Caso de Hood contra el Reino Unido, de 18/02/1999 [ENG]

Violation of Art. 5-3

EUROPEAN COURT OF HUMAN RIGHTS

JUDGMENT

STRASBOURG

18 February 1999

In the case of Hood v. the United Kingdom,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. Wildhaber, *President*,

Mrs E. Palm,

Mr L. Ferrari Bravo,

Mr P. Kuris,

Mr J.-P. Costa,

Mr W. Fuhrmann,

Mr K. Jungwiert,

Mr M. Fischbach,

Mr B. Zupancic,

Mrs N. Vajic,

Mr J. Hedigan,

Mrs W. Thomassen,

Mrs M. Tsatsa-Nikolovska,

Mr T. Pantîru,

Mr E. Levits,

Mr K. Traja,

Sir John Freeland, ad hoc *judge*,

and also of Mr P.J. Mahoney, *Deputy Registrar*,

Having deliberated in private on 9 December 1998 and 4 February 1999,

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

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 14 August 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 27267/95) against the United Kingdom lodged with the European Commission of Human Rights ("the Commission") under former Article 25 by a British national, Mr David Hood, on 18 April 1995.

The Government's application referred to former Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (former Article 46). Although the Government reserved its position as to whether they would contest the Commission's opinion as to a violation of Article 5 §§ 3 and 5, the express object of the reference was to obtain a decision as to the amount of just

satisfaction, if any, which should be awarded to the applicant under Article 41 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[1], the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 30).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Thór Vilhjálmsson, the Vice-President of the Court at the time, acting through the Registrar, consulted the Agent of the Government and the applicant's lawyer on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received both the Government's and the applicant's memorials on 17 November 1998.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr P. Kuris, Mr W. Fuhrmann, Mr K. Jungwiert, Mr B. Zupancic, Mrs N. Vajic, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Pantîru, Mr E. Levits and Mr K. Traja (Rule 24 § 3 and Rule 100 § 4). Subsequently Sir Nicolas Bratza, who had taken part in the Commission's examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). The Government accordingly appointed Sir John Freeland to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. The President decided that it was not necessary to invite the Commission to delegate one of its members to take part in the proceedings before the Grand Chamber (Rule 99).

6. In accordance with the President's decision, a hearing in this case and in the case of Cable and Others v. the United Kingdom took place in public in the Human Rights Building, Strasbourg, on 9 December 1998.

There appeared before the Court:

(a) *for the Government*

Mr C. Whomersley, Foreign and Commonwealth Office, *Agent*,

Mr P. Havers QC, *Counsel*;

(b) *for the applicant*

Mr J. Mackenzie, Solicitor, *Counsel*,

Ms K. Duigan, *Adviser*.

The Court heard addresses by Mr Mackenzie and Mr Havers.

THE FACTS

I. The CIRCUMSTANCES OF THE CASE

7. The applicant, David Hood, is a British national born in 1970. He resides in the United Kingdom. At the relevant time, he was a soldier with the regular forces of the British army.

8. Prior to the events in question, the applicant went absent without leave from his unit in Germany three times. Prior to his third absence, he had been remanded for trial by court martial on an assault charge (later abandoned), he remained absent for almost two and a half years and he gave himself up to the civilian police in December 1993.

A. The relevant detention and court martial of the applicant

9. On 11 May 1994 the applicant did not return after two weeks' leave (his fourth absence without leave). On 27 November 1994 he was arrested at his home by the civilian police and on 28 November 1994 he was taken by army escort to Brompton Barracks. Before the Court, the parties disputed whether the applicant was then brought before his commanding officer on

29 November 1994 pursuant to Rule 4 of the Rules of Procedure (Army) 1972 (see paragraph 29 below).

10. The applicant remained in close arrest until his court martial. He was detained in a cell in a guardroom under the supervision of a guard apart from certain occasions when he was taken to hospital for psychiatric care.

11. In or about December 1994 the applicant was informed that he would have to appear before the unit adjutant after Christmas. He retained a solicitor prior to Christmas, who advised him until 17 January 1995. On 4 January 1995 the applicant appeared before the unit adjutant and was given the abstract of evidence. He was told that he should read the abstract and check that it was accurate. The applicant was cautioned pursuant to Rule 10 of the Rules of Procedure (Army) 1972 (see paragraph 32 below).

12. Acting on his original solicitor's advice, the applicant prepared his own statement and obtained a statement from his girlfriend, which statements were completed on 4 and 19 January 1995 respectively. The applicant submitted both statements to the adjutant on 20 January 1995, which statements were then attached to the abstract of evidence. The applicant was then remanded for trial by court martial by his commanding officer and he applied for legal aid from the military authorities. The charge sheet, dated 25 January 1995 and signed by his commanding officer and on behalf of the convening

officer, recorded two charges of absence without leave and two of desertion contrary to the Army Act 1955.

13. Although the applicant instructed his present solicitor in early February, the latter did not commence work for the applicant until legal aid was granted by the Ministry of Defence by letter dated 14 February 1995.

