United Kingdom

R v Spear and Another
R v Boyd
R v Saunby and other appeals

[2002] UKHL 31

House of Lords

Lord Bingham of Cornhill, Lord Steyn, Lord Hutton, Lord Scott of Foscote and Lord Rodger of Earlsferry

11–13 June, 18 July 2002

(1) Constitutional law – Fundamental rights – Right to fair trial – Right to fair hearing by independent and impartial tribunal – Court-martial – Membership – Junior officers – Role – Whether subject to external influence – Reviewing authority – Role – Civil offence – Whether trial by court-martial in United Kingdom infringing fundamental right – Human Rights Act 1998 – Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 6.

(2) Constitutional law – Fundamental rights – Right to fair trial – Right to fair hearing by independent and impartial tribunal – Court-martial – Membership – Permanent president – Civil offence – Fair hearing – Whether role of permanent president precluding court-martial from being independent and impartial tribunal – Whether trial of offence against ordinary criminal law by court-martial in United Kingdom infringing fundamental right – Human Rights Act 1998 – Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 6.

In the first of two groups of conjoined appeals, the issue was whether, because of the part played in the district courts-martial which had convicted the defendants by the permanent president of the court-martial, those courts-martial had lacked the qualities of independence and impartiality required of a tribunal by art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The role of the permanent president, who was an officer appointed to that post in the closing years of his service career, was similar to that of a juror, except that, during the period of his appointment, his full-time professional occupation was to sit in courts-martial; he had administrative responsibilities in relation to the staging of the court-martial; and it was his responsibility to see that the hearing was conducted in accordance with service tradition. The Courts Martial Appeal Court decided the issue against the defendants, who appealed to the House of Lords. The second group of appeals against conviction, which had all been dismissed by the Courts Martial Appeal Court, raised the issue whether a trial by court-martial in the United Kingdom of an offence against the ordinary

criminal law of the land was compatible with art 6(1) of the Convention, either generally or in cases where the offence had been committed within the United Kingdom. On their appeals to the House of Lords, the defendants raised no objection to the trial by court-martial of purely military offences charged against servicemen, wherever committed, and they accepted that civil offences charged against servicemen abroad, in places where the local administration of justice had broken down or was of unacceptable quality, could properly be tried by court-martial. They nevertheless contended that, in relation to the trial of civil offences in the United Kingdom, courts-martial lacked the independence and impartiality required by art 6. In particular, they challenged the independence and impartiality of junior officers who served on courts-martial and further contended that the whole culture and ethos of the services was such as to incline those who took part in courts-martial to attach excessive weight to the values of discipline and morale, to the point of rendering the trial of the accused unfair.

HELD: Appeals dismissed.

(1) In principle, a military court could constitute an independent and impartial tribunal in terms of art 6(1). What was required was that there should be sufficient safeguards of the independence and impartiality of its members. A trial of a civil offence by court-martial in the United Kingdom was compatible with art 6(1) of the Convention. The rules governing the role of junior officers as members of courts-martial were in practice such as effectively to protect the accused against the risk that they might be subject to external army influence. Moreover, whilst it was true that officers serving on courts-martial would disapprove of those found to have acted in breach of the law governing their respective service, judges and jurors in the Crown Court would similarly disapprove of those found to have infringed the ordinary criminal law. There was no reason to think that in the former case, any more than in the latter, such disapproval would infect the tribunals' approach to deciding whether the particular accused had broken the law in the manner charged. Further, a court-martial either was or was not an independent and impartial tribunal. Since courts-martial were to be regarded as independent and impartial tribunals for the trial of military offences and civil offences committed abroad in the conditions noted, it followed that they were also independent and impartial tribunals for the trial of civil offences committed in the United Kingdom. Furthermore, the review of conviction and sentence carried out by the reviewing authority, whether the accused sought such review or not, was not objectionable as it could not work otherwise than to the advantage of the accused (see paras [2], [12], [14]–[19], [26]–[27], [44], [50], [54], [83], [91]–[94], [101], below). *Morris v UK* (2002) 34 EHRR 1253 disapproved in part.

Per curiam. Per Lord Bingham of Cornhill. While disciplinary rules and procedures inevitably vary from state to state, three principles command acceptance in any liberal democracy governed by the rule of law. First, a man does not by becoming a soldier cease to be a citizen. On becoming a soldier he subjects himself to duties and exposes himself to the risk of penalties to which a civilian is not subject or exposed. But he remains subject to almost

every law, including the criminal law, which binds other citizens and continues to enjoy almost all the same rights, including the right to a fair trial before an independent and impartial tribunal. Second, the maintenance of the discipline essential to the effectiveness of a fighting force is as necessary in peacetime as in wartime: a force which cannot display the qualities mentioned above in time of peace cannot hope to withstand the much more testing strains and temptations of war. Third, a modern code of military discipline cannot depend on arbitrary decision-making or the infliction of savage punishments, nor can it depend on inherited habits of deference or gradations of class distinction. Such a code must reflect the hierarchical structure of any army and respect the power of command. But an effective code of military discipline will buttress not only the respect owed to their leaders by those who are led but also, and perhaps even more importantly, the respect owed by leaders to those whom they lead and which all members of a fighting force owe to each other (see para [4], below).

Quaere. To what extent art 6 applies to the decision to prosecute (see para [99], below).

(2) The part played by permanent presidents in courts-martial did not preclude such courts from having the independence and impartiality required of a judicial tribunal by art 6 of the Convention. Permanent presidents had no effective hope of promotion and no effective fear of removal. While no doubt they were, as officers, answerable for any extra-judicial delinquency, as any judge might be, they were answerable to no one for the discharge of their decision-making function (see paras [1], [10], [17]–[19], [58], [64], below). *Morris v UK* (2002) 34 EHRR 1253 adopted in part.

Per curiam. Unlike the army permanent presidents, Royal Air Force permanent presidents remain subject to reports. The practice is undesirable and unnecessary and it would be preferable if it were discontinued. However, there is nothing to suggest that any report ever is or ever has been made on any junior officer's decision-making as a member of a court-martial, and it is hard to see how any such report could be made given the prohibition on disclosure of the deliberations of the tribunal in the oath taken by the members (see paras [10], [12], [62], below).

[Article 6 of the European Convention, so far as material, is set out at para [20], below.]

Cases referred to in judgments

Boucher v R (1954) 110 Can CC 263, Can SC

Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 LRC 612, [2001] 2 All ER 97, [2001] 2 WLR 817, UK PC

Brumarescu v Romania (1999) 33 EHRR 862, ECt HR

Committee for Justice and Liberty v National Energy Board (1976) 68 DLR (3d) 716, Can SC

Cox v Army Council [1962] 1 All ER 880, [1963] AC 48, [1962] 2 WLR 950, UK HL

Engel v The Netherlands (No 1) (1976) 1 EHRR 647, ECt HR

Findlay v UK (1997) 24 EHRR 221, ECt HR

Golder v UK (1975) 1 EHRR 524, ECt HR
Grant v Gould (1792) 2 Hy Bl 69, [1775–1802] All ER Rep 182, 126 ER 434, CP
Gregory v UK (1997) 25 EHRR 577, ECt HR
MacKay v R (1980) 114 DLR (3d) 393, Can SC
Millar v Dickson (Procurator Fiscal, Elgin) [2001] UKPC D4, [2002] 1 LRC 457, [2002] 3 All ER 1041, [2002] 1 WLR 1615, UK PC
Montgomery v HM Advocate, Coulter v HM Advocate [2001] 2 LRC 569, [2001] 2 WLR 779, UK PC
Morris v UK (2002) 34 EHRR 1253, ECt HR
Porter v Magill [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 WLR 37, UK HL
Pullar v UK (1996) 22 EHRR 391, ECt HR
R v Généreux (1992) 88 DLR (4th) 110, Can SC
R v McKendry (6 March 2000, unreported)
Randall v R [2002] UKPC 19, [2002] 5 LRC 678, [2002] 1 WLR 2237, Cayman Is PC
Tracey, Re, ex p Ryan (1989) 166 CLR 518, Aus HC

Legislation referred to in judgments

Canada
Canadian Bill of Rights 1960, ss 1(b), 2(f)
Narcotic Control Act 1970, s 3
National Defence Act 1970, ss 154, 201

