

FOURTH SECTION
DECISION
AS TO THE ADMISSIBILITY OF

Application no. 41534/98
by Brian BELL
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 15 November 2005 as a Chamber composed of

Mr J. Casadevall, *President*,

Sir Nicolas Bratza,

Mr M. Pellonpää,

Mr R. Maruste,

Mr K. Traja,

Ms L. Mijoviæ,

Mr J. Šikuta, *judges*,

and Mr M. O'Boyle, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 22 May 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

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

Having deliberated, decides as follows:

THE FACTS

The applicant is a British national, born in 1973 and living in Surrey. He was represented before the Court by Mr J. Mackenzie, a lawyer practising in Henley-on-Thames. The respondent Government were represented by their Agents, Mr C.A. Whomersley and, subsequently, Mr J. Grainger, both of the Foreign and Commonwealth Office.

A. The circumstances of the case

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

At the time of the events in question, the applicant was a soldier serving as a Private with the Grenadier Guards of the British Army, stationed at Alexandra Barracks, Ballinlinla, County Down in Northern Ireland.

On the evening of 19 December 1997 the applicant was talking with an officer, Captain J, in the foyer to the cookhouse at Alexandra Barracks. There followed an exchange of words between the applicant and a non-commissioned officer, Colour Sergeant H, who subsequently ordered another non-commissioned officer, Corporal G, to have the applicant locked up overnight. The applicant was not told the offence of which he was accused, but on his arrival at the guardroom he overheard Colour Sergeant H tell the Guard Commander that he had seen the applicant with a bleeding nose and that, when he asked the applicant about it, the applicant had told him to "fuck off".

The applicant was released the following morning and went to the medical centre where he was examined by medical staff. The applicant submitted that this examination established that he had not had a nose bleed the night before.

On 22 December 1997 at approximately 2 p.m. the applicant was informed that he would have to appear before his company commander. At approximately 4 p.m. he appeared before the company commander, who, in connection with the events of 19 December, charged the applicant with the offence of using insubordinate language to a superior contrary to section 33(1)(b) of the Army Act 1955, and informed the applicant that the case would be heard the following day by the battalion commanding officer ("CO"). He informed the applicant that the allegation was that Colour Sergeant H had seen him with a nose bleed and had asked him why his nose was bleeding and that the applicant had then told Colour Sergeant H to "fuck off".

The applicant maintained that he went to the medical centre and asked for a record of his examination establishing that he had not had a nose bleed on the

night in question. The applicant stated that staff at the medical centre refused to provide the record, though this is disputed by the Government.

The applicant accepted that he received a version of the information pamphlet entitled "Rights of a Soldier charged with an offence under the Army Act 1955". He claimed that he received the pre-October 1997 version of the pamphlet.

On the morning of 23 December 1997 the applicant was asked if he had any witnesses to call at the hearing before the CO. He asked that Captain J and Corporal G be called to give evidence on his behalf. When the applicant arrived at the Regimental Offices later that morning he saw Corporal G being called into the Regimental Sergeant Major's office. The applicant complained that Corporal G was directed not to give evidence which supported the applicant's case. The Government argued that it was routine practice for witnesses to be called into the Regimental Sergeant Major's office in this way so that the procedure to be followed at the hearing could be explained. They denied that Corporal G was directed not to give evidence supporting the applicant's case.

The applicant appeared before the CO at 10.30 a.m. on 23 December 1997. The hearing lasted approximately ten minutes. Present in the CO's office for the hearing were the CO, the battalion adjutant, the regimental sergeant major, Colour Sergeant H and an officer appointed to look after the applicant's interests, whose identity is unknown to the applicant and with whom the applicant had no opportunity to discuss his case. That officer did not speak at any point during the hearing. The applicant was required to stand to attention throughout the hearing and was permitted to speak only when invited to do so by the CO.

The CO asked Colour Sergeant H to give his evidence. The latter said that he had seen the applicant in the foyer of the cookhouse on the evening of 19 December 1997 and that the applicant's nose had been bleeding. When he had asked the applicant about his nose bleed, the applicant had replied: "Fuck off, it's nothing to do with you".

The CO then asked the applicant if he admitted the offence described and the applicant pleaded not guilty. The CO asked the applicant to give his evidence. The latter said that he had been speaking to Captain J when Colour Sergeant H had ordered him to go to bed. The applicant had said to Colour Sergeant H that he was speaking to Captain J, but Colour Sergeant H had then ordered Corporal G to lock him up. The CO asked the applicant if he had any evidence to call and the applicant asked to call Captain J. The latter said that he had been speaking to the applicant in the foyer of the cookhouse and had not heard him swear at Colour Sergeant H. At this point, the applicant alleged that Colour Sergeant H interrupted Captain J's evidence and said that he did not think the Captain could have heard anything as the exchange in question had taken place outside the cookhouse. The Government denied that Colour Sergeant H made any such interruption. The applicant alleged that Captain J responded to Colour Sergeant

H: "In which case I would not have heard it". Corporal G did not give evidence.

