flashbacks, nightmares, feelings of anxiety, insomnia and outbursts of anger. This disorder was not diagnosed until after the events of 29 July 1990. 2

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

10. In 1990 the applicant, who had become a Lance Sergeant, was sent with his regiment to Northern Ireland. On 29 July 1990, after a heavy drinking session, he held members of his own unit at pistol point ***225** and threatened to kill himself and some of his colleagues. He fired two shots, which were not aimed at anyone and hit a television set, and subsequently surrendered the pistol. He was then arrested. 1.

The medical evidence

11. On 31 July 1990 an ex-naval psychiatrist, Dr McKinnon, examined Mr Findlay and found that he was responsible for his actions at the time of the incident. However, a combination of stresses (including his back injury and posting to Northern Ireland) together with his heavy drinking on the day, had led to an "almost inevitable" event. Dr McKinnon recommended "awarding the minimum appropriate punishment" . Following this report, the decision was taken to charge Mr Findlay with a number of offences arising out of the incident on 29 July. 3

12.In order to establish that he was fit to stand trial, at the request of the army he was examined on two occasions by Dr Blunden, a civilian consultant psychiatrist who had been employed by the Ministry of Defence since 1980. In her report of January 1991, Dr Blunden confirmed that Mr Findlay was fit to plead and knew what he was doing at the time of the incident. However, his chronic back problem (which caused him to be frustrated and depressed at not being fit for duty in his Northern Ireland posting) together with "his previous combat stresses and a very high level of alcohol … combined to produce this dangerous behaviour" . In her second report, of March 1991, she explained that the applicant had reacted to the stress caused by his back problems in the way he did on 29 July 1990 because of his experiences in the Falklands war. Whilst she did not clearly state that he suffered from PTSD, she confirmed that similar patterns of behaviour frequently occurred at a late stage in those who experienced this disorder. She confirmed that the consumption of alcohol on the relevant day was a result of his condition and not a cause of it.

13.Mr Findlay was also examined by Dr Reid, at the request of his (Mr Findlay's) solicitor. Dr Reid diagnosed him as suffering from PTSD as a result of his service in the Falklands.2.

The composition of the court-martial

14. The position of "convening officer" 4 for the applicant's court-martial was as-

sumed by the General Officer Commanding London District, Major General Corbett. He remanded Mr Findlay for trial on eight charges arising out of the incident of 29 July 1990 and decided that he should be tried by general court-martial. ***226**

15. By an order dated 31 October 1991, the convening officer convened the general court-martial and appointed the military personnel who were to act as prosecuting officer, assistant prosecuting officer and assistant defending officer (to represent Mr Findlay in addition to his solicitor) and the members of the court-martial. 5

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

• (1) the President, Colonel Godbold, was a member of London District staff (under the command of the convening officer).6 He was appointed by name by the latter and was not a permanent president;
• (2) Lieutenant Colonel Swallow was a permanent president of courts-martial, sitting in the capacity of an ordinary member. He had his office in the London District Headquarters. He was appointed by name by the convening officer;
• (3) Captain Tubbs was from the Coldstream Guards, a unit stationed in London District. His reporting chain was to his officer commanding, his commanding officer and the Brigade Commander, after which his report could, in exceptional circumstances, go to the convening officer; he was a member of a footguard unit and the convening officer, as General Officer Commanding, was responsible for all footguard units. He was appointed to the court-martial by his commanding officer;
• (4) Major Bolitho was from the Grenadier Guards, also a footguard unit stationed in London District. The convening officer was his second superior reporting officer. He was appointed to the court-martial by his commanding officer;
• (5) Captain O'Connor was from the Postal and Courier Department, Royal Engineers (Women's Royal Army Corps), which is under the direct command of the Ministry of Defence and is administered by the London District. She was appointed by her commanding officer.
In summary, all of the members of the court-martial were subordinate in rank to the convening officer and served in units stationed within London District. None of them had legal training.

17. The assistant prosecuting and defending officers were both officers from the Second Scots Guards stationed in the London District and had the same reporting chain as Captain Tubbs. 7

18. The judge advocate for the general court-martial was appointed by the Judge Advocate General. 8 He was a barrister and assistant judge advocate with the Judge Advocate General's Office. ***227** 3.

The court-martial hearing

19.On 11 November 1991, Mr Findlay appeared before the general court-martial, at Regents Park Barracks in London. He was represented by a solicitor.He pleaded guilty to three charges of common assault (a civilian offence), two charges of conduct to the prejudice of good order and military discipline (a military offence) and two charges of threatening to kill (a civilian offence).

20.On 2 November 1991, his solicitor had made a written request to the prosecuting authorities to ensure the appearance of Dr Blunden at the court-martial and on 5 November 1991 the prosecuting officer had issued a witness summons requiring her at-

tendance. However, the defence was informed on the morning of the hearing that Dr Blunden would not be attending. Mr Findlay claims that her absence persuaded him to plead guilty to the above charges. However, his solicitor did not request an adjournment or object to the hearing proceeding.

21. The defence put before the court-martial the medical reports referred to above 9 and called Dr Reid to give evidence. The latter confirmed his view that the applicant suffered from PTSD, that this had been the principal cause of his behaviour, that he had not been responsible for his actions and that he was in need of counselling. During cross-examination, Dr Reid stated that this was the first time he had dealt with battle-related PTSD. The prosecution did not call any medical evidence in rebuttal or adopt any of the evidence prepared by the army-instructed psychiatrists, Drs McKinnon and Blunden. 10

22.In the course of his speech in mitigation, Mr Findlay's solicitor urged the court-martial that, in view of the fact that his client had been suffering from PTSD at the time of the incident and was extremely unlikely to reoffend, he should be allowed to complete the few remaining months of his service and leave the army with his pension intact and a minimum endorsement on his record.