United Kingdom
Air Force Act 1955, ss 31, 38, 63A, 70, 71(1), 71A, 76(1), (2), (5), 76A(1), 83A–C, 84B–D, 92(1), 205
Armed Forces Act 1996
Army Act 1955, ss 31, 38, 63A, 69–70, 71(1), 71A, 71AA, 76(1), (2), (5), 76A(1), 83A–C, 84B(1)–(4), 84C, 84D(1), (2), 85, 92 (as amended), 94(6), 96(1A), (5), 103A(1), (2), 103B, 113(2), (3), 113AA(4), 133, 205
Army Discipline and Regulation Act 1879, s 41
Courts-Martial (Appeals) Act 1968, ss 8(1), 12, 16(A), 18, 19(1), 28(1)
Courts-Martial (Army) Rules 1997, SI 1997/169, rr 17(b), 31, 32(1), 33(1), 39–40, 62(2), 69, 70(1), (2), 72(3), (4), 79, 80(2), 83, 84C
Courts-Martial (Royal Air Force) Rules, SI 1997/171, r 83
Criminal Appeal Act 1968, ss 4(3), 11(3)
Human Rights Act 1998, s 2(1)(a), Sch 1
Misuse of Drugs Act 1971, s 5(1)
Naval Discipline Act 1866, s 45
Naval Discipline Act 1957, s 42

Other sources referred to in judgments

Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969), art 6(1)
Queen's Regulations, paras J7.002–J7.012
Rant *Courts-Martial Handbook* (1998) pp 10, 146

Appeals against conviction

R v Spear

The appellants, John Spear and Philip David Hastie, appealed with leave of the Appeal Committee of the House of Lords given on 20 June 2001 from the order of the Courts Martial Appeal Court (Laws LJ, Holman and Goldring JJ) on 15 January 2001 ([2001] EWCA Crim 3, [2001] QB 804) dismissing their appeals against their conviction by a district court-martial held at Osnabrück, Germany, on 1 February 2000 of an offence of assault occasioning actual bodily harm. The Appeal Court certified that a point of law of general public importance, set out at para [22], below, was involved in its decision. The facts, so far as material, are set out in the judgment of Lord Rodger of Earlsferry.

R v Boyd

The appellant, David Morton Boyd, appealed with leave of the Appeal Committee of the House of Lords given on 12 March 2002 from the order of the Courts Martial Appeal Court (Laws LJ, Holman and Goldring JJ) on 15 January 2001 ([2001] EWCA Crim 3, [2001] QB 804) dismissing his appeal against his conviction by a district court-martial held at RAF Akrotiri, Cyprus, on 17 December 1999 of an offence of assault occasioning actual bodily harm. The Appeal Court certified that a point of law of general public importance, set out at para [22], below, was involved in its decision. The facts, so far as material, are set out in the judgment of Lord Rodger of Earlsferry.

R v Saunby

The appellant, David Saunby, appealed with leave of the Appeal Committee of the House of Lords given on 4 March 2002 from the order of the Courts Martial Appeal Court (Laws LJ, Turner and McCombe JJ) on 30 July 2001 ([2001] EWCA Crim 2311, [2001] All ER (D) 425 (Jul)) dismissing his appeal against his conviction by a district court-martial at Aldershot on 16 December 1999 of an offence of doing an act tending and intending to pervert the course of public justice. The Appeal Court certified that a point of law of general public importance, set out at para [22], below, was involved in its decision. The Secretary of State for Defence participated in the proceedings as an interested party. The facts, so far as material, are set out in the judgment of Lord Rodger of Earlsferry.

R v Clarkson

The appellants, Lee Martin Clarkson and Paul Anthony English, appealed with leave of the Appeal Committee of the House of Lords given on 4 March 2002 from the order of the Courts Martial Appeal Court (Laws LJ, Turner and McCombe JJ) on 30 July 2001 ([2001] EWCA Crim 2311, [2001] All ER (D) 425 (Jul)) dismissing their appeals against their conviction by a district court-martial at Colchester on 8 March 2000 of an offence of assault occasioning actual bodily harm. The Appeal Court certified that a point of law of general public importance, set out at para [22], below, was involved in its decision. The Secretary of State for Defence participated in the proceedings as an interested party. The facts, so far as material, are set out in the judgment of Lord Rodger of Earlsferry.

R v Williams

The appellant, David Omar Williams, appealed with leave of the Appeal Committee of the House of Lords given on 4 March 2002 from the order of the Courts Martial Appeal Court (Laws LJ, Turner and McCombe JJ) on 30 July 2001 ([2001] EWCA Crim 2311, [2001] All ER (D) 425 (Jul)) dismissing his appeal against his conviction by a general court-martial at RAF St Mawgan on 5 April 2000 of an offence of common assault. The Appeal Court certified that a point of law of general public importance, set out at para [22], below, was involved in its decision. The Secretary of State for Defence participated in the proceedings as an interested party. The facts, so far as material, are set out in the judgment of Lord Rodger of Earlsferry.

R v Dodds

The appellant, Andrew Alistair Dodds, appealed with leave of the Appeal Committee of the House of Lords given on 4 March 2002 from the order of the Courts Martial Appeal Court (Laws LJ, Turner and McCombe JJ) on 30 July 2001 ([2001] EWCA Crim 2311, [2001] All ER (D) 425 (Jul)) dismissing his appeal against his conviction by a district court-martial at RAF Cosford on 13 June 2000 of an offence of battery. The Appeal Court certified that a point of law of general public importance, set out at para [22], below, was involved in its decision. The Secretary of State for Defence participated in the proceedings as an interested party. The facts, so far as material, are set out in the judgment of Lord Rodger of Earlsferry.

R v Leese

The appellant, Henry Leese, appealed with leave of the Appeal Committee of the House of Lords given on 4 March 2002 from the order of the Courts Martial Appeal Court (Laws LJ, Turner and McCombe JJ) on 30 July 2001 ([2001] EWCA Crim 2311, [2001] All ER (D) 425 (Jul)) dismissing his appeal against his conviction by a district court-martial at RAF Lossiemouth on 20 October 2000 of an offence of furnishing false information. The Appeal Court certified that a point of law of general public importance, set out at para [22], below, was involved in its decision. The Secretary of State for Defence participated in the proceedings as an interested party. The facts, so far as material, are set out in the judgment of Lord Rodger of Earlsferry.

R v Marsh

The appellant, Peter James Marsh, appealed with leave of the Appeal Committee of the House of Lords given on 4 March 2002 from the order of the Courts Martial Appeal Court (Laws LJ, Turner and McCombe JJ) on 30 July 2001 ([2001] EWCA Crim 2311, [2001] All ER (D) 425 (Jul)) dismissing his appeal against his conviction by a district court-martial at RAF Lossiemouth on 8 November 2000 of an offence of furnishing false information. The Appeal Court certified that a point of law of general public importance, set out at para [22], below, was involved in its decision. The Secretary of State for Defence participated in the proceedings as an interested party. The facts, so far as material, are set out in the judgment of Lord Rodger of Earlsferry.

R v Cormack

The appellant, James Albert Cormack Webb, appealed with leave of the Appeal Committee of the House of Lords given on 4 March 2002 from the order of the Courts Martial Appeal Court (Laws LJ, Turner and McCombe JJ) on 30 July 2001 ([2001] EWCA Crim 2311, [2001] All ER (D) 425 (Jul)) dismissing his appeal against his conviction by a district court-martial at RAF Lossiemouth on 24 November 2000 of an offence of furnishing false information. The Appeal Court certified that a point of law of general public importance, set out at para [22], below, was involved in its decision. The Secretary of State for Defence participated in the proceedings as an interested party. The facts, so far as material, are set out in the judgment of Lord Rodger of Earlsferry.

R v Ashby

The appellant, Mark William Ashby, appealed with leave of the Appeal Committee of the House of Lords given on 4 March 2002 from the order of the Courts Martial Appeal Court (Laws LJ, Turner and McCombe JJ) on 30 July 2001 ([2001] EWCA Crim 2311, [2001] All ER (D) 425 (Jul)) dismissing his appeal against his conviction by a district court-martial at RAF Stafford on 18 December 2000 of an offence of false accounting. The Appeal Court certified that a point of law of general public importance, set out at para [22], below, was involved in its decision. The Secretary of State for Defence participated in the proceedings as an interested party. The facts, so far as material, are set out in the judgment of Lord Rodger of Earlsferry.

Lord Thomas of Gresford QC and *Gilbert Blades* for the appellants.
Philip Havers QC, *Dingle Clark* and *Paul Rogers* for the Crown.
Philip Havers QC and *Hugo Keith* for the Secretary of State.

18 July 2002. The following judgments were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, the conjoined appeals before the House fall into two groups. The first group comprises the three cases of Aircraftman Boyd and Messrs Spear and Hastie. These three appellants were all non-commissioned officers, Boyd in the Royal Air Force, Spear and Hastie in the army. All three were charged (Spear and Hastie jointly) with assault occasioning actual bodily harm to another member of their respective services. All three were tried by district court-martial, pleaded not guilty, were convicted and were sentenced. At both the courts-martial a permanent president of courts-martial (or PPCM, Wing Commander Chambers in the first case, Lieutenant Colonel Stone in the second) presided. The sole issue in the appeal before the House in these cases is whether, because of the part played by the PPCM, the courts-martial lacked the qualities of independence and impartiality which art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) requires of any judicial tribunal. The Courts Martial Appeal Court (Laws LJ, Holman and

Goldring JJ) decided this issue against the accused (see [2001] EWCA Crim 3, [2001] QB 804).