14. By notice dated 17 March 1995 a district court martial was convened to try the applicant on the charges. The court martial took place on 3 and 4 April 1995. The assistant prosecuting officer was the unit adjutant. The applicant, who was legally represented, pleaded not guilty.

15. During the court-martial hearing, the applicant's solicitor challenged (under section 78 of the Police and Criminal Evidence Act 1984) the admission into evidence of the statements of the applicant and his girlfriend. The judge advocate (having heard evidence from the unit adjutant and the applicant's representative) found that Rule 10 of the Rules of Procedure (Army) 1972 had been followed. Given the applicant's legal representation at the relevant time and the procedures followed, the judge advocate could not see "how a fairer situation could have arisen" and, accordingly, he rejected the applicant's challenge. The judge advocate also clarified during the court martial that "we can take it as an agreed fact that the adjutant or the assistant adjutant will either be the prosecuting or assistant prosecuting officer in any court martial". The applicant was convicted on the two

charges of absence without leave and on one of the charges of desertion, and the remaining charge of desertion was reduced to one of "absent without leave". He was sentenced to be imprisoned for eight months and to be dismissed from the service, the sentence expressly taking account of the period of close arrest immediately preceding the court martial.

16. After confirmation and promulgation of the conviction and sentence, the applicant petitioned the Army. By letter dated 13 July 1995 the applicant was informed that his petition to the Army Board had been rejected. His leave application to the single judge of the Courts-Martial Appeal Court was rejected on 13 September 1995 and his further appeal to the full Courts-Martial Appeal Court was also refused on 18 March 1996.

B. The habeas corpus proceedings

17. The seventy-second day of the applicant's detention fell on or around 7 February 1995. Accordingly, and pursuant to Rule 6 of the Rules of Procedure (Army) 1972 and paragraph 6.045(c) of the Queen's Regulations (see paragraphs 31 and 38 below), a direction from the convening officer was completed on 3 February 1995 attaching an authorisation from the Commander in Chief, the latter of whom directed the applicant's continued detention "to prevent him absconding" before trial ("the delay report").

18. Having requested a copy of the delay report and informed the authorities of his intention to apply for a writ of habeas corpus, the applicant's solicitor issued those proceedings on 17 February 1995 challenging mainly the regularity of the delay report.

That report was received by the applicant's solicitor on 20 February 1995, following which further submissions were made to the High Court.

19. On 21 February 1995 the High Court rejected the application. The court found, *inter alia*, that the delay report had been properly completed in a timely fashion. It noted that the expressed reason for the applicant's continued detention was to prevent his absconding and found that "perfectly understandable" given the charges against him.

II. RELEVANT DOMESTIC LAW and practice

20. At the relevant time the provisions governing the detention and trial of members of the army were contained in the Army Act 1955 ("the 1955 Act"), in the Rules of Procedure (Army) 1972 ("the 1972 Rules") and in the Queen's Regulations for the Army 1975 ("the Queen's Regulations").

21. Since the applicant's court martial, the law has been amended by, *inter alia*, the Armed Forces Act 1996 (see the Findlay v. the United Kingdom judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 276, §§ 52-57) and by the Investigation and Summary Dealing (Army) Regulations 1997 ("the 1997 Regulations"). The provisions detailed below are those applicable at the time of the applicant's arrest, detention and court martial.

A. Arrest

22. A warrant for the arrest of a person subject to military law and considered to have deserted or to be absent without leave may be issued by the commanding officer and any such warrant must be addressed to the civilian police. A person arrested pursuant to that warrant must be handed over as soon as is practicable to the military (section 190A of the 1955 Act).

B. Investigation of charges and detention

23. The relevant rules vary depending on whether the accused is a non-commissioned officer or soldier or, on the other hand, an officer or warrant officer. In the former case (described below), the commanding officer's powers are generally broader as regards the investigation and pursuit of charges against an accused.

1. The 1955 Act

24. Desertion and absence without leave constitute offences under the 1955 Act. The punishment for the offence of desertion is imprisonment for an unlimited term (subject to the sentencing power of the court martial in question) and that for absence without leave is imprisonment for a maximum of two years.

25. Section 75 of the 1955 Act provides that the allegations against a person subject to military law who is under arrest shall be duly investigated without unnecessary delay and that as soon as may be, either proceedings shall be taken for punishing the offence or he shall be released from arrest. In addition, should that detention last longer than

eight days without a court martial being convened, a report (a "delay report") on the necessity for further delay shall be made by the person's commanding officer to the prescribed authority in the prescribed manner and a similar report shall be made to the same authority and in the same manner every eight days until a court martial is assembled or the offence is dealt with summarily or the accused is released from detention.

26. Any allegation that the person subject to military law has committed an offence under the 1955 Act must be reported in the form of a charge to that person's commanding officer and, before any action is taken, the commanding officer must investigate the charge (section 76).

27. After investigation, a charge (which cannot be dealt with summarily) may be dismissed by a commanding officer if he is of the opinion that it ought not to be proceeded with. Moreover, if it appears to the commanding officer that proceedings in respect of the matters to which the charge relates could be, and in the interests of the better administration of justice ought to be, taken against the accused otherwise than under the 1955 Act, the commanding officer may stay further proceedings (sections 77 and 77A).