The CO asked the applicant if he wished to go for court martial, but the applicant said that he would accept the CO's award. The company commander, who was present by this time, said that the applicant was a satisfactory member of his company. The CO then said that he found the applicant guilty and sentenced him to seven days detention and seven days associated loss of pay. The applicant served his sentence locked in a cell in the battalion guardroom.

B. Relevant domestic law and practice

1. The Offence

Section 33(1)(b) of the Army Act 1955 ("the 1955 Act") provides:

"Any person subject to military law who - ...

(b) uses threatening or insubordinate language to his superior officer

shall, on conviction by court martial, be liable to imprisonment or any less punishment provided by this Act."

2. Investigation

Section 76 of the 1955 Act provides that an allegation that an accused has committed an offence, including the offence cited above, shall be reported to his commanding officer ("CO") who shall investigate the charge. Regulation 25 of the Investigation and Summary Dealing (Army) Regulations 1997 ("the 1997 Regulations"), which was enacted under section 83 of the 1955 Act, provides that COs shall investigate the charge by, *inter alia*, causing such enquiries or further enquiries to be made as appear to him to be necessary.

3. Hearings

Regulation 9 of the 1997 Regulations provides that COs may deal summarily with any charge brought against an accused under section 33 of the Army Act 1955. Regulation 29 of the 1997 Regulations provides that before dealing summarily with a charge, a commanding officer shall, *inter alia*, call witnesses whose evidence he considers may be relevant

to the charge (29(1)(b)); allow the accused to question those witnesses (29(1)(c)); allow the accused to give evidence on his own behalf (29(1)(d)); allow the accused to call his own witnesses (29(1)(e)). The CO has the power at any time to adjourn the proceedings if it appears necessary in the interests of justice to do so (29(2)).

Section 76B of the 1955 Act (as substituted by the Armed Forces Act 1996 ("the 1996 Act")) provides (insofar as relevant):

"(1) This section applies where a charge is to be dealt with summarily by a commanding officer...

(5) If he determines that the charge has been proved the commanding officer ... shall, before recording a finding that the charge has been proved, afford the accused the opportunity of electing trial by court martial.

Section 76C of the 1955 Act (as substituted by the Armed Forces Act 1996 ("the 1996 Act")) provides that COs may only award penalties where they have recorded a finding that the charge against an accused has been proved.

Annex N to Chapter 62 of the Army General Administrative Instructions ("AGAs") is headed:

"SUMMARY DEALINGS - AIDE MEMOIRE 1 WHERE A COMMANDING OFFICER DEALS SUMMARILY USING HIS ORDINARY POWERS"

Paragraph 10 of Annex N provides (as relevant):

"The CO should ... consider all the evidence and consider whether the accused is guilty or not guilty of the offence(s) charged. ... In order to convict on a charge, he must be satisfied beyond a reasonable doubt, i.e. that he is sure, that the accused is guilty of that charge. Any uncertainty should be exercised in favour of the accused by finding him not guilty. ..."

4. Penalties

The maximum duration of the imprisonment for the offence of using insubordinate language is not defined under the 1955 Act. Hence, the maximum penalties available depend on the form of the tribunal making the award.

By virtue of Regulation 12 of the 1997 Regulations, a CO dealing summarily with an offence does not have power to make an award of detention exceeding 28 days unless he complies with Regulation 31 of the 1997 Regulations.

Regulation 31 of the 1997 Regulations provides that a CO may only award extended detention of up to 60 days if he has taken written statements from all the witnesses (Reg. 31(3)), satisfied himself that the accused was not likely to dispute the charge (Reg. 31(4)), obtained permission from a higher authority to

award extended detention (Reg.31(5)&(7)) and informed the accused of his extended powers (Reg. 31(9)).

A district court martial can award imprisonment of up to two years (cf. section 85(2) of the 1955 Act). There is no limitation on the powers of the general court martial to award imprisonment.

However, paragraph 6.121 of the Queen's Regulations provides as follows:

"If an accused has elected to be tried by court-martial his punishment is not for that reason to be increased. In ordinary circumstances, the court should not award a heavier punishment than that which could have been awarded summarily. However, the court sentencing him is not bound by the limits imposed on summary awards ..."