[2] The second group of appeals comprises the cases of Mr Saunby, Sapper Clarkson, Lance Corporal English, Flying Officer Williams, Senior Aircraftman Dodds, Messrs Leese, Marsh and Webb and Aircraftman Ashby. They were charged with a variety of different offences (Clarkson and English jointly). All appeared before district courts-martial (DCMs) except Williams (who, as a commissioned officer, appeared before a general court-martial, or GCM). All pleaded not guilty but were convicted, save for Ashby who pleaded guilty. A variety of different sentences were passed, ranging from 84 days' imprisonment and dismissal (Saunby, Webb) to forfeiture of three years' seniority (Williams). Petitions for review were rejected in all cases save in that of Dodds, whose sentence of 112 days' detention was reduced to 28 days. The Courts Martial Appeal Court (Laws LJ, Turner and McCombe JJ) dismissed appeals by all appellants save in the case of Marsh, whose sentence of 56 days' imprisonment was reduced to 42 days' detention, a reduction which greatly mitigated the financial loss suffered by him on leaving the service (see [2001] EWCA Crim 2311, [2001] All ER (D) 425 (Jul)). All the offences of which these appellants were convicted were offences under the ordinary law applicable in the United Kingdom. All the offences (with two exceptions) were committed within the United Kingdom. The issue which arises in all these appeals is whether a trial by court-martial in the United Kingdom of an offence against the ordinary criminal law of the land is compatible with art 6(1) of the Convention, either generally or in cases where the offence in question had been committed within the United Kingdom.

[3] Since the dawning of the modern age the defence of the state against the threats and depredations of external enemies has been recognised as one of the cardinal functions of government. To this end most countries have over time established regular armed forces, in this country a navy, then an army, and then in due course an air force. The effectiveness of such forces has been recognised to depend on their being disciplined forces: that is, forces in which lawful orders will be obeyed, the law will be observed and appropriate standards of self-control and conduct will be shown.

[4] While disciplinary rules and procedures will inevitably vary from state to state, three principles would now, I think, command acceptance in any liberal democracy governed by the rule of law. (In stating these principles I draw no distinction between different services, although the issues in these appeals do not concern the Royal Navy. Nor do I distinguish between regular and reserve or volunteer forces, or between men and women. It is convenient for purposes of exposition to speak of soldiers and of the army. Since the Army Act 1955 and the Air Force Act 1955 are, in the respects relevant to these appeals, indistinguishable, I shall refer only to the former and to the Courts-Martial (Army) Rules 1997, SI 1997/169). First, a man does not by becoming a soldier cease to be a citizen. On becoming a soldier he subjects himself to duties and exposes himself to the risk of penalties to which a civilian is not subject or exposed. But he remains subject to almost every law, including the criminal law, which binds other citizens and continues to enjoy almost all the same rights, including the right (if a charge of serious

misconduct is made against him) to a fair trial before an independent and impartial tribunal. Secondly, the maintenance of the discipline essential to the effectiveness of a fighting force is as necessary in peacetime as in wartime: a force which cannot display the qualities mentioned above in time of peace cannot hope to withstand the much more testing strains and temptations of war. Thirdly, and whatever the practice in former times, a modern code of military discipline cannot depend on arbitrary decision-making or the infliction of savage punishments, nor can it depend on inherited habits of deference or gradations of class distinction. Such a code must of course reflect the hierarchical structure of any army and respect the power of command. But an effective code of military discipline will buttress not only the respect owed to their leaders by those who are led but also, and perhaps even more importantly, the respect owed by leaders to those whom they lead and which all members of a fighting force owe to each other.

[5] The dual status of the soldier, as both soldier and citizen, raises no issue where he is said to have committed a purely military offence, that is, an offence which could not be committed by anyone who was not a soldier. Some such offences are potentially very serious: mutiny, desertion, absence without leave, striking a superior officer are examples. Since these are offences which cannot be committed by those not subject to military discipline, it is unsurprising that they cannot be tried in the ordinary courts of the land and can only be tried in a military tribunal. But the effect of s 70 of the 1955 Act (as my noble and learned friend Lord Rodger of Earlsferry, whose citation of the relevant legislation and authority I gratefully adopt and need not repeat, has pointed out) is to expose the soldier accused of an offence against the ordinary criminal law of the land to prosecution either in the ordinary courts or in a military tribunal. Since he cannot be tried in either tribunal if he has already been tried in the other for substantially the same offence (see s 133 of the 1955 Act, and the ordinary common law rules of autrefois convict and acquit), a question may arise whether he should face trial in a civil court or in a military tribunal. As my noble and learned friend has shown, no hard and fast rules have been laid down to resolve this problem where it arises. Instead, a pragmatic solution has been adopted, largely dependent on identification of the public interest which the soldier's allegedly criminal conduct has infringed. If it appears to be the general public interest which has been injured (as where a civilian has been injured or non-military property damaged or stolen) a civil court is ordinarily regarded as the more appropriate forum, since the defendant's status as a soldier is essentially irrelevant to his criminal conduct. If, however, the public interest which the soldier's allegedly criminal conduct has infringed is primarily a service interest (as where another soldier has been injured or military property has been damaged or stolen) the charge is ordinarily considered appropriate for trial by a military tribunal: the general public interest is much less directly engaged, and an internal offence of this kind may well have a direct effect on the morale and discipline of the unit involved.

[6] The practice of other states is not dissimilar to our own. So much appears from such decisions as *MacKay v R* (1980) 114 DLR (3d) 393 at 413–414, 416–418, 419–421, 423–426, *Re Tracey, ex p Ryan* (1989) 166 CLR 518

at 543–544 and *R v Généreux* (1992) 88 DLR (4th) 110 at 135–136, 156–157. That there is a rational basis for the practice is made plain in those decisions, and in the statement of Air Chief Marshal Sir Anthony Bagnall, the vice-chief of the defence staff which is before the House. In *Findlay v UK* (1997) 24 EHRR 221 the defendant was charged with a number of offences of which the more serious were offences against the ordinary criminal law. The European Court of Human Rights (the European Court) found serious breaches of art 6(1) of the Convention in the structure and procedure under which courts-martial were then conducted, and a number of changes were made in the Armed Forces Act 1996. The effect of these changes was well summarised by Laws LJ in the first of the judgments under appeal (see *R v Spear, R v Boyd* [2001] QB 804 at [18]). There is, however, nothing in the judgment of the European Court in *Findlay v UK*, or in the earlier case of *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 or in the more recent case of *Morris v UK* (2002) 34 EHRR 1253, to suggest that trial by court-martial, whether of civil or purely military offences, necessarily involves a violation of rights protected by art 6(1).

[7] Lord Thomas of Gresford QC directed his initial challenge on behalf of the second group of appellants to the terms of s 70 of the 1955 Act, which he criticised as incompatible with art 6(1). The short answer to this point is that given by Mr Havers QC, that this section does not engage art 6(1) at all. While the section provides that persons subject to military law who commit civil offences shall (save in the case of certain offences) be guilty of offences against the section, it makes no provision governing the constitution of the tribunal by which such persons shall be tried nor the procedure to be followed. Recognising this, Lord Thomas concentrated the weight of his argument on criticism of the independence and impartiality of courts-martial as a tribunal for the trial of civil offences committed by servicemen. In these appeals the House is concerned with GCMs and DCMs. It is unnecessary to consider field general courts-martial, which are governed by different provisions (see ss 103A(1) and (2) and 103B of the 1955 Act), nor is it necessary to explore the differences between GCMs and DCMs. A court-martial of either type has no exact equivalent elsewhere in the British legal system but has features closely reflecting those of well-established judicial models:

(1) Central to the conduct of a court-martial is the judge-advocate, whose role is essentially that of the judge at a criminal trial on indictment in the Crown Court. He is a trained lawyer of standing and experience. He is responsible for ensuring the fair and regular conduct of the trial. He controls the course of evidence. He rules on legal objections. He gives all appropriate directions to the members of the court-martial on both the facts and the law. He elucidates issues on which the members seek further guidance. He plays no part in reaching a decision on guilt but (if the defendant is convicted) he guides the members on the question of sentence and casts a vote on that issue (see ss 84B(2) and (3), 94(6), 96(1A) of the 1955 Act and rr 31, 32(1), 39, 69, 70(1) and (2), 79, 80(2) of the 1997 rules, and see also Judge JW Rant QC *Courts-Martial Handbook* (1998) pp 10, 146).

(2) The role of the members of the courts-martial is closely analogous to

that of jurors. They come to the case with no legal training (see r 17(b)) and no knowledge of the facts or issues (see s 84C). At the outset of the hearing, the names of the members of the tribunal (and also of the judge-advocate and of any interpreter) are read out, as is the practice with jurors, and the accused has the right to object to any of them (see s 92 (as amended) and r 40). The members are bound to give effect to the legal directions given by the judge-advocate and will heed the guidance which he gives (see s 84B(4)). But they alone are the judges of fact, they alone must resolve issues of credibility and they alone decide whether the charge is proved or not (see s 94(6)).