23. Having heard the evidence and speeches, the court-martial retired to consider their decision on sentence, accompanied by the judge advocate. On their return they sentenced the applicant to two years' imprisonment, reduction to the rank of guardsman and dismissal from the army (which caused him to suffer a reduction in his pension entitlement). No reasons were given for the sentence. 11 4.

The confirmation of sentence and review process

24. Under the Army Act 1955 , the decision of the court-martial had no effect until it was confirmed by the "confirming officer" . 12 In Mr ***228** Findlay's case, as was usual practice, the confirming officer was the same person as the convening officer. Mr Findlay petitioned him for a reduction in sentence. Having received advice from the Judge Advocate General's Office, the confirming officer informed the applicant on 16 December 1991 that the sentence had been upheld.

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

26. He appealed by way of petition to the first of the "reviewing authorities" 13 the Deputy Director General of Personal Services, as delegate of the Army Board, a non-legally qualified officer who obtained advice from the Judge Advocate General's Office. By a letter dated 22 January 1992, Mr Findlay was informed that this petition had been rejected.

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

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

jecting his petitions.

29.On 10 March 1992, the applicant applied to the Divisional Court for leave to challenge by judicial review the validity of the findings of the court-martial. He claimed that the sentence imposed was excessive, the proceedings were contrary to the rules of natural justice and that the judge advocate had been hostile to him on two occasions during the hearing. On 14 December 1992 the Divisional Court refused leave on the basis that the court-martial had been conducted fully in accordance with the Army Act 1955 and there was no evidence of improper conduct or hostility on the part of the judge advocate. 14 5.

Civil proceedings

30. Mr Findlay commenced a civil claim in negligence against the military authorities, claiming damages in respect of his back injury and PTSD. In a report dated 16 January 1994 prepared for these purposes, Dr Blunden confirmed her previous opinion 15 and clearly diagnosed PTSD.

31. In March 1994 the civil action was settled by the Secretary of State for Defence, who paid the applicant £100,000 and legal costs, ***229** without any admission of liability. The settlement did not differentiate between the claims in respect of PTSD and the back injury. II.

Relevant domestic law and practice1.

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

(a)General

32. The law and procedures which applied to the applicant's court-martial were contained in the Army Act 1955 (“the 1955 Act”), the Rules of Procedure (Army) 1972 (“the 1972 Rules”) and the Queen's Regulations (1975) . Since the Commission's consideration of the case, certain provisions in the 1955 Act have been amended by the Armed Forces Act 1996 (“the 1996 Act”), which comes into force on 1 April 1997. 16

33. Many civilian offences are also offences under the 1955 Act (section 70(1)) . Although the final decision on jurisdiction lies with the civilian authorities, army personnel who are accused of such offences are usually tried by the military authorities unless, for example, civilians are involved in some way. Depending on their gravity, charges against army law can be tried by district, field or general court-martial. A court-martial is not a standing court: it comes into existence in order to try a single offence or group of offences.

34. At the time of the events in question, a general court-martial consisted of a President (normally a brigadier or colonel in the army), appointed by name by the convening officer, 17 and at least four other army officers, either appointed by name by the convening officer or, at the latter's request, by their commanding officer.

35. Each member of the court-martial had to swear the following oath: I swear by almighty God that I will well and truly try the accused before the court according to the evidence, and that I will duly administer justice according to the Army Act 1955 , without partiality, favour or affection, and I do further swear that I will not on any account at any time whatsoever disclose or discover the vote or opinion of the president or any member of this court-martial, unless thereunto required in the due course of law.

(b)The convening officer

36. Before the coming into force of the 1996 Act, a convening officer (who had to be a field officer or of corresponding or superior rank, in command of a body of the regular forces or of the command within ***230** which the person to be tried was serving) assumed responsibility for every case to be tried by court-martial. He or she would decide upon the nature and detail of the charges to be brought and the type of court-martial required, and was responsible for convening the court-martial.

37. The convening officer would draw up a convening order, which would specify, inter alia , the date, place and time of the trial, the name of the President and the details of the other members. He ensured that a judge advocate 18 was appointed by the Judge Advocate General's Office and failing such appointment, could appoint one. He also appointed, or directed a commanding officer to appoint, the prosecuting officer.

38.Prior to the hearing, the convening officer was responsible for sending an abstract of the evidence to the prosecuting officer and to the judge advocate, and could indicate the passages which might be inadmissible. He procured the attendance at trial of all witnesses to be called for the prosecution. When charges were withdrawn, the convening officer's consent was normally obtained, although it was not necessary in all cases, and a plea to a lesser charge could not be accepted from the accused without it.

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

40. The convening officer could dissolve the court-martial either before or during the trial, when required in the interests of the administration of justice. 19 In addition, he could comment on the “proceedings of a court-martial which require confirmation” . Those remarks would not form part of the record of the proceedings and would normally be communicated in a separate minute to the members of the court, although in an exceptional case “where a more public instruction [was] required in the interests of discipline” , they could be made known in the orders of the command. 20

41. The convening officer usually acted as confirming officer also. 21

(c)The Judge Advocate General and judge advocates

42.The current Judge Advocate General was appointed by the Queen in February 1991 for five years. He is answerable to the Queen and is removable from office by her for inability or misbehaviour. At the time of the events in question, the Judge Advocate General had the role of adviser to the Secretary of State for Defence on all matters touching and concerning the office of Judge Advocate ***231** General, including advice on military law and the procedures and conduct of the court-martial system. He was also responsible for advising the confirming and reviewing authorities following a court-martial. 22

43.Judge Advocates are appointed to the Judge Advocate General's Office by the Lord Chancellor. They must have at least seven and five years experience respect-

ively as an advocate or barrister.