28. If the commanding officer has not stayed the charge and if the charge is not one which can be dealt with summarily and it has not been dismissed or if it is a charge which can be dealt with summarily but the commanding officer is of the opinion that it should not be so dealt with, he shall take the "prescribed steps" with a view to the charge being tried by court martial (section 78(1) and (2)). Dealing summarily with a charge includes taking evidence, reducing it to writing, deciding as to the guilt or innocence of the accused and rendering sentence (section 78(3)). However, where the commanding officer has taken steps to have the charge tried by court martial, any higher authority to whom the case is forwarded may refer the charge back to the commanding officer to be tried summarily if the charge is one that can be dealt with summarily (section 78(6)) or with a direction to dismiss the charge or to stay all further proceedings therein.

2. The 1972 Rules

29. Rule 4 of the 1972 Rules provides that when a person is detained by a military authority, his commanding officer shall, unless it is impracticable, within forty-eight hours of becoming aware that he is so detained have such person brought before him, inform him of the charge against him and begin to investigate it. If the investigation has not begun within the forty-eight hours, the commanding officer must report the case to a higher authority together with the reasons for the delay in commencing the investigation (Rule 4(2)).

30. The report to which section 75 of the 1955 Act refers shall be signed by the commanding officer of the person detained and shall be sent to the person who would be responsible for convening the court martial (Rule 5). According to Schedule 1 to the 1972 Rules the report must, *inter alia*, specify whether the accused is in close or open arrest, the reasons for his detention, certain details about the progress of the investigations and of the preparation for trial together with the reasons for the delay since the last report.

31. The accused shall not be held in arrest for more than seventy-two consecutive days without a court martial having been convened unless the convening officer directs in writing, citing reasons, that the accused shall not be released from detention (Rule 6).

32. Rule 10(1) provides that an abstract of evidence shall be made by the commanding officer or by another officer on the direction of the commanding officer. The accused shall not be present while the abstract of evidence is being made and it shall consist of a signed statement by, or a précis of the evidence of, each witness whose evidence is necessary to prove the charge. Once compiled, the accused is given (normally by the officer who compiled the abstract) a copy and the accused is cautioned as follows:

"This is a copy of the abstract of evidence in your case; you are not obliged to say anything with regard to it unless you wish to do so, but you should read it and, when you have read it, if you wish to say anything, what you say will be taken down in writing and may be given in evidence." (Rule 10(2) of the 1972 Rules)

33. Statements submitted by the accused (including those of witnesses which he wishes to be included in the abstract) shall be attached to the abstract of evidence and shall thereafter form part of it (Rule 10(4)). The pamphlet entitled "Rights of a Soldier" (which is given to accused persons and which is available in the cells in the guardroom) describes the purpose of the extract of evidence as, *inter alia*, to "provide a brief for the prosecutor at trial" and to inform the accused of the evidence which will be given at trial.

34. The prescribed steps to be taken by a commanding officer for sending a case for trial by court martial include, in accordance with Rule 13, sending to higher authority a draft charge sheet (signed by the commanding officer), the abstract of evidence, a statement of character together with the service record of the accused and a recommendation as to how the charge should be proceeded with (for example, by district or general court martial). It is the convening officer who finally decides on the charges to be retained against an accused and he generally does so by countersigning the draft charge sheet submitted by the commanding officer.

3. The Queen's Regulations

35. Paragraph 6.005 of the Queen's Regulations states that the mere allegation that a person subject to military law has committed an offence does not, of itself, necessarily warrant placing that person under arrest of any description. If the offence is trivial, the offender is to be informed of the charge and required to report to the unit orderly room at a specific date and time. If arrest is necessary, the category of arrest is to be determined in the interests of the service and by the nature of the alleged offence. Generally, a person is to be placed under close arrest only when confinement is necessary to ensure his safe custody or to maintain discipline.

36. The circumstances which would warrant placing an accused under close arrest include those where the accused is deliberately trying to undermine discipline, is likely to injure himself or others or is likely to suborn witnesses; where he has not surrendered but has been apprehended as an illegal absentee or has habitually absented himself; and where, having regard to the nature or prevalence of the alleged offence which is under investigation, it is undesirable in the interests of discipline that he should be at large or allowed to consort with his comrades (also paragraph 6.005).

37. Paragraph 6.007 provides that (subject to, *inter alia*, the general principle that the accused is not to be unnecessarily held under arrest) commanding officers are responsible for ensuring that in each case the need to keep an accused under arrest, together with the form of that arrest, is kept under constant review. As necessary, the form of arrest may be changed or the accused released.

38. Paragraph 6.045(c) provides that the person into whose custody the accused is committed is to inform the accused of the rank, name and unit of the person by whom he is alleged to have committed the offence and the nature of the allegation. Paragraph 6.047 provides that a charge preferred against an officer or soldier is to be dealt with at the earliest opportunity. Accordingly, it is provided, *inter alia*, that on the receipt of every delay report the convening officer is to satisfy himself (if the accused is in detention) as to the necessity of the ongoing detention (subsections (a) and (b)). On receipt of the fourth delay report, or, in any event, after forty days' detention, the convening officer is to make a special report to his/her superior officer outlining the reasons for the delay, when it is expected the accused will be brought to trial and the reasons for the continued detention (subsection (c)). If an accused is not brought to trial by the seventy-second day, the latter superior officer must, in turn, make a special report to the Commander in Chief by that day (subsection (d)). On receipt of such special reports, the superior officer and Commander in Chief mentioned are to take all practical steps to expedite the trial of the accused (subsection (e)).