5. Reviews

Section 115 of the 1955 Act (as amended by the Armed Forces Act 1996) provides:

"(1) This section applies where a charge has been dealt with summarily and a finding has been recorded that the charge has been proved.

(3) The finding or any punishment awarded (or both) may be reviewed at any . . . time."

Such a review is conducted by the Defence Council, any military officer superior in command to the commanding officer of the soldier requesting the review, or a general officer or brigadier appointed by the Defence Council to carry out the review or any class of review (section 115(5)). The reviewing authority may quash any guilty verdict and associated sentence or substitute any finding or sentence which could have been validly made or imposed by the commanding officer who conducted the summary proceedings, save that any new sentence imposed must not be, in the opinion of the authority, more severe than the sentence originally passed (sections 113AA(2)-(5) and 115(6)).

Under Queen's Regulation 6.071A(c), summary findings and awards are automatically subject to review where the accused has been sentenced to detention in excess of 28 days.

6. *The Pamphlet*

All soldiers are provided with a pamphlet, entitled "The Rights of a Soldier Charged with an Offence under the Army Act 1955". The pamphlet was said to be a 'guide', which was not intended to cover all the rights that a soldier might have. The content of this pamphlet was modified on 1 October 1997.

The pre-October 1997 version of the pamphlet informed soldiers of their right to have an officer as 'adviser' both before and during the hearing. This Adviser was to be allowed to make a statement on the accused's background or in mitigation of punishment if the accused so wished. In addition, the pamphlet explained the ways that hearings had to be conducted and the procedures that had to be followed before a CO could award extended detention (see above). Finally, it said the following in relation to an appeal:

"16. **Appeal.** Although there is no formal right of appeal against summary dealing, if an accused considers that he has been treated unjustly by his CO when dealing with charges summarily against him, he may submit a written complaint specifying his reasons, requesting redress of complaint under AA s. 180 and asking that the finding and/or sentence be reviewed under AA s. 115. The matter will then be reviewed by the CO's higher authority, who has power to quash or vary the CO's finding and sentence..."

COMPLAINTS

1. The applicant complained under Article 6 § 1 that the trial was unfair:
 - a) the CO was not "independent or impartial" since he acted both as prosecutor and judge;
 - b) the proceedings were not held in public;
 - c) he was not allowed to comment on the strength of the case against him or to make a statement in mitigation of sentence;
 - d) the tribunal was not "established by law";
 - e) no reasons were given for the CO's decision; and
 - f) there was no form of appeal available to the applicant.
2. He also complained, under Article 6 § 2, that he was not given the benefit of the presumption of innocence.
3. He complained under Article 6 § 3 that:
 - a) he was given insufficient time to prepare his defence and certain medical evidence was not obtained (Article 6 § 3 (b));
 - b) he was not provided with legal representation (Article 6 § 3(c)); and
 - c) certain medical evidence was not obtained, one witness was intimidated

into not giving evidence and the other was interrupted in the course of his evidence without intercession by the CO (Article 6 § 3(d)).

THE LAW

A. Exhaustion of domestic remedies

The Government submitted that, in failing to seek a review of his conviction and sentence under section 115 of the 1955 Act by the reviewing authority, the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. They highlighted the wide powers of the reviewing authority to substitute a new verdict or sentence in place of that of the applicant's CO (see above). The applicant argued that there was no form of procedure for reviews under section 115 of the 1955 Act and that, as a result, such reviews were ineffective. The Government responded that no specific procedure was required: all that was needed was a simple request for review.

The Court recalls that, pursuant to Article 35 of the Convention, it is only competent to consider complaints after all effective remedies have been exhausted, according to the generally recognised rules of international law. It is further noted that, in the case of *Thompson v. United Kingdom* (dec.), no. 36256/97), the applicant was not required to exhaust an internal army review as regards his complaints about alleged deficiencies in the domestic provisions applicable to summary trials ("generic complaints") whereas he was required to do so as regards his complaints about the application of those domestic provisions in his case ("non-generic complaints").

In the present case, the Court considers that certain complaints under Article 6 §§ 1 and 3 (namely, those about the independence and impartiality of the CO and the consequent fairness of the proceedings; the "public" nature of the proceedings; the tribunal being "established by law"; the availability of an appeal and the lack of legal representation for his summary trial) amount to allegations of deficiencies in the relevant domestic provisions (generic complaints). The domestic remedy to which the Government referred (a review under section 115 of the 1955 Act, as amended) could not therefore have been effective in respect of these complaints so that they cannot be considered inadmissible for failure to exhaust domestic remedies.