44.At the time of the events in question, a judge advocate was appointed to each court-martial, either by the Judge Advocate General's Office or by the convening officer. He or she was responsible for advising the court-martial on all questions of law and procedure arising during the hearing and the court had to accept this advice unless there were weighty reasons for not doing so. In addition, in conjunction with the President he was under a duty to ensure that the accused did not suffer any disadvantage during the hearing. For example, if the latter pleaded guilty, the judge advocate had to ensure that he or she fully understood the implications of the plea and admitted all the elements of the charge. At the close of the hearing, the judge advocate would sum up the relevant law and evidence.

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

(d)Procedure on a guilty plea

46. At the time of the events in question, on a plea of guilty, the prosecuting officer outlined the facts and put in evidence any circumstance which might have made the accused more susceptible to the commission of the offence. The defence made a plea in mitigation and could call witnesses. 23 The members of the court-martial then retired with the judge advocate to consider the sentence, which was pronounced in open court. There was no provision for the giving of reasons by the court-martial for its decision.

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

(e)Confirmation and post-hearing reviews

48. Until the amendments introduced by the 1996 Act, a court-martial's findings were not effective until confirmed by a “confirming ***232** officer” . Prior to confirmation, the confirming officer used to seek the advice of the Judge Advocate General's Office where a judge advocate different to the one who acted at the hearing would be appointed. The confirming officer could withhold confirmation or substitute, postpone or remit in whole or in part any sentence.

49. Once the sentence had been confirmed, the defendant could petition the “reviewing authorities” . These were the Queen, the Defence Council (who could delegate to the Army Board), or any officer superior in command to the confirming officer. 24 The reviewing the authorities could seek the advice of the Judge Advocate General's Office. They had the power to quash a finding and to exercise the same powers as the confirming officer in relation to substituting, remitting or commuting the sentence.

50.A petitioner was not informed of the identity of the confirming officer or of the reviewing authorities. No statutory or formalised procedures were laid down for the conduct of the post-hearing reviews and no reasons were given for decisions delivered subsequent to them. Neither the fact that advice had been received from the

Judge Advocate General's Office nor the nature of that advice was disclosed.

51.A Court-Martial Appeal Court (made up of civilian judges) could hear appeals against conviction from a court-martial, but there was no provision for such an appeal against sentence when the accused pleaded guilty.2.

The Armed Forces Act 1996

52. Under the 1996 Act, the role of the convening officer will cease to exist and its functions will be split among three different bodies; the “higher authorities” , the prosecuting authority and court administration officers. 25

53.The higher authority, who will be a senior officer, will decide whether any case referred to him by the accused's commanding officer should be dealt with summarily, referred to the new prosecuting authority, or dropped. Once the higher authority has taken this decision, he or she will have no further involvement in the case.

54. The prosecuting authority will be the Services' legal branches. Following the higher authority's decision to refer a case to them, the prosecuting authority will have absolute discretion, applying similar criteria as those applied in civilian cases by the Crown Prosecution Service to decide whether or not to prosecute, what type of court-martial would be appropriate and precisely what charges should be brought. They will then conduct the prosecution. 26

55. Court administration officers will be appointed in each Service ***233** and will be independent of both the higher and the prosecuting authorities. They will be responsible for making the arrangements for courts-martial, including arranging venue and timing, ensuring that a judge advocate and any court officials required will be available securing the attendance of witnesses and selection of members. Officers under the command of the higher authority will not be selected as members of the court-martial. 27

56. Each court-martial will in future include a judge advocate as a member. His advice on points of law will become rulings binding on the court and he will have a vote on sentence (but not on conviction). The casting vote, if needed, will rest with the president of the court-martial, who will also give reasons for the sentence in open court. The Judge Advocate General will no longer provide general legal advice to the Secretary of State for Defence. 28

57. Findings by a court-martial will no longer be subject to confirmation or revision by a confirming officer (whose role is to be abolished). A reviewing authority will be established in each Service to conduct a single review of each case. Reasons will be given for the decision of the reviewing authority. As part of this process, post-trial advice received by the reviewing authority from a judge advocate (who will be different from the one who officiated at the court-martial) will be disclosed to the accused. A right of appeal against sentence to the (civilian) Courts-Martial Appeal Court will be added to the existing right of appeal against conviction. 29

PROCEEDINGS BEFORE THE COMMISSION

58. In his application to the Commission 30 of 28 May 1993, Mr Findlay made a number of complaints under Article 6(1) of the Convention, inter alia that he had been denied a fair hearing before the court-martial and that it was not an independent

and impartial tribunal.

59. The Commission declared the application admissible on 23 February 1995. In its report of 5 September 1995 (Article 31), it expressed the unanimous opinions that there had been a violation of Article 6(1) of the Convention, in that the applicant was not given a fair hearing by an independent and impartial tribunal, and that it was unnecessary to examine the further specific complaints as to the fairness of the court-martial proceedings and the subsequent reviews or the reasonableness of the decisions taken against him and the available sentencing options. The full text of the Commission's opinion is reproduced below: ***234**

OpinionA.

Complaints declared admissible

75.31 The Commission has declared admissible the applicant's complaints that the court-martial, the Confirming Officer and the Reviewing Authorities lacked independence and impartiality, that the proceedings before those bodies were unfair, that their decisions were unreasonable and that the sentencing options available were limited.B.

Points at issue

76.Accordingly, the points at issue in the present case are whether there has been a violation of Article 6(1) of the Convention:

• — as regards the independence and impartiality of the court-martial, the Confirming Officer and the Reviewing Authorities; and
• — as regards the fairness of the proceedings before the above-mentioned bodies as well as the reasonableness of the decisions of and the sentencing options available to those bodies.
C.

Article 6(1) of the Convention

77.Article 6(1) of the Convention, in so far as relevant, reads as follows: 1. In the determination … of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …1.

Applicability

78.The Government argue that Article 6(1) does not apply to the post-hearing proceedings as these proceedings are best understood as pleas in mitigation rather than appeals forming part of the overall procedure which must satisfy Article 6 of the Convention.