(3) The role of the PPCM (such as served in the first group of cases under appeal and in the military cases in the second group) is similar to that of a juror in all the respects just noted. But his role differs from that of a juror, and from that of the other military members of the court-martial: during the period of his appointment his full-time professional occupation is to sit in courts-martial; he has administrative responsibilities in relation to the staging of the court-martial; it is his responsibility to see that the hearing is conducted in accordance with service tradition (see r 33(1)); and during the deliberations of the tribunal he will no doubt chair the members' discussion in the manner of a good chairman. The PPCM is in practice more than a permanent foreman of the jury, because he performs the functions already noted and because he has a casting vote on sentence (see s 96(5)). Participating in a number of trials, he no doubt acquires a reasonable working knowledge of law and practice, such as a busy and experienced lay magistrate might acquire.

[8] The European Court has defined with great clarity and consistency the meaning of the art 6(1) requirement that a tribunal be independent and impartial. It is enough to quote the court's judgment in *Findlay v UK* (1997) 24 EHRR 221 at 244–245 (para 73):

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

It should also be remembered, as the court pointed out (at 245 (para 76)) that in order to maintain confidence in the independence and impartiality of the tribunal appearances may be of importance. Relying on these statements of principle, Lord Thomas submitted that courts-martial, in relation to the trial of civil offences committed in England, despite the changes made by the 1996 Act, lack the independence and impartiality required of any judicial tribunal

by art 6 of the Convention. This radical challenge, rejected by the Court of Appeal, plainly calls for very careful consideration.

[9] Lord Thomas did not pursue in argument any challenge to the independence or impartiality of the Judge-Advocate General. Given the key role played by the Judge-Advocate General in the conduct of courts-martial, this is a very significant omission.

[10] Lord Thomas did challenge the independence and impartiality of the PPCM, and this challenge founded the first group of appeals. He naturally relied on the conclusion of Assistant Judge-Advocate General Pearson given at the court-martial of Lance Corporal McKendry held at Aldershot on 6 March 2000 that 'the appointments of permanent presidents do not give rise to an impartial and independent tribunal'. But Lord Thomas faced the difficulty that the European Court in *Morris v UK* (2002) 34 EHRR 1253 at 1276–1278 (paras 68–71), after and with full knowledge of the decisions both in *R v McKendry* (6 March 2000, unreported) and (by the Courts Martial Appeal Court) in the first group of appeals, reached the opposite conclusion. I do not for my part doubt that the Courts Martial Appeal Court and the European Court were correct. PPCMs are appointed to that office in the closing years of their service careers, whether in the army or the Royal Air Force. They are officers who have no effective hope of promotion and no effective fear of removal. While no doubt they are, as officers, answerable for any extra-judicial delinquency, as any judge might be, they are answerable to no one for the discharge of their decision-making function. The only factual matters on which Lord Thomas could rely were the reports written on Wing Commander Chambers who presided at the court-martial of Aircraftman Boyd (there being no report on any army PPCM). It would in my opinion be preferable if no annual report were written on officers serving as PPCMs, but those on Wing Commander Chambers gave no support in substance to Lord Thomas' argument. While praising the wing commander's efficiency and effectiveness as a PPCM, they made no allusion at all to the quality or outcome of any of his judicial decisions, but instead made express reference to the isolated, unsupervised and independent nature of his role. There is no substance in this challenge.

[11] Lord Thomas also challenged the independence and impartiality of the junior officers who serve on courts-martial, and in this respect was able to rely on a finding of the European Court in *Morris v UK* (2002) 34 EHRR 1253 at 1278, 1279 (paras 72, 76) that such officers lacked the necessary qualities of independence and that the applicant's misgivings about the independence of the court-martial were objectively justified. In the first of these paragraphs the court said:

> 'However, the Court considers that the presence of these safeguards was insufficient to exclude the risk of outside pressure being brought to bear on the two relatively junior serving officers who sat on the applicant's court martial. In particular, it notes that those officers had no legal training, that they remained subject to army discipline and reports, and that there was no statutory or other bar to their being made subject to external army influence when sitting on the case. This is a matter of

particular concern in a case such as the present where the offence charged directly involves a breach of military discipline. In this respect, the position of the military members of the court martial cannot generally be compared with that of a member of a civilian jury who is not open to the risk of such pressures.'

[12] It goes without saying that any judgment of the European Court commands great respect, and s 2(1) of the Human Rights Act 1998 requires the House to take any such judgment into account, as it routinely does. There were, however, a large number of points in issue in *Morris v UK*, and it seems clear that on this particular aspect the European Court did not receive all the help which was needed to form a conclusion. It is true that the junior officers who sit on courts-martial have very little legal training, but that is also true of the PPCM whose presence was accepted (at 1278 (para 71)) as a guarantee of the rights of the accused. It is also true that junior officers sitting on courts-martial remain subject to army discipline and reports. But there is nothing to suggest that any report ever is or ever has been made on any junior officer's decision-making as a member of a court-martial, and it is hard to see how any such report could be made given the prohibition on disclosure of the deliberations of the tribunal in the oath taken by the members. There is nothing to suggest that they remain subject to service discipline in relation to their judicial decision-making, and again it is hard to see how they could. It is true that there is no statutory bar on an officer being made subject to external army influence when sitting on the case. Any person seeking to influence the decision of a sitting member of a court-martial otherwise than at the hearing would, however, be at risk of prosecution either for perverting or attempting to pervert the course of justice or under s 69 of the 1955 Act. The officer members are drawn from a different command from the accused. Briefing notes sent to officer members of courts-martial before they sit enjoin them not to 'speak to any unit personnel and certainly not to any unit officer who may be attending the trial in an official capacity or as a spectator'. They are instructed in writing not to talk to anyone about the case (other than the other members of the court-martial, when all are together) for as long as the trial continues, and this instruction is routinely emphasised by the judge-advocate. The officers do not occupy accommodation at the unit of the accused and are told to be seen to avoid 'local unit influences'. They are instructed 'not to associate with Formation or Unit personnel either professionally or socially until the trial is over'. At the outset of the hearing the officers take an oath in terms quoted by the European Court in *Morris v UK* (2002) 34 EHRR 1253 at 1265 (para 27), swearing to try the accused 'according to the evidence' and to 'administer justice according to the Army Act 1955 without partiality, favour or affection'. In considering the independence and impartiality of the PPCM both the Court of Appeal in its judgment in *R v Spear, R v Boyd* [2001] QB 804 at [33], [35] and the European Court in *Morris v UK* (2002) 34 EHRR 1253 at 1276–1277 (paras 68–69) attached weight to established convention and practice. In my opinion the rules governing the role of junior officers as members of courts-martial are in practice such as effectively to protect the accused against the risk that they

might be subject to 'external army influence', as I feel sure the European Court would have appreciated had the position been more fully explained.

[13] In its judgment in *Morris v UK* the European Court (at 1278–1279 (paras 73–75)) criticised the role of the reviewing authority established under s 113 of the 1955 Act. Lord Rodger has outlined the role of the reviewing authority and I need not repeat his account. Its role can certainly be seen as anomalous, since ordinarily a binding decision of any court cannot be disturbed otherwise than (exceptionally) by itself or by a superior appellate court. It is however to be noted that the review of conviction and sentence carried out by the reviewing authority, whether the accused seeks such review or not (see s 113(3) of both Acts), cannot work otherwise than to the advantage of the accused. The reviewing authority cannot substitute conviction of a more serious offence, nor can it substitute a sentence which is in its opinion more severe (see s 113AA(4)). This subsection does not confer a discretion, but calls for an exercise of judgment. It is essentially the same exercise of judgment as is required of the Court of Appeal under ss 4(3) and 11(3) of the Criminal Appeal Act 1968, which has not given rise to difficulty in practice. If the reviewing authority were to substitute a sentence which the accused considered to be more severe than that imposed by the court-martial, it would be open to the accused to challenge the substituted sentence on appeal to the Courts Martial Appeal Court, and it is important to note that the intervention of the reviewing authority in no way diminishes the rights of the accused on appeal. It is difficult to see any analogy with the situation which the European Court considered in *Brumarescu v Romania* (1999) 33 EHRR 862 where the applicant, with a final and irreversible judgment of a court in his favour, was deprived of the benefit of that judgment by a later decision in proceedings initiated by a party not involved in the earlier case. If a court-martial is not an independent and impartial tribunal for the trial of civil offences committed by service personnel in England and Wales, the reviewing authority could not be relied on to save it. But if it is, I find it difficult to understand how the role of the reviewing authority can undermine or reduce its independence and impartiality. Lord Thomas recognised the difficulty of this argument and did not seek to sustain the judgment of the European Court on the point. For similar reasons I find it unnecessary to consider the role of the prosecuting authority, of which Lord Thomas made certain (to my mind unpersuasive) criticisms.