39. Where an accused has been in detention for seventy-two consecutive days without a court martial being convened, a direction in accordance with Rule 6 of the 1972 Rules not to release the accused can only be given with the prior approval of the Commander in Chief. This report is to contain the reasons for the delay, when it is expected the accused will be brought to trial and the reasons for the continued detention (paragraph 6.047(f)). Delay reports are not, as a rule, copied to the accused or his representative.

C. Habeas corpus

40. Habeas corpus is a procedure whereby a detained person may make an urgent application for release from custody on the basis that his detention is unlawful. Jurisdiction is normally exercised by the Divisional Court of the Queen's Bench Division of the High Court and habeas corpus is available to persons in military custody (*R. v. Royal Army Service Corp. Colchester, ex parte Elliott* [1949] 1 All England Law Reports at p. 373).

41. The scope of this review will depend on the context of the particular case and, where appropriate, the terms of the relevant statute under which the power of detention is exercised. However, the court will examine the legal validity of an accused's detention and whether there is sufficient evidence to detain him, and, if the power to detain depends on the prior establishment of an objective fact, the court will decide whether that fact exists *(Khawaja v. Secretary of State for the Home Department* [1984] Appeal Cases at p. 74).

D. Legal Aid

42. Legal aid is not available from the military authorities for applications to the civilian courts, including applications for writs of habeas corpus. However, legal aid from the civilian authorities is available for such proceedings. A person will not be granted representation for the purposes of any such proceedings unless it is considered that there are reasonable grounds for taking, defending or being a party to proceedings (section 15(2) of the Legal Aid Act 1988). Such an application for legal aid will only be approved after all the questions of fact or law arising in the action, cause or matter to which the application relates, and all the circumstances in which the application was made, have been considered (Civil Legal Aid (General) Regulations 1989).

43. An application for an emergency legal aid certificate can be made pursuant to the Civil Legal Aid (General) Regulations 1989. The information furnished must be such as to allow the area director to decide the nature of the relevant proceedings, the circumstances in which it is required, whether the application is likely to fulfil the conditions under which legal aid may be granted and whether it is in the interests of justice that the applicant should as a matter of urgency be granted legal aid.

E. Courts martial

44. The relevant provisions of the 1955 Act relating to general courts martial are set out in the above-mentioned Findlay judgment (at pp. 272-75, §§ 32-51). These provisions (summarised at paragraph 45 below) apply equally to a district court martial with certain relevant differences. A district court martial comprises a president and a minimum of two other officers and the minimum rank of those members is lower than for a general court martial.

45. Central to the court-martial system under the 1955 Act was the role of the "convening officer". This officer (who had to be of a specified rank and in command of a body of the regular forces or of the command within which the person to be tried was serving) assumed responsibility for every case to be tried by court martial. That officer had the final decision on 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.

The convening officer would draw up a convening order, which would specify, *inter alia*, the date, place and time of the trial, the name of the president and the details of the other members, all of whom he could appoint. Failing the appointment of a judge advocate by the Judge Advocate General's Office, the convening officer could appoint one. He also appointed, or directed a commanding officer to appoint, the prosecuting officer.

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. 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.

The convening officer could dissolve the court martial either before or during the trial, when required in the interests of the administration of justice. In addition, he could comment on the proceedings of a court martial. 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.

The convening officer usually acted as confirming officer also. The findings of a court martial were not effective until confirmed by the confirming officer, who was empowered to withhold confirmation or substitute, postpone or remit in whole or in part any sentence.

PROCEEDINGS BEFORE THE COMMISSION

46. Mr Hood applied to the Commission on 18 April 1995. Relying on Articles 5 and 13 of the Convention, he submitted that he had not been brought promptly before a judge or other officer authorised by law to exercise judicial power, that he had had available to him no procedure complying with Article 5 § 4 to challenge his continuing detention and that he had no enforceable right to compensation or effective domestic remedy in those respects. He also contended under Article 6 §§ 1 and 3 that he had been denied a fair and public hearing by an independent and impartial tribunal established by law.

47. On 1 December 1997 the Commission declared inadmissible the applicant's complaints relating to periods of detention prior to 27 November 1994 and the remainder of the application (no. 27267/95) admissible. In its report of 28 May 1998 (former Article 31 of the Convention), it expressed the unanimous opinion that there had been a violation of Article 5 §§ 3 and 5 but not of Article 5 § 4 and that it was not necessary to consider the complaint under Article 13. It was also of the unanimous opinion that there had been a violation of Article 6 § 1 as regards its requirements of fairness, independence and impartiality but no violation of this provision as regards the public nature of the proceedings and that it was not necessary to consider the applicant's remaining complaints under Article 6 §§ 1 and 3. The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

48. The Government did not contest the findings of the Commission as to a violation of Article 5 §§ 3 and 5 or of Article 6 § 1. However, as regards Article 41 of the Convention (formerly Article 50), they submitted that the finding of a violation in itself would afford the applicant sufficient reparation.

