Caso de Stephen Jordan contra el Reino Unido, de 14/03/2000 [ENG]

Violation of Art. 5-3

EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

JUDGMENT

STRASBOURG

14 March 2000

FINAL

14/06/2000

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of Stephen Jordan v. the United Kingdom,

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

Mr J.-P.Costa, *President,*

Sir Nicolas Bratza,

Mr L. Loucaides,

Mr P. Kuris,

Mr W. Fuhrmann,

Mrs H.S. Greve,

Mr K. Traja, *judges*,

and Mrs S. Dollé, *Section Registrar*,

Having deliberated in private on 27 April 1999 and 29 February 2000,

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

PROCEDURE

1. The case originated in an application (no. 30280/96) against the United Kingdom lodged with the European Commission of Human Rights ("the Commission") under former Article 25 by the applicant Mr Stephen Jordan ("the applicant"), a British national, on 19 February 1996. The applicant made numerous complaints under Articles 5, 6 and 13 of the Convention in relation to his pre-trial detention and the early stages of the court-martial proceedings against him.

On 14 January 1998 the Commission declared the application partly inadmissible. It adjourned and communicated to the Government of the United Kingdom ("the Government") the applicant's complaints under Articles 5 and 13 of the Convention in relation to his detention between 27 May and 11 December 1995.

2. The Government submitted observations by letter dated 8 June 1998, to which the applicant replied by letter dated 23 July 1998.

3. After the entry into force of Protocol No. 11 on 1 November 1998, and in accordance with the provisions of Article 5 § 2 thereof, the case fell to be examined by the Court.

4. In accordance with Rule 52 § 1 of the Rules of Court[1], the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section.

5. Before the Court the applicant was represented by Mr J. Mackenzie, a lawyer practising in London. The Government were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office.

6. On 27 April 1999 the Court declared the applicant's complaints under Article 5 §§ 3 and 5 admissible and declared the remainder of the application inadmissible.

7. By letter dated 6 July 1999, the applicant detailed his claim for just satisfaction pursuant to Article 41 and confirmed that he had no further observations to make. The Government commented on the applicant's just satisfaction proposals in their letter dated 11 August 1999.

8. After consulting the Agent of the Government and the applicant's lawyer, the Chamber decided that it was not necessary to hold a hearing.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. In 1995 the applicant, born in 1971, was a soldier of the regular forces in the Grenadier Guards. On 3 March 1995 the Special Investigations Branch of the military police ("SIB") began investigating charges against him in relation to the misuse of travel warrants. The applicant was due to be interviewed on 28 March 1995 and went missing from his unit. On 20 April 1995 he was arrested by the civilian police and returned to his unit. His commanding officer dealt with the charge summarily and sentenced him to, *inter alia*, 28 days' imprisonment. The applicant served 23 days (after remission for good conduct in detention).

10. The applicant was therefore due for release on 27 May 1995 but his detention continued on the basis of the suspected offences that were being investigated by the SIB. On 1 and 2 June 1995 the applicant was interviewed by the SIB and he was advised by a civilian solicitor during those interviews. The applicant then instructed his current representative on 15 June 1995. On 16 June 1995 the applicant was brought before his commanding officer and a charge sheet recording one charge under the Theft Act 1968 relating to the making of fraudulent motor mileage claims was read to him.

11. On 29 August 1995 a further charge sheet was read to the applicant which included eight additional and similar charges (obtaining property by deception) and the applicant was remanded for trial by court-martial. On 15 September 1995 the applicant applied for legal aid under the army legal aid scheme, which was granted as from 1 November 1995.

12. In November 1995 the applicant commenced habeas corpus proceedings in the High Court requesting his release on the grounds, *inter alia*, that he had not been given a formal hearing at which he was informed of the case against him and was able to present his own case for release, and on the grounds of the delay in holding the court-martial. The army authorities admitted that due to an "administrative oversight" the applicant had not been charged until 16 June 1995. On 11 December 1995 the army authorities undertook to the Court to release the applicant from close to open arrest and he was so released on the same day. The form of order of the High Court recorded the pleadings before it and the Government's undertaking to release the applicant, but included no other order except to award costs to the applicant. The applicant was released from open arrest in mid-1996 and was sent on leave.

13. On 12 February 1996 the applicant instituted further proceedings in the High Court for compensation from the Ministry of Defence in respect of his detention from 27 May to 11 December 1995. The applicant alleged unlawful detention, breach of a duty of care, false imprisonment and trespass to the person. The defence filed by the army authorities in those proceedings accepted that the applicant had not been charged until 16 June 1995, initially because the investigation of the charges had been impeded by his absence and, subsequently, due to an error associated with the replacement of the applicant's commanding officer. The authorities therefore accepted that the applicant's detention between 27 May and 16 June 1995 was unlawful. Various other admissions were made by the army authorities as regards the failure properly to complete certain delay reports, but it was denied that these latter omissions rendered the applicant's subsequent detention unlawful. The applicant had also claimed, and the army authorities

denied, that there had been a violation of the rules of natural justice and of Article 5 § 3 of the Convention.