[14] Lord Thomas also advanced a more general criticism of trial by court-martial. The whole culture and ethos of the services, he submitted, is such as to incline those who take part in courts-martial to attach excessive weight to the values of discipline and morale, to the point of rendering the trial of the accused unfair. He complained of the ritual which has accompanied the conduct of courts-martial, at any rate in the past, as being oppressive and intimidatory. I would for my part have no hesitation in agreeing that a court-martial is a court of law, not a parade, and its procedures (while properly involving some formality) should be those appropriate to a court of law and not the parade ground. I would also accept that officers serving on courts-martial will disapprove of those found to have acted in breach of the law governing their respective service. But judges and

jurors in the Crown Court will similarly disapprove of those found to have infringed the ordinary criminal law. There is no reason to think that in the former case any more than in the latter such disapproval will infect the tribunal's approach to deciding whether the particular accused has broken the law in the manner charged. Officers will appreciate, better than anyone, that to convict and punish those not shown to be guilty is not to promote the interests of good discipline and high morale but to sow the seeds of disaffection and perhaps even mutiny. In the absence of any evidence at all to support it, I could not accept the suggestion that any modern officer would, despite the oath he has taken, exercise his judgment otherwise than independently and impartially or be thought by any reasonable and informed observer to be at risk of doing so.

[15] In truth, as was pointed out in argument, Lord Thomas' submission was vitiated by a contradiction lying at its heart. For he raised no objection to the trial by court-martial of purely military offences charged against servicemen, wherever committed, and he accepted that civil offences charged against servicemen abroad, in places where the local administration of justice had broken down or was of unacceptable quality, could properly be tried by court-martial. But a court-martial either is or is not an independent and impartial tribunal. If it is, it can properly try civil as well as purely military offences. If it is not, it cannot, compatibly with art 6(1), try military offences, which may carry a severe sentence of imprisonment or detention. Nor, leaving aside issues concerning the territorial reach of the Convention, and leaving aside also the special conditions in which a field general court-martial may be held, can it be compatible with the standard required by art 6(1) to subject service personnel accused of civil offences committed abroad to trial by court-martial if such is not an independent and impartial tribunal. Lord Thomas is not to be criticised for limiting his argument as he has, no doubt wisely, chosen to do. But if courts-martial are to be regarded, as in my opinion they are, as independent and impartial tribunals for the trial of military offences and civil offences committed abroad in the conditions noted, it must follow that they are also independent and impartial tribunals for the trial of civil offences committed in the United Kingdom.

[16] For these reasons, and those more fully given by Lord Rodger with which I am in full agreement, I would dismiss both groups of appeals.

LORD STEYN.

[17] My Lords, I have read the opinions of Lord Bingham of Cornhill and Lord Rodger of Earlsferry. For the reasons they give I would also dismiss the appeals.

LORD HUTTON.

[18] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Rodger of Earlsferry. I agree with them, and for the reasons they give I would also dismiss the appeals.

LORD SCOTT OF FOSCOTE.

[19] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Rodger of Earlsferry. I agree with them and for the reasons they give I too would dismiss the appeals.

LORD RODGER OF EARLSFERRY.

[20] My Lords, the appeals before the House challenge the compatibility of the appellants' trials by court-martial with art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). In particular on behalf of the appellants Lord Thomas of Gresford QC based his challenge on their right to the determination of the charges against them by 'an independent and impartial tribunal' in terms of the first sentence of art 6(1):

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

[21] There are in total 12 appeals against decisions of the Courts Martial Appeal Court (the appeal court). In a judgment dated 15 January 2001 the appeal court, comprising Laws LJ, Holman and Goldring JJ, refused the appeals of John Spear and Philip Hastie along with the separate appeal of David Morton Boyd (see *R v Spear, R v Boyd* [2001] EWCA Crim 3, [2001] QB 804). I refer to the three appeals by that name. The appeal court (Laws LJ, Turner and McCombe JJ) subsequently refused the other nine appeals, along with an appeal by John Scofield, in an unreported judgment dated 30 July 2001 (see *R v Williams* [2001] EWCA Crim 2311, [2001] All ER (D) 425 (Jul)). In the documentation of these appeals before the House the appeal of David Saunby appeared first and it is therefore convenient to refer to them collectively under his name (*R v Saunby*).

[22] In *R v Spear, R v Boyd* the appeal court certified that the following question of law of general public importance was involved:

> 'Whether proceedings by way of courts-martial regularly constituted and conducted in accordance with a procedure prescribed by Parliament may nevertheless be incompatible with the provisions of art 6 of the Convention when those proceedings are chaired by (a) a permanent president of the courts-martial and (b) a deputy judge-advocate.'

Before the House, Lord Thomas accepted that no issue arose as to the role of the deputy judge-advocate and he therefore concentrated on the role of the permanent president. In *R v Saunby* the appeal court certified that the nine appeals involved this point of law of general public importance:

> 'Is a trial by court-martial in the United Kingdom of a civilian criminal offence, that is to say, an offence falling under s 70 of the Air Force Act 1955 or s 70 of the Army Act 1955, compatible with art 6(1) of the Convention (a) generally, or (b) at least in regard to cases where the offence in question is said to have been committed in the United

Kingdom?'

At the hearing of the appeals there were accordingly two certified questions in play but both counsel treated the more particular question in *R v Spear, R v Boyd*, relating to the role of the permanent president, as one aspect of the wider challenge to the compatibility with art 6 of trial by courts-martial of what the certified question in *R v Saunby* calls 'civilian criminal offences'. The submissions of counsel in relation to this wider challenge were advanced in respect of all the appeals, while the submissions on the position of the permanent president were advanced in respect of all the appeals where the court-martial had been chaired by a permanent president.

[23] Since various other, discrete, issues were canvassed in the proceedings before the appeal court, it was necessary for that court to examine the circumstances of the individual cases in some detail. In the proceedings before the House, on the other hand, the debate was conducted without reference to the particular circumstances of the individual cases. For present purposes therefore I need not narrate those circumstances and I can simply, and gratefully, refer to the full accounts given by the appeal court in both their judgments. Some of the appellants were serving in the army and the others in the Royal Air Force. They were, accordingly, all persons to whom military law applied by virtue of s 205 of the Army Act 1955 or s 205 of the Air Force Act 1955.

[24] The military law set out in the 1955 Acts contains many offences which are peculiar to the forces, eg mutiny (see s 31), being absent without leave (see s 38) and spreading reports that are likely to create despondency or unnecessary alarm (see s 63A). In addition, however, s 70 provides, inter alia:

> '(1) Any person subject to military law who commits a civil offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against this section.
>
> (2) In this Act the expression "civil offence" means any act or omission punishable by the law of England or which, if committed in England, would be punishable by that law; and in this Act the expression "the corresponding civil offence" means the civil offence the commission of which constitutes the offence against this section ...
>
> (3) Subject to section 71A below, a person convicted by court-martial of an offence against this section shall—(a) if the corresponding civil offence is treason ... be liable to suffer death; (aa) if the corresponding civil offence is one for which the sentence is fixed by law as life imprisonment, be sentenced to imprisonment for life ... (b) in any other case, be liable to suffer any punishment or punishments which a civil court could award for the corresponding civil offence, if committed in England, being a punishment or punishments provided by this Act, or such punishment, less than the maximum punishment which a civil court could so award, as is so provided ...
>
> (4) A person shall not be charged with an offence against this section committed in the United Kingdom if the corresponding civil offence is treason, murder, manslaughter, treason-felony or rape ...

(6) A person subject to military law may be charged with an offence against this section notwithstanding that he could on the same facts be charged with an offence against any other provision of this Part of this Act.'

The effect of sub-ss (1) and (2) is, first, that where anyone who is subject to military law is guilty of an act or omission in England that would be punishable by the law of England, he is also guilty of an offence under s 70. Similarly, anyone who is guilty of an act or omission that would be punishable by the law of England if committed in England is guilty of an offence under s 70 wherever he commits it, whether in some other part of the United Kingdom or elsewhere in the world (see *Cox v Army Council* [1962] 1 All ER 880). So, for instance, a soldier or airman who possesses cocaine in England is guilty not only of an offence under s 5(1) of the Misuse of Drugs Act 1971 but also of an offence against s 70 of the Army Act 1955 or the Air Force Act 1955, as the case may be, although he can, of course, be prosecuted for only one of them. If he possesses cocaine while on duty in Afghanistan, on the other hand, he does not commit an offence under s 5(1) of the 1971 Act since the legislation does not apply there, but he is guilty of an offence under s 70 of the relevant 1955 Act, because he would have been guilty of a contravention of s 5(1) if he had been in possession of the drug in England. Offences of this kind, which mirror offences under English criminal law, are referred to as 'civil' offences (see s 70(2)). As s 70(3) makes clear, these civil offences are triable by court-martial. All of the appellants were convicted of civil offences of this kind after trial by court-martial. The question of law certified by the appeal court in *R v Saunby* relates only to the trial by court-martial of such civil offences. Put shortly and subject to what I say later, Lord Thomas' contention was that, if committed in the United Kingdom or in a country with an acceptable criminal justice system, civil offences should be tried by the ordinary criminal courts rather than by court-martial and that the appellants' art 6 right to a fair trial of the charges against them had been infringed by their being subjected to trial by court-martial.