79.The Commission recalls that the determination of a criminal charge within the meaning of Article 6(1) of the Convention includes, not only the determination of the guilt or innocence of the accused, but also the determination of his sentence. 32 The Commission also notes that the Confirming Officer and the Reviewing Authorities had submissions and advice to consider in relation to the appropriate sentence to be awarded and had the power to significantly change that sentence. Accordingly, the Commission is satisfied that these proceedings involved the determination of the applicant's sentence and, as such, the determination of a criminal charge against him. ***235** 2.

Independence and impartiality

80.The applicant submits that the organisation and internal structure of the court-martial and the post-hearing reviewing authorities meant that they were not, or were

not seen to be, independent or impartial.

81.In this respect, the applicant refers, inter alia , to the extensive powers of the Convening Officer before, during and after a court-martial hearing. He claims that there is a strong inference that the Convening Officer is the prosecuting authority and submits that the members of the court-martial were military personnel subordinate to and otherwise closely related to the Convening Officer. He contends that there are few guarantees against outside pressures because, inter alia , the appointment of the members is for a specific court-martial only, the members return to their military duties after the court-martial, the Judge Advocate (“J.A.”) is closely linked to the Ministry of Defence and the J.A. has, in any event, no vote in decisions of the court-martial. The Confirming Officer is normally the same person as the Convening Officer and the Reviewing Authorities were members of the armed forces with no legal training who were advised by the Judge Advocate General's office.

82.The applicant also submits that, in addition to the above structural problems, his defence of Post Traumatic Stress Disorder raised a military issue of some importance and sensitivity which the military authorities were unwilling to accept.

83.The applicant further submits that the J.A.'s hostility to him during the court-martial hearing was indicative of his lack of impartiality.

84.The Government, in the first place, submit that it should be borne in mind that the special disciplinary requirements flowing from the vital duties of the armed forces require a separate code of military law and, in turn, a separate military judicial system.

85.Against this background, the Government refer to the many guarantees in place to guard against outside pressures on the members of the court-martial. The members must take an oath and none are subject to instruction from, or accountable to, a higher authority as regards their functions in the court-martial. None of the members can be removed on an individual basis (except after a successful challenge at the commencement of a hearing) and the entire court-martial can be dissolved only in the interests of the administration of justice by the Convening Officer, which is an enhancement of the protections available. The decisions of the court-martial are by a majority and the members do not disclose the nature of their votes to third parties. The convening of the court-martial on an ad hoc basis is a guarantee against outside influence because the members have no interest in renewing a term of office.

86.The Government also refer to many structural and procedural elements which indicate the independent functioning of the court-martial ***236** and of the post-hearing reviewing authorities. In this respect the Government contend, inter alia that the prosecuting authority was Army Legal Services from where the prosecuting officer was appointed and not the convening officer. The convening officer assumes responsibility for the setting up of the court-martial and his work in this respect is largely administrative in nature. As regards the make-up of the court-martial, the Government point out that the members were chosen from diverse regiments, only two were appointed by name by the convening officer and none was immediately subordinate to or had a direct prior personal relationship with the convening officer. The applicant, though he could have, did not object to the constitution of the court-

martial.

87.The Government also emphasise the crucial role played by the J.A., a civilian judicial officer independent of the armed forces, in ensuring a fair trial and the role of the Judge Advocate General's office in advising at the confirming and reviewing stages.

88.Furthermore, the Government do not accept that the applicant has demonstrated any subjective bias on the part of the J.A. and point out that the Divisional Court did not accept this either. Moreover, the Government dispute that the applicant's defence of Post Traumatic Stress Disorder raised an issue of army policy and reject any assertion by the applicant that this matter affected the proceedings as unfounded, untrue and an attack on the integrity of the members of the court-martial.

89.As regards the applicant's complaint as to the impartiality of the members of the court-martial, the J.A., the confirming officer and the Reviewing Authorities, the Commission recalls that for the purposes of Article 6(1) of the Convention the existence of impartiality must be determined according to a subjective test, that is on the basis of a personal conviction of a particular judge in a given case, the personal impartiality of a judge being assumed until there is proof to the contrary. 33

90.In addition, an objective test must also be applied, that is ascertaining whether sufficient guarantees exist to exclude any legitimate doubt in this respect. It must be determined whether there were ascertainable facts, particularly of internal organisation, which might raise doubts as to impartiality. In this respect, even appearances may be important: what is at stake is the confidence which the court must inspire in the accused in criminal proceedings and what is decisive is whether the applicant's fear as to a lack of impartiality can be regarded as objectively justifiable. 34

91.In the present case the Commission does not consider that the applicant has demonstrated that the members of the court-martial, the J.A., the confirming officer or the Reviewing Authorities were ***237** personally or subjectively biased against him. In this respect, the Commission notes that the Divisional Court rejected the allegations made by the applicant about the conduct of the J.A. during the court-martial hearing.

92.As to whether these bodies satisfy the objective test of impartiality, the Commission recalls that this concept and that of independence are frequently difficult to dissociate. 35

93.Furthermore, the Commission also recalls that in certain cases the link between the concepts of independence and objective impartiality are such that if a tribunal fails to offer the requisite guarantees of independence it will not satisfy the test for objective impartiality. 36 The Commission finds that such a link exists in the present case, concerned as it is with the issue of the structure and internal organisation of the court-martial system.

94.The Commission recalls the established criteria to which the Court has regard in assessing the independence of tribunals, in particular from the parties. These include, the manner of appointment of members, the duration of their terms of office, the guarantees afforded by the procedure against outside pressures and whether the body presents an appearance of independence. 37

95.Applying the above principles of assessment of independence to the court-martial, the Commission has considered the questions of what person or body constitutes the prosecuting authority and the independence of the members of the court-martial from that authority. This examination necessarily involves a consideration of the manner of appointment of the members and the composition of the court-martial.