49. The applicant invited the Court to hold that his rights pursuant to Articles 5, 6 and 13 of the Convention had been violated and to award him compensation for non-pecuniary damage and for legal costs and expenses under Article 41 of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

50. The applicant maintained that his pre-trial detention did not comply with Article 5 § 3, which, in so far as relevant, reads as follows:

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

A. Applicability of Article 5 § 3

51. The parties did not contest the applicability of Article 5 § 3 and the Court finds that it clearly does apply. Given the nature of the relevant charges and the penalty imposed, the applicant was arrested on reasonable suspicion of having committed an "offence" within the meaning of Article 5 § 1 (c) (see, for example, the De Jong, Baljet and Van den Brink v. the Netherlands judgment of 22 May 1984, Series A no. 77, pp. 21-22, §§ 42-44). Moreover, the applicant's close arrest amounted to detention in view of his confinement to a cell in the unit guardroom under the supervision of a guard (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 26, § 63).

B. Compliance with Article 5 § 3

52. The applicant contended before the Court that he was not brought before his commanding officer on 29 November 1994 pursuant to Rule 4 of the 1972 Rules (see paragraph 29 above), submitting that he had no recollection of any such hearing and that there was no entry for that date in his diary or any written record of any such hearing. In the alternative, he argued that, even if there had been such a hearing pursuant to Rule 4 of the 1972 Rules, his commanding officer could not be considered to be impartial because of that officer's additional role in the prosecution of cases and his responsibility for discipline and order in his command. The applicant also referred in this context to the commanding officer's lack of legal qualifications.

53. Finally, the applicant asserted that the Rule 4 procedure was deficient for other reasons, including the lack of any written record and the absence of any provision for the accused to be informed of the reasons for his proposed pre-trial detention or for the accused to make submissions against such detention.

54. The Commission found in its report that the applicant had not disputed that he was brought before his commanding officer on 29 November 1994 pursuant to Rule 4 of the 1972 Rules. However, since it was satisfied that the commanding officer's impartiality was capable of appearing open to doubt because of that officer's other powers and duties to which the applicant adverted, it concluded that there had been a violation of Article 5 § 3. In view of this conclusion, the Commission did not find it necessary to examine the applicant's remaining complaints under Article 5 § 3.

55. The Government maintained that the applicant's Rule 4 hearing did take place on 29 November 1994 and pointed out at the hearing before the Court that the applicant had not disputed that fact before the Commission or raised the point in his habeas corpus application to the High Court. They accepted the Commission's conclusion of a violation of Article 5 § 3 and they took the view that it was not necessary to consider separately the applicant's additional complaints under this Article.

56. With regard to the factual dispute between the parties as to whether the applicant was brought before his commanding officer on 29 November 1994 in accordance with Rule 4 of the 1972 Rules, the Court finds the submissions of the Government persuasive. The applicant could have raised the matter before the Commission after its decision on the admissibility of his application but he did not do so. In addition, any failure to fulfil the requirements of Rule 4 of the 1972 Rules would fall within the scope of habeas corpus proceedings. The applicant did not plead any such omission in the habeas corpus proceedings which he instituted in relation to another alleged non-compliance with domestic law and for which proceedings he was advised by the same legal representative as appeared before this Court (see paragraph 18 above). In such circumstances, the Court shall examine the complaint under Article 5 § 3 on the basis that the applicant was brought before his commanding officer on 29 November 1994 pursuant to Rule 4 of the 1972 Rules.

57. As to the applicant's substantive complaint about the commanding officer's impartiality in the context of the Rule 4 hearing, according to the case-law of the Convention bodies, if it appears at the time the decision on pre-trial detention is taken that the "officer authorised by law to exercise judicial power" is liable to intervene in the subsequent proceedings as a representative of the prosecuting authority, then he could not be regarded as independent of the parties at that preliminary stage as it is possible for him to become one of the parties at a later stage (see the Huber v. Switzerland judgment of 23 October 1990, Series A no. 188, p. 18, §§ 42-43, and the Brincat v. Italy judgment of 26 November 1992, Series A no. 249-A, pp. 11-12, §§ 20-21).

The Court has noted the powers and duties of the commanding officer outlined, in particular, at paragraphs 23, 27, 28, 32 and 34 above, which would arise subsequent to that officer's conduct of the hearing pursuant to Rule 4 of the 1972 Rules. This being so, the commanding officer was liable to play a central role in the subsequent prosecution of the case against the applicant. Although the unit adjutant often carries out certain of these functions of the commanding officer (and, indeed, did so in the present case), it is clear that the adjutant does so on behalf of the commanding officer to whom he is directly subordinate in rank. Moreover, the judge advocate confirmed during the applicant's court martial that the unit adjutant is generally nominated prosecuting or assistant prosecuting officer and, in the present case, he carried out the latter function.