[25] All the appellants were tried by a district court-martial comprising, in accordance with the minimum statutory requirement, a judge-advocate, a president and two other officers (see s 84D(2)). In *R v Spear, R v Boyd* and in the cases of David Saunby, Lee Martin Clarkson and Paul Anthony English the president was a 'permanent president', ie an officer towards the end of his career whose only service function was to act as the president of courts-martial. In the other appeals the president, like the other members, was appointed ad hoc. The powers of general and district courts-martial are set out in s 85:

'(1) A general court-martial shall have power to try any person subject to military law for any offence which under this Act is triable by court-martial, and ... to award for any such offence any punishment authorised by this Act for that offence.

(2) A district court-martial shall have the powers of a general court-martial except that it shall not try an officer or sentence a warrant officer to imprisonment, discharge with ignominy, dismissal or detention,

and shall not award the punishment of death or of imprisonment for a term exceeding two years or make an order committing a person to be detained under section 71AA of this Act for a period exceeding two years.'

The district courts-martial therefore had the appropriate powers of punishment from among those listed in s 71(1):

'(a) death, (b) imprisonment, (bb) detention by virtue of a custodial order made under section 71AA of this Act [dealing with young service offenders] ... (c) dismissal with disgrace from Her Majesty's service, (d) dismissal from Her Majesty's service, (e) detention for a term not exceeding two years, (f) forfeiture of seniority for a specified term or otherwise, (g) reduction to the ranks or any less reduction in rank, (h) fine, (i) severe reprimand, (j) reprimand, (k) in the case of an offence which has occasioned any expense, personal injury loss or damage, stoppages, and (l) such minor punishments as may from time to time be authorised by the Defence Council.'

Subsection (1) goes on to provide that:

'For the purposes of this Part of this Act a punishment specified in any of the above paragraphs shall be treated as less than the punishments specified in the paragraphs preceding that paragraph and greater than those specified in the paragraphs following it: Provided that [detention] shall not be treated as a less punishment than [imprisonment] if the term of detention is longer than the term of imprisonment ...'

[26] After the appellants had been convicted and sentenced by their respective district courts-martial, their conviction and sentence were subject to review by the reviewing authority under s 113. The reviewing authority reviews both conviction and sentence in all cases, whether or not the convicted person petitions for a review (see s 113(2)). For these purposes the reviewing authority is the Defence Council or any officer to whom all or any of the powers of the Defence Council as reviewing authority have been delegated (see s 113(5)(b)). In practice such reviews are carried out by an officer who gives the person affected the reasons for his decision (see r 83 of the Courts-Martial (Army) Rules 1997, SI 1997/169 and of the Courts-Martial (Royal Air Force) Rules, SI 1997/171 (the rules)). Conviction and sentence are also reviewed by the Judge-Advocate General, who will advise the reviewing authority if he thinks that either the conviction or the sentence should be altered in the convicted person's favour. The advice is disclosed to the convicted person. The reviewing authority may quash a finding of guilt and quash the related sentence or substitute a finding of guilt if it is one that the court-martial could have validly made and the reviewing authority is of the opinion that the court-martial must have been satisfied of facts which would justify the making of that finding (see s 113AA(2)). Where the reviewing authority substitutes a finding in exercise of that power, it may—

'pass any such sentence (not being, in the opinion of the authority, more severe than the sentence originally passed) open to a court-martial

on making such a finding as appears proper.'

Similarly, when reviewing sentence the authority may quash the original sentence or substitute a sentence which was open to the court-martial, 'not being, in the opinion of the authority, more severe than the sentence originally passed ...' (see s 113AA(4)).

[27] Two important points to notice about the powers of the reviewing authority are that they are confined by the terms of the original charge against the convicted person and that the reviewing authority cannot pass any sentence that is, in its opinion, more severe than the sentence originally passed. The system is therefore intended to operate solely to the advantage of persons convicted and sentenced by court-martial. The House was supplied with figures showing that in the year 2000, in prosecutions under the Army Act 1955, 455 cases were reviewed, 107 after petition, the remaining 348 without any petition by the convicted person. In the petition cases 19 sentences were mitigated and three quashed, while in the non-petition cases five sentences were mitigated and three quashed. In fact, however, in none of the cases which form the subject of these appeals, except that of Andrew Alistair Dodds ([2001] All ER (D) 425 (Jul)), did the reviewing authority touch either the conviction or the sentence. The court-martial sentenced Dodds to 112 days' detention but on review this was reduced to 28 days.

[28] Even after a case has been reviewed by the reviewing authority, the convicted person may appeal to the appeal court against his conviction or sentence, with leave of that court, under s 8(1) of the Courts-Martial (Appeals) Act 1968. The appeal court must allow an appeal against conviction and quash the conviction if they think that it is unsafe (see s 12). Where a conviction is quashed on appeal, the person is not liable to be tried again for that offence by a court-martial or any other court (see s 18), unless the appeal court authorise a retrial by court-martial in the interests of justice (see s 19(1)). The appeal court have power to quash any sentence if they consider that it is not appropriate for the case and in that event they may pass a sentence that is not of greater severity than the one for which it is substituted (see s 16A). In addition the appeal court have, of course, a range of ancillary powers, eg to order the production of documents, to order that witnesses should be examined and to receive fresh evidence (see s 28(1)). It is unnecessary to explore these powers since there was no suggestion that the appeal court who heard the appeals in these cases lacked the powers necessary to provide an effective remedy.

[29] The present appeals are by no means an isolated phenomenon. They are the latest in a series of challenges to the system of trial by court-martial under United Kingdom law which has been going on for a number of years. These challenges have borne fruit in the shape of substantial reforms to the court-martial system. Particularly important was the judgment of the European Court of Human Rights (the European Court) in *Findlay v UK* (1997) 24 EHRR 221, which criticised the system as it stood before the Armed Forces Act 1996 introduced a number of very significant changes, in particular the abolition of the institutions of 'the convening officer' and 'the confirming officer'. The changes were designed to ensure the independence of the

prosecuting authority and of its decision-making and also to make the courts-martial themselves independent of both the prosecuting authority and the wider service command structure. The effects of the reforms were accurately summarised by the appeal court in *R v Spear, R v Boyd* [2001] QB 804 at [18]. In *Morris v UK* (2002) 34 EHRR 1253 at 1275 (para 61) the European Court noted that these reforms had gone a long way to meeting its concerns in *Findlay v UK*. All the appeals before the House arise from cases conducted in accordance with the reformed procedures. Despite the reforms, challenges to the system continue to come before the European Court. It was indeed only after leave to appeal to this House had been granted in the present cases that the European Court gave judgment in *Morris v UK*. Your Lordships were told that there were other cases in the pipeline. In *Morris v UK* the Third Chamber of the European Court rejected a challenge based on the role of the permanent president but upheld the contention that there were no adequate safeguards of the independence of the other two officers. The court also held that the role of the reviewing authority was incompatible with a court-martial being an independent 'tribunal' in terms of art 6(1). The government did not request that the case should be referred to the Grand Chamber. In these circumstances Lord Thomas placed considerable weight on the decision in *Morris v UK* as to the position of the officers other than the permanent president. For the respondents Mr Havers QC founded on the part of the decision where the European Court rejected the challenge to the role of the permanent president. He also indicated that, in cases still to be heard by the European Court, the government would argue that the decision in *Morris v UK* on the role of the other officers and of the reviewing authority had proceeded on a view of the factual position that was incomplete. While the decision in *Morris v UK* is not binding on the House, it is, of course, a matter which the House must take into account (see s 2(1)(a) of the Human Rights Act 1998) and which demands careful attention, not least because it is a recent expression of the European Court's view on these matters.

[30] In presenting the appeal, Lord Thomas made a number of separate criticisms of the system of trial by court-martial, his purpose being to show that, taken overall, the system as operated in the appellants' cases had infringed their right to a fair trial under art 6. In order to evaluate those criticisms, I must look in more detail at how the system actually works.