96.The applicant contends that there is a strong presumption that the convening officer was the prosecuting authority. The Government contend that since the prosecuting officer is appointed from Army Legal Services and the convening officer's work is administrative in nature, the prosecuting authority is Army Legal Services and not the convening officer.

97.The Commission recalls that the convening officer is empowered to direct upon what charges the accused is to be tried, to decide the wording of those charges, to decide on the type of court-martial required and to convene the court-martial. He appoints the members of the court-martial and appoints, or directs a commanding officer to appoint, the prosecuting officer. In the absence of the appointment of a J.A. by the Judge Advocate General's office, the J.A. is appointed by the convening officer. When sending an abstract of the evidence to the prosecuting officer, the convening officer may indicate to the prosecuting officer the passages of the evidence which may be inadmissible. He procures the attendance at trial of all witnesses to be ***238** called for the prosecution and those witnesses “reasonably” requested by the defence.

98.Moreover, during the trial, when charges are not to be pursued, the convening officer's consent is normally obtained (as it was in the present case) though it is not necessary in all cases. However, when a plea to a lesser charge is made by the accused, it cannot be accepted without the consent of the convening officer. Furthermore, the convening officer can also comment on the “proceedings of a court-martial which require confirmation” and those remarks will not normally form part of the record of the proceedings and will usually be communicated in a separate minute to the members of the court. 38

99.The Commission therefore considers that, whether or not the convening officer is as a matter of fact the prosecuting authority, he is seen to be central to the prosecution of a case by court-martial.

100.As to the independence of the members of the court-martial from the convening officer, the Commission notes that there is some dispute between the parties as to the relationship between those members and the convening officer. However, the following is undisputed. All members were serving army officers, subordinate in rank to the convening officer. In addition, as members of units in London District, all members were under the overall command of the convening officer in his capacity as the General Officer Commanding, London District. Two members were similarly under the overall command of the convening officer by virtue of their membership of footguard units. Moreover, one of the members had the convening officer as his second superior reporting officer. Furthermore, the President was personally selected by the convening officer and was on the convening officer's staff in London.

101.Furthermore and as noted above, not only does the convening officer also normally act as confirming officer, but the court-martial's findings do not have any ef-

fect until confirmed by the confirming officer. 39 Even assuming that in these circumstances the court-martial, rather than the confirming officer, is to be properly regarded as the decision-making body, this dual role of the convening officer gives further cause to doubt the independence of the court-martial from the prosecuting authority.

102.In this respect, the safeguard most strongly relied upon by the Government is the presence during the court-martial of the J.A. whose principal duty is to ensure that the accused has a fair trial and whose role is described as being “crucial in the conduct of a court martial” .The applicant impugns the independence of both the Judge Advocate General's office and the J.A. submitting that the Judge Advocate General is a legal adviser to the Ministry of Defence and that, since the J.A. is answerable to the Judge Advocate General, the J.A. is also closely linked to the Ministry of Defence. The Government ***239** counter this by arguing that the Judge Advocate General's office fulfils two separate roles—a judicial role through the deputy and assistant J.A.'s who assist the court-martial and an advisory role (creating a lawyer/client relationship) with, inter alia , the Ministry of Defence.

103.However, the Commission considers that, even assuming that this connection between the Judge Advocate General's office and the Ministry of Defence does not raise a reasonable doubt as to the independence of that office, and consequently, of the J.A., the involvement of the J.A. in the court-martial is not sufficient to dispel any doubt as to the court-martial's independence. In the first place, the J.A. is not a member of the court-martial. Secondly, he does not take part in the deliberations on the charges and any advice requested, as to the general principles governing the approach to sentencing, is given in private.

104.The Government argue that the absence of a civilian judicial member does not of itself cast doubt on the independence of the court-martial and refer to the Engel judgment 40 where the Netherlands Supreme Military Court was considered by the Court to constitute an independent tribunal. However, the Commission recalls that in the Engel case, the tribunal in question had to include as members two civilian jurists who were justices of the Supreme Court or the Court of Appeal and who were appointed by the Crown. 41 By contrast the court-martial in the present case contained no judicial members, no legally qualified members and no civilian members.

105.As to the guarantees against outside influence to which the Government refer, the Commission is not satisfied that the requirement to take the oath, important though it may be, could of itself dispel doubts as to a lack of independence of the court-martial. While the Government contend that the members are free from outside instruction, the Commission notes the power of the convening officer, referred to above, to comment on the proceedings of a court-martial and to communicate such remarks to the members of the court-martial. The power of the convening officer to dissolve the court-martial either before or during the trial pursuant to section 95 of the Army Act 1955 is also noted in this context. Furthermore, the submission by the Government that the convening of courts-martial on an ad hoc basis enhances their independence is inconsistent with the constant view of the Court that an established term of office is an important guarantee of a tribunal's independence. 42 In the present

case, while one of the members was a permanent president, the remaining members went back to their ordinary military duties at the end of the applicant's court-martial.

106.Accordingly, the Commission considers that the applicant's fears that the court-martial lacked independence from the prosecuting ***240** authority in the case could be regarded as objectively justified particularly in view of the nature and extent of the convening officer's roles, the composition of the court-martial and its ad hoc convening. The Commission therefore finds that the court-martial did not constitute an independent tribunal, or consequently an impartial tribunal, within the meaning of Article 6(1) of the Convention.

107.The question remains as to whether the defect in the court-martial was remedied by a form of subsequent review by a judicial body that afforded all the guarantees required by Article 6(1) of the Convention. The Commission finds that, where (as in the present case) the accused pleads guilty and cannot appeal to the Courts-Martial Appeal Court, there is clearly no such remedy and the Government do not suggest that there is 43). In this context the Commission notes that the confirming officer was the same person as the convening officer and that the Reviewing Authorities were army officers (the second of whom was the superior of the first) fulfilling their duties as delegates of the Army Board. The lack of effectiveness of the post-hearing reviews is further emphasised by the secrecy surrounding those reviews (including the fact and nature of the advice given by the Judge Advocates General's office) and the applicant's inability to participate in those reviews in any meaningful manner.