In such circumstances, the Court concludes that the applicant's misgivings about his commanding officer's impartiality must be taken to be objectively justified.

58. The Court also considers, as did the Commission, that the commanding officer's concurrent responsibility for discipline and order in his command would provide an additional reason for an accused reasonably to doubt that officer's impartiality when deciding on the necessity of the pre-trial detention of an accused in his command. This view is reinforced by paragraph 6.005 of the Queen's Regulations (see paragraph 36 above), which allows for the commanding officer to refuse the pre-trial release of an accused if he is of the view that it is undesirable "in the interests of discipline" that the accused be at large or be allowed to consort with his comrades.

59. The foregoing conclusion renders it unnecessary to address the applicant's related argument about his commanding officer's lack of legal qualifications.

60. Finally, as to the applicant's submission that the Rule 4 procedure was deficient in other respects (see paragraph 53 above), the Government submitted before the Commission that the Rule 4 procedure had provided the applicant with the "opportunity" to be heard and that the applicant had been informed by his commanding officer of the reasons for his pre-trial detention. In this connection the Court recalls the procedural and substantive requirements of Article 5 § 3 obliging the "officer", *inter alia*, to hear himself the accused, to examine all the facts militating for and against pre-trial detention and to set out in the decision on detention the facts upon which that decision is based (see the Schiesser v. Switzerland judgment of 4 December 1979, Series A no. 34, p. 13-14, § 31, and the Letellier v. France judgment of 26 June 1991, Series A no. 207, p. 18, § 35). The Court further stressed, in its Duinhof and Duijf v. the Netherlands judgment, the importance of "formal, visible requirements stated in the 'law'" as opposed to standard practices in determining whether a national procedure for deciding on the liberty of an individual satisfies the requirements of Article 5 § 3 (judgment of 22 May 1984, Series A no. 79, pp. 15-16, § 34).

However, given its conclusions at paragraphs 57 and 58 above, the Court is of the view that it is not necessary to rule on this additional complaint.

61. In sum, the Court finds that there has been a violation of Article 5 § 3 of the Convention since the commanding officer could not be regarded as independent of the parties at the relevant time.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

62. The applicant contended that military legal aid was not available for habeas corpus proceedings and that, having no dependants, he would not have been granted legal aid from the civilian legal aid scheme for such proceedings. He alleged a violation of Article 5 § 4, which provides as follows:

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

63. The Commission observed in its report that legal aid was available to military personnel for such proceedings from the civilian legal aid scheme (including on an emergency basis) and that the applicant was, in fact, legally represented by a solicitor prior to Christmas 1994 until mid-January 1995 and from early February 1995 to date by his current legal representative. It concluded that there had been no violation of Article 5 § 4 of the Convention.

64. The Government supported the conclusion of the Commission and confirmed during the hearing before the Court that the applicant could have applied for legal aid from the civilian legal aid scheme but that he did not do so.

65. The Court has noted the applicant's failure to apply for legal aid from the civilian legal aid scheme (see paragraphs 42 and 43 above) and observes that he was, in any event, legally represented during the major part of his pre-trial detention by two lawyers including for the habeas corpus proceedings he pursued (see paragraphs 11, 13 and 18 above). In these circumstances, the applicant has not demonstrated that he did not have available to him guarantees appropriate to the kind of deprivation of liberty in question

(see, for example, the Megyeri v. Germany judgment of 12 May 1992, Series A no. 237-A, pp. 11-12, § 22).

66. Accordingly, the Court finds that there has been no violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

67. Article 5 § 5 of the Convention reads as follows:

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

68. The applicant did not specifically refer to Article 5 § 5 of the Convention before the Court. The Commission was of the opinion that there had been a violation of this Article and the Government did not contest this before the Court.

69. Given the Court's finding of a violation of Article 5 § 3 (at paragraph 61 above) and the Government's acknowledgment that the applicant did not have an enforceable right to compensation in relation to such a contravention, the Court cannot but hold that there has also been a violation of Article 5 § 5 (see, for example, the Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, p. 35, § 67).

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

70. The applicant referred to Article 13 of the Convention in his memorial before the Court in relation to his complaints regarding available remedies for deprivation of liberty but he made no specific submissions to the Court in this respect. Article 13, in so far as relevant, reads as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority ..."

71. The Commission did not find it necessary to consider this complaint under Article 13 in view of its conclusion on the complaint before it under Article 5 § 4 of the Convention. The Government suggested during the hearing that the Court follow the approach of the Commission.

72. The Court would agree with the Commission that the finding of no violation of Article 5 § 4 of the Convention in the present case (see paragraph 66 above) means that it is not necessary to enquire whether the less strict requirements of Article 13 of the Convention were complied with (see the Brogan and Others judgment cited above, p. 36, § 68).

V. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3 OF THE CONVENTION

73. The applicant claimed that his trial by court martial did not meet the requirements of Article 6 §§ 1 and 3 of the Convention, which provide, so far as is relevant:

"1. 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 ...

3. Everyone charged with a criminal offence has the following minimum rights:

…

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

…"

74. The applicant's main challenge before the Court was to the independence and impartiality of the court martial.

The Commission found that the applicant had not been given a hearing by an independent and impartial tribunal.