14. The matter was settled on 21 October 1996, the applicant being paid a substantial sum of money and his costs.

15. Although a district court-martial was initially convened by order of 31 October 1995 to try the applicant, it was postponed on a number of occasions. In March 1997 the applicant was charged with further but similar offences and, on 27 November 1997, the army authorities directed that the applicant be tried by court-martial on the 27 outstanding charges against him. On 22 November 1999 the applicant was tried by general court-martial. He pleaded guilty to offences of obtaining property by deception to the value of £15,000 and was sentenced to 14 months' imprisonment of which he was to serve 7 months. The reviewing authority later reduced this sentence to 3 months' imprisonment and the applicant's appeal to the Courts-Martial Appeal Court is pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. At the relevant time the provisions governing the prosecution and pre-trial detention of accused 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").

Subsequent to the relevant facts of the present case, 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.

17. The legal provisions relevant to the present application are set out in detail in the judgment of the Court in the case of Hood v. the United Kingdom (judgment of 18 February 1999, to be published in the Official Reports of selected Judgments and Decisions). The main provisions are summarised below.

18. In general terms, the commanding officer of an accused retains numerous powers and duties in relation to the arrest and pre-trial detention of an accused and in respect of the investigation and subsequent prosecution of charges. If the accused is a soldier (as opposed to an officer), the commanding officer's powers are broader as regards the investigation and pursuit of charges against an accused.

19. Any allegation that a person subject to military law has committed an offence under the 1955 Act must be reported to that person's commanding officer. The latter may investigate the charge (section 76 of the 1955 Act) and may issue a warrant for the arrest of a person who is accused of certain charges.

20. Subsequently the commanding officer of an accused must, unless it is impracticable, within forty-eight hours of becoming aware that an accused is 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 of the 1972 Rules).

21. Commanding officers are responsible for ensuring that in each case the need to keep an accused in detention, together with the form of that detention, is kept under constant review (paragraph 6.007 of the Queen's Regulations). However, ultimate responsibility initially lies with the officer convening the court-martial and, as the pre-trial detention continues, with the convening officer's superior officer and, finally, with the Commander in Chief of the accused (paragraphs 6.045 and 6.047).

If the detention of an accused is considered necessary, the category of detention (close arrest or open 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. 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 (paragraph 6.005 of the Queen's Regulations).

22. The commanding officer is responsible for the compilation of the abstract of evidence during the investigation. The abstract consists of the evidence of each witness considered necessary to prove the charge. Once it is compiled, the accused is given a copy, he is cautioned as to the use that could be made of any evidence he may submit and statements submitted by the accused are attached to the abstract of evidence (Rule 10 of the 1972 Rules). The pamphlet entitled "Rights of a Soldier" 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.

23. The commanding officer can also decide how a charge will be proceeded with after investigation. The commanding officer can deal summarily with or dismiss certain charges and can stay the proceedings against an accused (sections 77 and 77A of the 1955 Act). He can also decide that the accused should be tried by court-martial and he must take the necessary steps in this respect (section 78(1) and (2) of the 1955 Act). The necessary steps include (Rule 13 of the 1972 Rules) sending to a 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 the commanding officer's recommendation as to how the charge should be proceeded with (for example, by district or general court martial). It is the higher authority who takes the final decision as to whether a court-martial is to be convened, and it is the convening officer of that court-martial who finally decides on the charges to be retained against an accused, although the latter generally does so by countersigning the draft charge sheet submitted by the commanding officer.

AS TO THE LAW

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

24. The applicant maintained that he did not benefit from the rights guaranteed by 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

25. 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 as close arrest means confinement to a cell under supervision (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

26. The applicant complained that he did not have a hearing which complied with Article 5 § 3 of the Convention and the principles as laid down in the above-cited De Jong, Baljet and Van den Brink judgment and in the Schiesser judgment (Schiesser v. Switzerland judgment of 4 December 1979, Series A no. 34).

He mainly submitted, in this respect, that his commanding officer and the other officers with decision-making power as regards his detention were closely connected to the prosecution of the case against him and that none were legally qualified. He also argued that he was not told who had made the decision to detain him in close arrest or why, and that he had no opportunity to present reasons against his continued detention. He also complained of the delay in holding the hearing pursuant to Rule 4 of the 1972 Rules and pointed out that there was no requirement for an assessment of the need for continued detention against specific criteria.

The Government did not make submissions on the merits of these complaints.

27. The Court recalls that in the above-cited Hood case the Government argued that the hearing of an accused by his commanding officer pursuant to Rule 4 of the 1972 Rules fulfilled the requirements of Article 5 § 3 of the Convention. However, the Court considered that the commanding officer was liable to play a central role in the subsequent prosecution of the case against an accused, and considered that Mr Hood's misgivings about his commanding officer's impartiality were therefore objectively justified. It was also of the view that the commanding officer's responsibility for discipline and order provided 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. Accordingly, the Court concluded that there had 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.