108.The Commission is further of the opinion that since the court-martial has been found to lack independence and impartiality, it could not guarantee a fair trial to the applicant. 44

Conclusion

109.The Commission concludes, unanimously, that there has been a violation of Article 6(1) of the Convention in that the applicant was not given a fair hearing by an independent and impartial tribunal.3.

Remaining points at issue

110.The Commission notes the applicant's further specific complaints as to the fairness of the court-martial proceedings and subsequent reviews together with his additional complaints in relation to the reasonableness of the decisions taken against him and in relation to the sentencing options available. In view of the above conclusion, the Commission finds that it is unnecessary to examine these complaints save that the Commission observes that it is, in any event, outside its competence to examine the reasonableness of the decisions taken against the applicant.

Conclusion

111.The Commission concludes, unanimously, that it is unnecessary to examine the further specific complaints made by the applicant as to ***241** the fairness of the court-martial proceedings and subsequent reviews or his additional complaints in relation to the reasonableness of the decisions taken against him and in relation to the sentencing options available.D.

Recapitulation

112.The Commission concludes, unanimously, that there has been a violation of Article 6(1) of the Convention in that the applicant was not given a fair hearing by

an independent and impartial tribunal. 45

113.The Commission concludes, unanimously, that it is unnecessary to examine the further specific complaints made by the applicant as to the fairness of the court-martial proceedings and subsequent reviews or his additional complaints in relation to the reasonableness of the decisions taken against him and in relation to the sentencing options available. 46

JUDGMENT

I.

The Scope of the Present CaseA.

The complaints concerning Article 6(1) of the Convention

61. In his written and oral pleadings before the Court, Mr Findlay complained that the court-martial was not an “independent and impartial tribunal” , that it did not give him a “public hearing” and that it was not a tribunal “established by law” .

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

63. The Court recalls that the scope of its jurisdiction is determined by the Commission's decision on admissibility and that it has no power to entertain new and separate complaints which were not raised before the Commission. 47 However, while Mr Findlay in his application to the Commission may not expressly have invoked his rights under Article 6(1) of the Convention to a “public hearing” and a “tribunal established by law” , he does appear to have raised in substance most of the matters which form the basis of his complaints in relation to these two provisions. Thus, in the Commission's decision on admissibility, he is reported as referring in particular to the facts that the members of the court-martial were appointed ad hoc, that the judge advocate's advice on sentencing was not disclosed, that no reasons were given for the decisions taken by the court-martial board and the confirming and ***242** reviewing officers, and that the post-hearing reviews were essentially administrative in nature and conducted in private. 48 It follows that these are not new and separate complaints, and that the Court has jurisdiction to consider these matters. 49 B.

The complaint concerning Article 25 of the Convention and Article 2 of the European Agreement

64. In his additional memorial 50 the applicant asserted that, in correspondence with the Solicitors' Complaints Bureau (a professional disciplinary body) concerning a matter of no relevance to the present case, the Judge Advocate General had complained that, during the course of Mr Findlay's application to the Commission, his solicitor had made allegations concerning a lack of impartiality in the advice given by the Judge Advocate General's Office. The Judge Advocate General, Judge Rant, had commented: “These are extremely serious allegations …” . In a later letter, Judge Rant wrote: I wish to make it clear that, at this stage and without prejudice to any action which might have to be taken in the future, I am making no formal complaint about the passage [from the applicant's submission to the Commission] quoted in that letter. The reason for this is that the case of *Findlay* is to be argued before the European Court of Human Rights in September 1996 and therefore it is only

proper for me to defer action until the end of those proceedings. The applicant alleged that his solicitor felt constrained in presenting his arguments to the Court in the knowledge that they might subsequently form the basis of disciplinary proceedings and he invoked his rights under Article 25 of the Convention and Article 2 of the European Agreement relating to Persons Participating in Proceedings before the European Commission and Court of Human Rights .

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

The new legislation

66. In their written and oral pleadings, the Government asked the Court to take note in its judgment of the changes to be effected in the court-martial system by the Armed Forces Act 1996 . 51

67. The Court recalls that this new statute does not come into force until April 1997, and thus did not apply at the time of Mr Findlay's court-martial. It is not the Court's task to rule on legislation *in abstracto* and it cannot therefore express a view as to the compatibility ***243** of the provisions of the new legislation with the Convention. 52 Nonetheless, it notes with satisfaction that the United Kingdom authorities have made changes to the court-martial system with a view to ensuring the observance of their Convention commitments. II.

Alleged Violation of Article 6(1) of the Convention

68. The applicant claimed that his trial by court-martial failed to meet the requirements of Article 6(1) of the Convention, which provides (so far as is relevant): “In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing … by an independent and impartial tribunal established by law. …”The Commission found that there had been a violation, in that the applicant was not given a fair hearing by an independent and impartial tribunal, and the Government did not contest this conclusion.A.

Applicability

69. In the view of the Court, Article 6(1) is clearly applicable to the court-martial proceedings, since they involved the determination of Mr Findlay's sentence following his plea of guilty to criminal charges; indeed, this point was not disputed before it. 53 B.

Compliance

70. The applicant complained that the court-martial was not an “independent and impartial tribunal” as required by Article 6(1) , because inter alia all the officers appointed to it were directly subordinate to the convening officer who also performed the role of prosecuting authority. 54 The lack of legal qualification or experience in the officers making the decisions either at the court-martial or review stages made it impossible for them to act in an independent or impartial manner. In addition, he asserted that he was not afforded a “public hearing” within the meaning of Article 6(1) in that the judge advocate's advice to the court-martial board, the confirming officer and the reviewing authorities was confidential; no reasons were given for the decisions made at any of these stages in the proceedings; and the process of confirming and reviewing the verdict and sentence by

the confirming officer and reviewing authorities was carried out administratively, in private, with no apparent rules of procedure. 55 Finally, he claimed that his court-martial was not a tribunal ***244** "established by law" , because the statutory framework according to which it proceeded was too vague and imprecise; for example, it was silent on the question of how the convening officer, confirming officer and reviewing authorities were to be appointed.