In view of the decision and reasoning of the Court in the above-mentioned Findlay judgment (at pp. 279-83, §§ 68-80) and in its Coyne v. the United Kingdom judgment of 24 September 1997 *(Reports of Judgments and Decisions* 1997-V, pp. 1854-55, §§ 54-58), the Government did not contest the Commission's conclusion.

75. The applicant also contended that the court martial was not a tribunal "established by law". He further complained under Article 6 §§ 1 and 3 (c) about the alleged inadequacy of the military legal aid system, arguing that he would not have submitted his and his girlfriend's statements to the unit adjutant if he had had legal representation.

The Commission did not find it necessary to consider these complaints.

The Government pointed out that the applicant had received legal aid from the military authorities and that the court martial had rejected his objection to the admission of the statements and submitted that the Court should adopt the same position as the Commission on these complaints.

76. The Court recalls that in its above-mentioned Findlay judgment it found that a general court martial convened pursuant to the Army Act 1955 did not meet the requirements of independence and impartiality laid down by Article 6 § 1 of the Convention, in view in particular of the central part played in the prosecution by the convening officer, who was closely linked to the prosecuting authorities, was superior in rank to the members of the court martial and had the power, albeit in prescribed circumstances, to dissolve the court martial and to refuse to confirm its decision (see the Findlay judgment cited above, pp. 279-83, §§ 68-80, together with paragraph 45 above). In its above-mentioned Coyne judgment, it came to a similar conclusion in respect of a district court martial convened under the Air Force Act 1955.

77. The Court can find no reason for distinguishing the present case from the cases of Mr Findlay and Mr Coyne as regards the part played by the convening officer in the organisation of the court martial. It follows that, for the reasons expressed in the above-mentioned Findlay judgment, the court martial which considered the applicant's case was not "independent and impartial" within the meaning of Article 6 § 1.

78. As in the above-mentioned Findlay judgment (at p. 283, § 80), the Court does not judge it necessary to examine separately the applicant's submission under Article 6 §

1 that the court martial was not a tribunal "established by law". The Court comes to a similar conclusion in relation to the applicant's complaint about the alleged inadequacy of the military legal aid system in view of the above findings and the particular circumstances of the present case, including the submission of the statements in question following specific legal advice obtained by the applicant.

79. In conclusion, the Court finds that there has been a violation of Article 6 § 1 since the court martial did not meet the requirements of independence and impartiality.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. The applicant claimed compensation under Article 41 of the Convention, which provides:

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

A. Damage

81. The applicant did not allege any pecuniary damage.

82. As regards non-pecuniary damage arising out of the breaches of Article 5, the applicant claimed compensation of 10,000 pounds sterling (GBP). He contended that he might have obtained some form of conditional release had he received a hearing as envisaged by Article 5 § 3 and submitted that he had, in consequence, suffered 125 days' pre-trial detention which had not been properly deducted from his sentence, together with extreme discomfort and uncertainty during that period of detention. He further claimed an additional GBP 15,000 compensation for non-pecuniary damage as a result of his trial, conviction and sentence by a tribunal which did not meet the requirements of Article 6 § 1. He also referred in this context to the alleged failure to deduct properly the period of his pre-trial detention from his sentence.

83. The Government argued that neither the applicant's pre-trial detention nor its alleged consequences provided any basis for a claim for compensation for non-pecuniary damage. In particular, the Government submitted that it was inconceivable that the applicant would not have been detained in any event prior to his court martial given his record of absence without leave. Moreover, the Government pointed out that there were no grounds for believing that the applicant would not have been convicted and suffered the same or similar consequences if the court martial had been organised to comply with Article 6 § 1. Accordingly, no causal link had been established between the breaches of Articles 5 and 6 of the Convention of which the applicant complained and the alleged non-pecuniary damage.

84. The Court recalls that just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he had had the benefit of the guarantees of Article 5 § 3. Consequently, in its Huber judgment, for example, the Court found that the evidence did not give any reason to suppose that the pre-trial detention would not have occurred had the making of the detention order been a

matter within the competence of a judicial officer who did offer the guarantees of Article 5 § 3. Accordingly, in that case the Court dismissed the claim as regards pecuniary damage and, in the circumstances, it was considered that the judgment would provide sufficient just satisfaction for any non-pecuniary damage suffered (see the Huber judgment cited above, pp. 18-19, §§ 45-46).

85. In the present case, the Court finds that the evidence and, in particular the applicant's history of absence without leave (see paragraphs 8 and 9 above), does not support the view that the applicant would not have been detained prior to his court martial had there been no breach of Article 5 § 3.

86. As in the above-mentioned Findlay and Coyne cases (p. 284, §§ 85 and 88, and pp. 1855-56, § 62 respectively), the Court considers that, in the particular circumstances, it is impossible to speculate as to the outcome of the court-martial proceedings had the violation of Article 6 § 1 of the Convention not occurred.

87. Accordingly, the Court finds that the present judgment in itself constitutes sufficient just satisfaction for any non-pecuniary damage arising from the violations of Articles 5 and 6 of the Convention.