The Court finds the remainder of the applicant's complaints under Article 6 §§ 1 and 3 and all of his complaints under Article 6 § 2 to amount to non-generic complaints by which he takes issue with the manner in which the relevant domestic provisions were applied in his case. In such circumstances, it would have been reasonable to expect the applicant to have raised these complaints either before the CO or in a review under section 115 of the 1955 Act.

However, there is no indication that he raised these complaints during his hearing with his CO. Nor did he apply to have the case reviewed by the CO's higher authority. As noted above, he had the right (from the date he was sentenced on 23 December 1997 to the date of his discharge in August 1998) to apply under section 115 of the 1955 Act for a review of the finding of the CO and/or of the punishment awarded by the CO. He had been informed of this option through the information pamphlet for soldiers which recorded that he could request that the finding and/or sentence be reviewed under section 115. The Court observes that the reviewing authority would have had the power under that section to quash any guilty verdict and associated sentence or substitute any finding or sentence which could have been validly made or imposed by the CO who conducted the summary proceedings, so long as that new sentence imposed was not, in the opinion of the reviewing authority, more severe than the sentence originally passed.

The Court therefore concludes that the applicant has failed to exhaust domestic remedies as regards the non-generic complaints under Article 6 §§ 1 and 3 and under Article 6 § 2. Those complaints must therefore be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

B. Article 6 §§ 1 and 3 of the Convention

The remaining (generic) complaints under these provisions concern the independence and impartiality of the CO and the consequent fairness of the proceedings before him; the "public" nature of those proceedings; whether the CO could be considered a tribunal "established by law"; the availability of an appeal and the lack of legal representation.

1. The parties' submissions

(a) Applicability of Article 6

The applicant contended that the charges against him were "criminal" for the purposes of Article 6. He argued that the applicability of Article 6 fell to be assessed on the basis of the three criteria outlined in the *Engel* judgment (*Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, §§ 82 and 83).

He did not dispute that the offences in question were disciplinary offences in domestic law. Nor did he dispute that they were disciplinary in nature. However, he argued that the maximum penalty rendered the offence criminal in character. The maximum penalty risked by him was, according to the applicant, either life imprisonment (the penalty that was available if the offence had been tried by

general court-martial), two years imprisonment (the maximum penalty available to a district court-martial) or 60 days imprisonment (the maximum penalty available to a CO who had applied for extended sentencing powers).

The Government argued that the offence was disciplinary in domestic law and disciplinary in nature and, further, that the maximum penalty the applicant risked incurring was only 28 days. They referred to the above cited *Engel* case and the case of *Eggs v. Switzerland* (No. 7341/76, Commission decision of 4 March 1978, Decisions and Reports (DR) 15, p. 35) and argued that this degree of severity of punishment did not "transform" an otherwise disciplinary offence into a criminal offence.

(b) Merits of the complaints under Articles 6 §§ 1 and 3

The applicant complained under Article 6 § 1 that his CO was not "independent or impartial" since he acted both as prosecutor and judge; that the proceedings were not public; that the tribunal was not "established by law" since it was of an *ad hoc* nature convened for each case at the convenience of the armed forces without suitable constitution or rules of evidence or procedure; and that there was no form of appeal available. In addition he complained under Article 6 § 3(c) that he was not provided with the opportunity for legal representation. He also maintained that any waiver by him of trial by court-martial was not valid.

The Government observed that the applicant declined to elect trial by court-martial when he had the opportunity and submitted that there were no important public interest considerations which might suggest that the matter should have been dealt with otherwise than summarily. In these circumstances, they argued that he waived his rights under Article 6 of the Convention. They contended that court-martial proceedings would have fully complied with the requirements of the Convention and the applicant would have been entitled to legal representation and, if necessary, legal aid.

2. The Court's assessment

(a) The complaint about the absence of a right of appeal

The Court recalls that Article 6 does not compel the Contracting States to set up courts of appeal or of cassation (*Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, § 25). Hence, even assuming that Article 6 was applicable, the applicant's complaint under Article 6 about the lack of an appeal must be rejected as incompatible *ratione materiae*, within the meaning of Article

35 § 3 of the Convention.

(b) The remaining complaints

The remaining complaints raise complex and serious issues under Articles 6 § 1 and 3(c) of the Convention which require determination on the merits. It follows that they cannot be dismissed as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring the complaints inadmissible has been established.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints under Article 6 §§ 1 and 3 about the lack of independence and impartiality of his CO, about the proceedings being consequently unfair, about those proceedings not being held in public, about his CO not constituting a tribunal "established by law" and about the lack of legal representation.

Declares inadmissible the remainder of the application.

Michael O'Boyle Josep Casadevall

Registrar President