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

72.The Commission found that although the convening officer played a central role in the prosecution of the case, all of the members of the court-martial board were subordinate in rank to him and under his overall command. He also acted as confirming officer, and the court-martial's findings had no effect until confirmed by him. These circumstances gave serious cause to doubt the independence of the tribunal from the prosecuting authority. The judge advocate's involvement was not sufficient to dispel this doubt, since he was not a member of the court-martial, did not take part in its deliberations and gave his advice on sentencing in private.In addition, it noted that Mr Findlay's court-martial board contained no judicial members, no legally-qualified members and no civilians, that it was set up on an ad hoc basis and that the convening officer had the power to dissolve it either before or during the trial. The requirement to take an oath was not a sufficient guarantee of independence. Accordingly, it considered that the applicant's fears about the independence of the court-martial could be regarded as objectively justified, particularly in view of the nature and extent of the covening officer's roles, the composition of the court-martial and its ad hoc nature. This defect was not, moreover, remedied by any subsequent review by a judicial body affording all the guarantees required by Article 6(1) since the confirming officer was the same person as the convening officer, and the reviewing authorities were army officers, the second of whom was superior in rank to the first. The ineffectiveness of the post-hearing reviews was further underlined by the secrecy surrounding them and the lack of opportunity for Mr Findlay to participate in a meaningful way.

73. The Court recalls that in order to establish whether a tribunal can be considered as "independent" , regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. 56 As to the question of "impartiality" , there are two aspects to this ***245** requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. 57 The concepts of independence and objective impartiality are closely linked and the Court will consider them together as they relate to the present case.

74. The Court observes that the convening officer, as was his responsibility under the rules applicable at the time, played a significant role before the hearing of Mr Findlay's case. He decided which charges should be brought and which type of court-martial was most appropriate. He convened the court-martial and appointed its members and the prosecuting and defending officers. 58 Under the rules then in force, he had the task of sending an abstract of the evidence to the prosecuting officer and the judge advocate and could indicate passages which might be inadmissible. He procured the attendance at trial of the witnesses for the prosecution and those "reasonably requested" by the defence. His agreement was necessary before the prosecuting officer could accept a plea to a lesser charge from an accused and was usually sought before charges were withdrawn. 59 For these reasons the Court, like the Commission, considers that the convening officer was central to Mr Findlay's prosecution and closely linked to the prosecuting authorities.

75.The question therefore arises whether the members of the court-martial were sufficiently independent of the convening officer and whether the organisation of the trial offered adequate guarantees of impartiality. In this respect also the Court shares the concerns of the Commission. It is noteworthy that all the members of the court-martial, appointed by the convening officer, were subordinate in rank to him. Many of them, including the President, were directly or ultimately under his command. 60 Furthermore, the convening officer had the power, albeit in prescribed circumstances, to dissolve the court-martial either before or during the trial. 61

76. In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court-martial which decided Mr Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr Findlay's doubts about the tribunal's independence and impartiality could be objectively justified. 62 ***246**

77. In addition, the Court finds it significant that the convening officer also acted as "confirming officer" . Thus, the decision of the court-martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit. 63 This is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal" and can also be seen as a component of the "independence" required by Article 6(1).64

78. The Court further agrees with the Commission that these fundamental flaws in the court-martial system were not remedied by the presence of safeguards, such as the involvement of the judge advocate, who was not himself a member of the tribunal and whose advice to it was not made public 65 or the oath taken by the members of the court-martial board. 66

79. Nor could the defects referred to above 67 be corrected by any subsequent review proceedings. Since the applicant's hearing was concerned with serious charges classified as "criminal" under both domestic and Convention law, he was entitled to a first instance tribunal which fully met the requirements of Article 6(1).68

80.For all these reasons, and in particular the central role played by the convening officer in the organisation of the court-mar-

tial, the Court considers that Mr Findlay's misgivings about the independence and impartiality of the tribunal which dealt with his case were objectively justified. In view of the above, it is not necessary for it to consider the applicant's other complaints under Article 6(1) namely that he was not afforded a “public hearing” by a tribunal “established by law” . In conclusion, there has been a violation of Article 6(1) of the Convention.III.

Application of Article 50 of the Convention

81. The applicant claimed just satisfaction pursuant to Article 50 of the Convention, which states: If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the … Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party. ***247** A.

Pecuniary damage

82.The applicant claimed compensation for loss of income totalling £440,200, on the basis that, had he not been convicted and sentenced as he was, he would have completed a 22-year engagement in the army, eventually attaining the rank of Colour Sergeant, with entitlement to a pension from the age of 40.

83. The Government submitted that a finding of a violation would constitute sufficient satisfaction, or, in the alternative, that only a very modest amount should be awarded. First, there were no grounds for believing that the applicant would not have been convicted, sentenced to a term of imprisonment and dismissed from the army following his trial (at which he pleaded guilty), even if the court-martial had been differently organised. Secondly, it was in any case unlikely that he would have enjoyed a long career in the army, in view of the post traumatic stress disorder and back injury from which he suffered 69 he had already received £100,000 in settlement of his civil claim against the Ministry of Defence, a large part of which related to loss of earning capacity.

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

85. The Court agrees; it cannot speculate as to what the outcome of the court-martial proceedings might have been had the violation of the Convention not occurred. 70 It is therefore inappropriate to award Mr Findlay compensation for pecuniary damage. B.