B. Punitive damages

88. At the hearing the applicant's representative argued that the applicant was entitled to punitive damages, based, *inter alia*, on the respondent State's failure, immediately following the publication of the Commission's report of 5 September 1995 which expressed the opinion that there had been a violation of Article 6 § 1, to take steps to ensure that military personnel did not continue to be tried by courts martial convened under the impugned procedure.

89. The Court finds no basis, in the circumstances of the present case, for accepting this claim (see, *mutatis mutandis*, the Selçuk and Asker v. Turkey judgment of 24 April 1998, *Reports* 1998-II, p. 918, § 119).

C. Costs and expenses

90. The applicant's representative submitted a detailed bill of costs and expenses amounting to GBP 14,137.75 (inclusive of value-added tax (VAT)) and relating to the domestic habeas corpus proceedings and to the proceedings before the Convention bodies.

91. The Government contended that no award should be made by the Court as regards the costs of the habeas corpus proceedings. Disputing the rates demanded for letters and telephone calls, the hourly charge out rates and the time spent on the application before the Convention bodies, the Government proposed an alternative sum for costs and expenses in the amount of GBP 7,666 (inclusive of VAT).

92. The Court notes that, if successful, the applicant's habeas corpus proceedings would have led to his release from pre-trial detention. These proceedings are therefore to be taken into account for the purposes of the award under Article 41. Deciding on an equitable basis, the Court awards the sum of GBP 10,500 in respect of costs and expenses, inclusive of any VAT which may be chargeable.

D. Default interest

93. 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 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention;

2. *Holds* unanimously that there has been no violation of Article 5 § 4;

3. *Holds* unanimously that there has been a violation of Article 5 § 5;

4. *Holds* unanimously that it is not necessary also to consider the case under Article 13 of the Convention;

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

6. *Holds* by sixteen votes to one that the present judgment constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant;

7. *Holds* unanimously

(a) that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, a total of 10,500 (ten thousand five hundred) pounds sterling inclusive of any value-added tax which may be chargeable;

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

8. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 February 1999.

Luzius Wildhaber

President

Paul Mahoney

Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Zupancic is annexed to this judgment.

L.W.

P.J.M.

PARTLY DISSENTING OPINION OF JUDGE ZUPANCIC

I voted with the majority on all points except the question of just satisfaction. I find the statement that it is "impossible [for the Court] to speculate as to the outcome of the court-martial proceedings" (paragraph 86 of the judgment) wholly unsatisfactory, the more so since the Court's own case-law, going back to the Colozza v. Italy judgment of 12 February 1985, Series A no. 89, does not offer any substantive explanation for this doctrine.

The question turns on the interpretation of Article 41 of the Convention, that is to say on the meaning of the words "... if the internal law of the High Contracting Party concerned allows only partial reparation to be made ...". In these cases the domestic law of the respondent State ought to provide for a retrial.

It cannot be logically maintained that a conviction and sentence in a criminal case are legitimate if the criminal procedure in question violates the essential precepts of a fair trial, due process and so on. The legitimacy of a substantive judgment depends on the legitimacy of the procedure by which it was arrived at. To hold otherwise – that is, to separate the procedure entirely from its substantive outcome (conviction and sentence) – would reduce the meaning and import of the procedure to an ancillary status. This would mean, as it used to mean in the purely inquisitorial procedure, considering the procedure a mere "adjective" to the "substantive" importance of the case.

That, however, is no longer a tenable position. If it were, a fair trial would not be as central to the meaning of Article 6 of the Convention as it is, neither would the exclusionary rule figure as an essential procedural sanction in most national jurisdictions as well as in some international instruments such as the United Nations Convention against Torture (Article 15).

To say in the instant cases that it is "impossible to speculate as to the [substantive] outcome" of the case, in other words to say that the Court does not know what would have happened if the precepts of a fair trial had in fact been respected, is itself a speculation. It is a speculation that the case would have been decided identically – that the defendant would have been convicted – even if the trial had in fact been fair.

The Court is therefore faced with a dilemma. It is forced to speculate whether it accepts the final substantive outcome of the case or not.

The words in Article 41 "... if the internal law of the High Contracting Party concerned allows only partial reparation to be made ..." ought, therefore, to be implemented so as to require the respondent State to permit retrial of the cases.

Some of the Contracting States' jurisdictions do in fact have appropriate provisions in their codes of criminal procedure. Those provisions afford a legal basis for convicted persons in situations similar to those of the applicant in the instant case to request retrials. Such convicted persons thus acquire standing to lodge a special appeal where the European Court of Human Rights has held that the national criminal proceedings in which they were convicted did not satisfy a particular procedural requirement of the Convention. Only in such circumstances, I think, is the purpose of Article 41 fully achieved.

In situations such as the one we are faced with here, however – in which no special post-conviction remedy is provided in the national legislation – the Court ought to take a

less defeatist approach. Our judgment should at least imply that the national legislation ought to provide for retrial of cases in which the proceedings have been found not to comply with essential procedural requirements. That, I think, is the purpose of the Article 41 words referring to the reparation allowed by internal law.

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

1. *Note by the Registry*. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

1. *Note by the Registry.* For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.