28. The Court finds no ground on which to distinguish the present case from the above-described Hood application. Even assuming that the applicant's interview with his commanding officer on 16 June 1995 was conducted pursuant to Rule 4 of the 1972 Rules, the Court considers, for the reasons detailed in the Hood judgment, that the

powers and position of the applicant's commanding officer were such that that officer could not be regarded as independent of the parties at the relevant time.

29. The foregoing conclusion renders it unnecessary to address the applicant's additional complaints under Article 5 § 3 of the Convention that the Rule 4 procedure and the controls on his pre-trial detention were deficient in other respects.

30. In sum, the Court finds that there has been a violation of Article 5 § 3 of the Convention since the applicant's commanding officer could not be regarded as independent of the parties.

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

31. 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."

32. The applicant complained under Article 5 § 5 that he did not have an enforceable right to compensation as regards the violation of his rights guaranteed by Article 5 § 3. The Government did not make any submissions in respect of the merits of this complaint.

33. The Court recalls that, in the Hood case, the Government acknowledged that the applicant did not have an enforceable right to compensation in relation to the same contravention of Article 5 § 3 as has been established in the present case. The Court, accordingly, concludes that there has also been a violation of Article 5 § 5 the Convention (see the above-cited Hood judgment at p. 17, § 69).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. Article 41 of the Convention provides:

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

A. Damages

35. The applicant did not allege any pecuniary damage.

36. As regards non-pecuniary damage arising out of the breaches of Article 5, the applicant claimed compensation of 5,000 pounds sterling (GBP). The Government submitted that the Court should follow its judgment in the above-cited Hood case, where it was considered that the judgment constituted sufficient just satisfaction for any non-pecuniary damage suffered as a result of violations which were similar to those established in the present case. Indeed the Government pointed out that even though a further violation was found in the Hood case (of Article 6 § 1), no award in respect of non-pecuniary damage was made. Moreover, the applicant presented no evidence, according

to the Government, to demonstrate that he would have been released earlier had a system complying with Article 5 § 3 been in place.

37. 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 v. Switzerland judgment of 23 October 1990, Series A no. 188, pp. 18-19, §§ 45-46).

38. In the present case, the Court finds, as it did in its Hood judgment, that the evidence and, in particular the applicant's previous absence without leave (see paragraph 9 above), does not support the view that the applicant would not have been detained prior to his court-martial, or that he would have been released earlier, had there been no breach of Article 5 § 3.

39. Accordingly, the Court finds that the present judgment in itself constitutes sufficient just satisfaction for any non-pecuniary damage arising from the established violations of Article 5 of the Convention.

B. Costs and expenses

40. The bill for costs and expenses submitted by the applicant's representative related solely to the proceedings before the Convention organs and amounted to a total of GBP 4,441.50 (inclusive of value-added tax (VAT)). This included 31 hours work at GBP 120 per hour, of which 25 hours was spent on drafting the initial application.

41. The Government considered that 15 hours work on the initial application and an hourly rate of GBP 100 would be more reasonable. In such circumstances, the costs and expenses would amount to GBP 2,250 (exclusive of VAT). Moreover, the Government noted that, out of seven initial complaints under Articles 5, 6 and 13, there was only one admissible claim under Article 5 §§ 3 and 5. This latter claim was "relatively identical" to that in the Hood case in which judgment was delivered in February 1999, and the same legal representative acted for both Mr Hood and the present applicant. Accordingly, the Government submit that the applicant should be awarded one seventh of the above-noted sum of GBP 2,250 (exclusive of VAT) in costs and expenses, namely GBP 320 (exclusive of VAT).

42. The Court recalls that in order for costs and expenses to be recoverable under Article 41 of the Convention, it must be established that they were actually and necessarily incurred, and reasonable as to quantum (see, among other authorities, the Nikolova v. Bulgaria judgment of 25 March 1999, to be published in the Official Reports of selected Judgments and Decisions, at § 79).

The Court does not consider that the fact that complaints are declared inadmissible means, of itself, that it can be concluded that the associated legal costs were not necessarily incurred. As to the similarity of the present case to the Hood application, the

Court notes that the bulk of the legal work for which a claim is made was completed prior to the registration of the present application, at which stage no decision had yet been taken by the Convention organs on the above-mentioned Hood application. Deciding on an equitable basis, the Court awards the sum of GBP 3,500 in respect of costs and expenses, inclusive of any VAT which may be chargeable.

C. Default interest

24. 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 UNANIMOUSLY

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

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

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, GBP 3,500 in respect of costs and expenses, which figure is inclusive of any value-added tax that 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;

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

Done in English, and notified in writing on 14 March 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. Dollé J.-P. Costa

Registrar President

Notes by the Registry
1. The Rules of Court came into force on 1 November 1998.