Non-pecuniary damage

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

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

88. The Court reiterates that it is im-

possible to speculate as to what might have occurred had there been no breach of the Convention. Furthermore, it has no jurisdiction to quash convictions pronounced by national courts. 71 In conclusion, the Court considers that a finding of violation in itself affords the applicant sufficient reparation for non-pecuniary damage. ***248** C.

Costs and expenses

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

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

91.The Court considers that, in the circumstances of the present case, it was reasonable to make the application to the Divisional Court, in an attempt to seek redress for the violation of which Mr Findlay complains. It therefore decides to award in full the costs and expenses claimed, less the amounts received in legal aid from the Council of Europe which have not already been taken into account in the claim.D.

Default interest

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

For these reasons, THE COURT unanimously

• 1.*Holds* that there has been a violation of Article 6(1) of the Convention ;
• 2.*Dismisses* the claim for pecuniary damage;
• 3.*Holds* that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
• 4.*Holds*

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

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

Concurring Opinion of Judge de Meyer

To this judgment, the result of which I fully approve, I would add a brief remark. ***249**

Once again reference is made in its reasoning to “appearances” . 72

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

Moreover, I would like to stress that, as a

matter of principle, we should never decide anything on the basis of “appearances” , and that we should, in particular, not allow ourselves to be impressed by them in determining whether or not a court is independent and impartial. We have been wrong to do so in the past, and we should not do so in the future. ***250**

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1. See paras 11–13 below.

2. See para. 10 below.

3. See para. 14 below.

4. See paras 36–41 below.

5. See para. 37 below.

6. See para. 14 above.

7. See para. 16(3) above.

8. See paras 42–45 below.

9. Paras 11–13.

10. See paras 11–13 above.

11. See para. 46 below.

12. See para. 48 below.

13. See para. 49 below.

14. R. v. General Court-Martial (Regents Park Barracks), ex parte Alexander Findlay, CO/1092/92, unreported .

15. See para. 12 above.

16. See paras 52–57 below.

17. See paras 36–41 below.

18. See para. 43 below.

19. s.95 of the 1955 Act.

20. Queen's Regulations, para. 6.129 .

21. See para. 48 below.

22. See para. 49 below.

23. Rules 71(3)(a) and 71(5)(a) of the 1972 Rules.

24. s.113 of the 1955 Act.

25. See 1996 Act, Sched. I .

26. 1996 Act, Sched. I, Pt. II .

27. 1996 Act, Sched. I, Pt. III, s.19 .

28. 1996 Act, Sched. I, Pt. III, ss.19, 25 and 27 .

29. 1996 Act, s.17 and Sched. V .

30. No. 22107/93.

31. The paragraph numbering from here to para. 113 in bold is the original numbering of the Commission's Opinion. Then we revert to the numbering of the Court's judgment.

32. *cf.* No. 8289/78, Dec. 5.3.80, 18 D.R. 166 .

33. Padovanijudgment of 26 February 1993, (A/257B), paras 25–26 .

34. De Cubber (A/86): (1985) 7 E.H.R.R. 236 , para. 26 and Padovani judgment, *loc. cit.*, paras 25 and 27.

35. Holm (A/279A): (1994) 18 E.H.R.R. 79 , para. 30.

36. Demicoli v. Malta,Comm. Rep. para. 42, (A/210): (1992) 14 E.H.R.R. 47, p. 27 .

37. See, for example, Le Compte, Van Leuven and de Meyere (A/43): (1982) 4 E.H.R.R. 1 , para. 55, and Campbell and

Fell (A/43): (1982) 4 E.H.R.R. 1 , para. 78.

38. Queen's Regulations, para. 6.129 .

39. See para. 71 above.

40. Engel (A/22): 1 E.H.R.R. 647 .

41. Engel , *loc. cit.*, para. 30.

42. See, for example, Le Compte, Van Leuven and de Meyere , *loc. cit.*, para. 57.

43. See para. 78 above.

44. *cf.* Mitap and Müftüoglu v. Turkey, Comm. Rep., para. 109 .

45. Para. 109.

46. Para. 111.

47. See, inter alia, Singh v. United Kingdom (1996) 22 E.H.R.R. 1 , para. 44.

48. See the Commission's decision on admissibility, application no. 22107/93, pp. 32–35.

49. See, *inter alia* and mutatis mutandis, James and Others v. United Kingdom (A/98): (1986) 8 E.H.R.R. 123 , para. 80.

50. See para. 4 above.

51. See paras 52–57 above.

52. See, mutatis mutandis, Silver and Others v. United Kingdom (A/61): (1983) 5 E.H.R.R. 347 , para. 79.

53. See Engel v. Netherlands , *loc. cit.* paras 80–85 and Eckle and Others v. Germany , *loc. cit.* paras 76–77.

54. See paras 14–17 and 36–41 above.

55. See paras 42–46 and 48–51 above.

56. See Bryan v. United Kingdom (A/335A): (1996) 21 E.H.R.R. 342 , para. 37.

57. See Pullar v. United Kingdom (1996) 22 E.H.R.R. 391 , para. 30.

58. See paras 14–15 and 36–37 above.

59. See paras 38–39 above.

60. See para. 16 above.

61. See para. 40 above.

62. See, mutatis mutandis, Sramek v. Austria (A/84): (1985) 7 E.H.R.R. 351 , para. 42.

63. See para. 48 above.

64. See, mutatis mutandis, Van de Hurk v. Netherlands (A/288): (1994) 18 E.H.R.R. 481 , para. 45.

65. See paras 45–46 above.

66. See paras 35 above.

67. In paras 75 and 77.

68. See the De Cubber v. Belgium (A/86): (1985) 7 E.H.R.R. 236 , paras 31–32.

69. See paras 8, 9 and 30 above.

70. See, for example, Schmautzer v. Austria (A/328A): (1996) 21 E.H.R.R. 511 , para. 44.

71. See the above-mentioned Schmautzer judgment, *loc. cit.*

72. Paras 73 and 76.

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