[31] When a possible offence is reported, it is necessary to decide whether it should be prosecuted and, if so, whether it should be prosecuted in the civil courts or dealt with by the service authorities, in particular by prosecution before a court-martial. The guiding principles, which have been agreed with the relevant civil authorities, are set out in Queen's Regulations. Where the offence is against military law only, jurisdiction will be with the service authorities (see para J7.002a(1)). Where, as in these appeals, the offence is a civil offence, in the United Kingdom jurisdiction lies with both the service authorities and the civil authorities except in a number of particularly serious offences, such as treason, murder, manslaughter and rape, when jurisdiction lies wholly with the civil authorities (see para J7.002a(2) and (3)). When the offence is committed abroad, jurisdiction lies wholly with the civil authorities if the offence is an offence only under the local law (see para J7.002b(2)).

When the offence committed abroad is an offence against military law only, then, subject to the local law of the country concerned or the terms of any relevant agreement or treaty, jurisdiction is wholly with the service authorities (see para J7.002b(1)). When the offence is one against both military law and local law then, again subject to the law of the country concerned or the terms of any relevant treaty or agreement, jurisdiction lies with both the service authorities and the civil authorities (see para J7.002b(3)).

[32] The precise way in which a case involving an alleged civil offence is handled will depend, to some extent, on the way the alleged offence comes to light. For instance, an offence allegedly committed on service property is more likely to come initially to the notice of the service authorities, while the equivalent offence committed elsewhere may well first come to the notice of the civil police. In minor cases—and there are, of course, more minor than major cases—the commanding officer may feel able to handle the matter within the service disciplinary structure but, where it is necessary to involve the civil authorities, the matter will be reported to the chief police officer for the area. The relevant paragraph (J7.004A) makes it clear that, as well as cases of murder, manslaughter or rape, the commanding officer must report 'Any other case where civilians are involved and Ministry of Defence Police are not in situ or readily available'. In addition to certain road traffic offences, he must report any other offence which may require to be dealt with by the civil authorities, for example, because it is one of a category of offences of importance to the community either locally or nationally.

[33] Where jurisdiction lies with either the service or the civil authorities, para J7.005 provides that in cases reported to the police it is for the chief officer of police to decide, normally after consultation with the commanding officer, whether the alleged offender is to be tried by the civil court or is to be dealt with by the service authorities. Counsel informed the House, however, that the decision is nowadays one for the Crown Prosecution Service, just as, in Scotland, it is one for the local procurator fiscal under the direction of the Lord Advocate (see para J7.012a). Again, para J7.007 provides that certain qualifications have to be taken into account, including:

> 'b. If the alleged offender was on duty at the time and the offence constituted a breach of that duty, the police will normally hand him over to the Service authorities even though the offence may affect the property of a civilian. This would not apply to a charge such as dangerous driving which involves risk to the general public.
>
> c. The Service authorities will generally deal with an offence committed by a member of the forces on Service premises, if it can be dealt with summarily, and was either a minor assault on a civilian or a minor offence against the property of a civilian.'

In Scotland these particular qualifications do not apply (see para J7.012a).

[34] Paragraph J7.013 deals with jurisdiction in Commonwealth and foreign countries and provides, inter alia:

> 'a. When United Kingdom forces are stationed in Commonwealth or foreign countries, or members of those forces are serving on loan or otherwise with the forces of such countries, it is the policy of Her

> Majesty's Government to secure arrangements which protect members of the United Kingdom forces, the civilian component, and their dependants from the jurisdiction of local military law and from the criminal jurisdiction of local courts. In some cases exclusive jurisdiction for the United Kingdom Service authorities is sought; elsewhere it is sought in respect of offences committed on duty and in certain other circumstances. Such arrangements are usually made by provisions included in Defence Agreements, Status of Forces, Loan or Training Team Agreements, or local Visiting Forces Acts.'

It is apparent, therefore, that the policy behind Queen's Regulations is very different from the thinking behind the submission advanced by Lord Thomas. Whereas he contended that the general rule should be that, wherever possible, alleged acts which would constitute offences under both local and military law should be tried by the local criminal courts, the policy of Queen's Regulations has been to 'protect' members of the armed forces, the civilian component and their dependants from local courts. Lord Thomas sees the court-martial system as something from which service offenders should be shielded, whereas the regulations see the availability of trial by court-martial as a boon to them.

[35] In a case of overlapping service and civil jurisdiction, it is ultimately the civil authorities who decide whether an offender is to be dealt with under the civil system or under military law. Lord Thomas stressed that in fact the majority of civil offences which go to trial are tried by the civil courts. So, he said, if the House were to hold that trial of civil offences by court-martial was incompatible with art 6, with the result that all such offences had to be tried by the civil courts, this would be neither a breakthrough in principle nor any very radical step in practice. He was merely arguing for a return to the position as understood by Lord Loughborough LC who held in *Grant v Gould* (1792) 2 Hy Bl 69 at 99–100 that—

> 'In this country, all the delinquencies of soldiers are not triable, as in most countries in *Europe*, by martial law; but where they are ordinary offences against the civil peace, they are tried by the common law courts.'

That had indeed remained the position until the enactment of s 45 of the Naval Discipline Act 1866, in the case of the navy, and the enactment of s 41 of the Army Discipline and Regulation Act 1879. While returning to the original position would involve some increase in the workload of the civil prosecuting and judicial authorities, the increase would, said Lord Thomas, be relatively slight and could be accommodated.

[36] Under the existing system, an allegation that a person subject to military law has committed an offence must be reported to his commanding officer in the form of a charge and the commanding officer must investigate the charge (see s 76(1) and (2) of the 1955 Acts). After investigation, the commanding officer may decide to refer the charge to higher authority under s 76(5)(b) and, if he does so, then the higher authority must usually refer the case to the prosecuting authority (see s 76A(1)). For these purposes 'the prosecuting authority' is an officer, appointed by Her Majesty, who has been legally qualified for at least ten years (see s 83A). If the prosecuting authority

considers that court-martial proceedings should be instituted, he must determine any charge to be preferred and whether it is to be tried by general or district court-martial, and he must also prefer the charge (see s 83B(4)). The prosecuting authority must notify the accused's commanding officer and a court administration officer (see s 83B(6)). The prosecuting authority has the conduct of any subsequent court-martial proceedings against the accused and has power to make all the decisions relating to the prosecution (see s 83B(7) and (8)). The prosecuting authority may delegate any of his functions to officers whom he appoints as prosecuting officers, but they too must be legally qualified (see s 83C).

[37] When the prosecuting authority notifies a court administration officer of a prospective court-martial, that officer must by order convene a court-martial of the required description (see s 84C(1)). The order will specify which officers are to be members of the court-martial and which officer is to be president. It will also state that a judge-advocate appointed by or on behalf of the Judge-Advocate General is to be a member of the court-martial. The legislation prevents various people from sitting on the court-martial because their previous involvement might prejudice their independence or impartiality (see s 84C(4)).

[38] The composition of both a general and a district court-martial must include a judge-advocate in addition to the prescribed number of officers (see s 84D(1) and (2)). The judge-advocate to sit on a particular court-martial is appointed by the Judge-Advocate General under s 84B(1). No one can be appointed as a judge-advocate unless he has had rights of audience in the higher courts of the United Kingdom for at least five years (see s 84B(2)). At the court-martial the judge-advocate is robed and sits in the centre with the president of the court-martial and one of the officers to his left and with the other officer to his right. All rulings and directions on questions of law (including questions of procedure and practice) are given by the judge-advocate and are binding on the court (see s 84B(3) and (4)). In these respects the judge-advocate's relationship with the other members of the court is similar to the relationship between a Crown Court judge and the members of the jury. Indeed counsel explained that the judge-advocates have available to them the same model directions prepared by the Judicial Studies Board as are available to Crown Court judges and that, when the members of a court-martial are to consider their verdict, the judge-advocate directs them in just the same way as a Crown Court judge would direct the members of a jury.

[39] At the start of the proceedings the accused has the right to object, on any reasonable grounds, to any member of the court (see s 92(1)). The officers sitting on the court-martial who are to try the case take an oath, recorded in the judgment in *Morris v UK* (2002) 34 EHRR 1253 at 1265 (para 27):

> 'I swear by almighty God that I will well and truly try the accused before the court according to the evidence, and that I will duly administer justice according to the Army Act 1955 without partiality, favour or affection, and I do further swear that I will not on any account at any

time whatsoever disclose or discover the vote or opinion of the president or any member of this court martial, unless thereunto required in the due course of law.' a

The decision of a district court-martial on the accused's guilt or innocence is taken by the president and the two other officers applying the directions on law which the judge-advocate has given them. They deliberate in private, b without the judge-advocate (see s 94(6)). They reach their verdict by a vote and, unlike the position in a jury trial in England and Wales but like the position in Scotland, the accused may be convicted by a simple majority (see s 96). In terms of their oath, the members of the court-martial are forbidden to reveal the vote or opinion of any member.

[40] The decision on sentence is reached by vote of all the members of the c court-martial, including the judge-advocate, who may, in addition, give the other members guidance on the appropriate sentence to be imposed. Moreover, in terms of r 80(2) of the rules the reasons for the sentence must be given by the judge-advocate.

[41] Lord Thomas' submission that the appellants' rights under art 6(1) had d been infringed did not depend on any specific circumstances relating to their trials or to the individuals who had made up the courts-martial: rather, his was a general challenge to the system of trial of civil offences allegedly committed in the United Kingdom by courts-martial duly set up in accordance with the legislation. In such cases courts-martial did not constitute an independent and impartial tribunal. In support, Lord Thomas e cited the dissenting opinion of Laskin CJ in *MacKay v R* (1980) 114 DLR (3d) 393 at 401–402 where he was considering the case of a serviceman who had been tried by court-martial for various drugs offences under the Narcotic Control Act 1970. Laskin CJ said:

'In the present case, the charges against the accused were laid by the f accused's commanding officer. The Standing Court Martial was ordered by a senior commander and a member of the armed forces, a lieutenant-colonel, was appointed from an approved list as the Standing Court Martial pursuant to s. 154 [of the National Defence Act 1970]. Both the officer constituting the Standing Court Martial and the prosecutor were part of the office of the Judge Advocate-General. In short, the g accused, who was tried on charges under a general federal statute, [the Narcotic Control Act 1970], was in the hands of his military superiors in respect of the charges, the prosecution and the tribunal by which he was tried. It is true that the Court Martial Appeal Court, consisting under s. 201 ... of the *National Defence Act*, of Judges of the Federal Court of h Canada and additional superior Court Judges appointed by the Governor in Council, exhibits independence and the appearance of independence in its composition but the same cannot be said of the constitution of a Standing Court Martial when trying an accused for breach of the ordinary criminal law. Needless to say, there is no impugning of the integrity of the presiding officer; it is just that he is not suited, by virtue i of his close involvement with the prosecution and with the entire military establishment, to conduct a trial on charges of a breach of the ordinary

criminal law. It would be different if he were concerned with a charge of breach of military discipline, something that was particularly associated with an accused's membership in the armed forces. The fact that "service offences" are so broadly defined as to include breaches of the ordinary law does not, in my opinion, make a Standing Court Martial the equivalent of an independently appointed judicial officer or other than an *ad hoc* appointee, having no tenure and coming from the very special society of which both the accused, his prosecutor and his "Judge" are members: *cf. Committee for Justice and Liberty et al. v. National Energy Board et al.* ((1976) 68 DLR (3d) 716). In my opinion, it is fundamental that when a person, any person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, he or she is entitled to be tried before a Court of Justice, separate from the prosecution and free from any suspicion of influence of or dependency on others. There is nothing in such a case, where the person charged is in the armed forces, that calls for any special knowledge or special skill of a superior officer, as would be the case if a strictly service or discipline offence, relating to military activity, was involved.'

Laskin CJ went on to conclude that the trial of the appellant for a contravention of s 3 of the Narcotic Control Act 1970 offended s 2(f) of the Canadian Bill of Rights 1960 in that he was not tried by an independent and impartial tribunal.

[42] Lord Thomas also referred to the opinion of Lamer CJ in the later case of *R v Généreux* (1992) 88 DLR (4th) 110 at 136 where he accepted that a military code of discipline would be less effective if the military did not have its own courts to enforce its terms, but continued:

'However, I share the concerns expressed by Laskin C.J.C. and McIntyre J. in [*MacKay v R* (1980) 114 DLR (3d) 393] with the problems of independence and impartiality which are inherent in the very nature of military tribunals. In my opinion, the necessary association between the military hierarchy and military tribunals—the fact that members of the military serve on the tribunals—detracts from the absolute independence and impartiality of such tribunals. As I shall elaborate in greater detail below, the members of a court martial, who are the triers of fact, and the judge advocate, who presides over the proceedings much like a judge, are chosen from the ranks of the military. The members of the court martial will also be at or higher in rank than captain. Their training is designed to insure that they are sensitive to the need for discipline, obedience and duty on the part of the members of the military and also to the requirement for military efficiency. Inevitably, the court martial represents to an extent the concerns of those persons who are responsible for the discipline and morale of the military. In my opinion, a reasonable person might well consider that the military status of a court martial's members would affect its approach to the matters that come before it for decision.'

Lamer CJ went on (at 141–147) to identify and analyse a number of aspects of

the Canadian system of courts-martial at the time which, in his view, gave rise to concern as to their independence. Some of these related to the position of the judge-advocate, about which there is no issue in the present appeals. Others arose out of the possibility that the performance of the officer members of courts-martial would be taken into account in determining their pay—not, as such, a possibility raised in the present cases. Lamer CJ also criticised the role of the convening officer who not only convened the court-martial and decided who would sit, but also, with the consent of the judge-advocate, appointed the prosecutor. It would thus be fair to say that some, at least, of the features of the system described and criticised by the two Chief Justices in *MacKay v R* and *R v Généreux* resemble features of the British system of courts-martial as it was in *Findlay v UK* (1997) 24 EHRR 221 before the reforms introduced by the 1996 Act.

[43] In both these passages on which Lord Thomas relied, a distinction is drawn between courts-martial trying military offences and courts-martial trying civil offences. Lord Thomas adopted the same distinction, limiting his challenge to trial of civil offences by court-martial in this country.

[44] Despite the apparent support for it in the passages which I have quoted from the Canadian cases, I am unable to accept such a distinction. In principle, either a tribunal is independent and impartial or it is not. If it is, then it is independent and impartial whatever the offence it is trying, wherever the offence may have been committed and wherever the tribunal may be sitting; equally, if it is not, then it is not independent or impartial whatever the offence it is trying, wherever the offence may have been committed and wherever the tribunal may be sitting. So far as military offences are concerned, members of courts-martial may have a particular familiarity with the issues and values that underlie them. That familiarity cannot, however, justify the members in reaching a decision on conviction or sentence that is anything other than the decision of an independent and impartial tribunal. The art 6 guarantee applies in the trial of such purely military offences, just as it does in the trial of civil offences. And this is indeed plain from the decision of the European Court in *Morris v UK*, where art 6 was held to apply in the case of an applicant who had pled guilty to the military offence of being absent without leave. Indeed it would be astonishing if the standards of independence and impartiality required of a court-martial trying, for instance, the purely military offence of mutiny, which may attract the most severe punishment, were one whit less strict than those required of a court-martial trying the civil offence of assault.

[45] So far as courts-martial held abroad for offences committed abroad are concerned, as McIntyre J pointed out in a passage in his judgment in *MacKay v R* (1980) 114 DLR (3d) 393 at 421 which I quote in para [52], below, the character of the members of the court-martial for independence and impartiality can hardly vary, depending on where they happen to be called on to sit. Lord Thomas eventually contended, however, under reference to *Golder v UK* (1975) 1 EHRR 524, that art 6 might be subject to an inherent limitation that would make it inapplicable to overseas courts-martial. I did not find the submission compelling. But, even if any such limitation could apply, it could do so only in the most extreme circumstances, such perhaps as required the

convening of a field general court-martial; it could certainly not apply in the case of a court-martial held in peacetime in a country such as Germany with a sophisticated local criminal justice system. Indeed Lord Thomas himself really accepted this since he was representing the appellants in *R v Spear, R v Boyd* [2001] QB 804, whose contention is that their art 6(1) rights were infringed in the case of a court-martial held in Osnabrück in Lower Saxony in respect of an assault in army barracks in Münster in Westphalia.

[46] For these reasons, while the certified question in *R v Saunby* concerns only courts-martial trying civil offences, in my view the issue of principle is whether, in any case where it is permitted, trial by court-martial infringes the accused's art 6 rights. Indeed the only justiciable issue for your Lordships' House is whether the appellants' art 6 rights have been infringed by reason of their trial by court-martial. Even though the logic of his position was that most of the appellants should have been tried by jury, Lord Thomas, of course, acknowledged that art 6 conferred on them no right to jury trial. Hence they could not base their case against trial by court-martial on the simple fact that it was not trial by jury. Nor, in its judicial capacity, is this House concerned with whether, as a matter of policy, trial of civil offences by the civil courts might be preferable to trial by court-martial. But certain of the submissions advanced by Lord Thomas verged at least on policy arguments in favour of reforming the present system. For instance, he argued that the continued existence of a parallel system of trial by court-martial of civil offences ran counter to general developments over the last 40 years. Courts-martial were redolent of out-of-date attitudes of deference to rank. The formality of the proceedings, with the accused being marched into court under escort and with special rules, for instance, about wearing and removing head-dress, made them intimidating to both the accused and witnesses. All these undesirable features could be remedied by trying civil offences in civil courts. Lord Thomas had to accept, of course, that in certain respects trial in a civil court might even seem to be more intimidating: for instance, in a civil court the accused would sit in the dock, while in a court-martial he sits beside his defending counsel. Mr Havers indicated that the formality of court-martial proceedings had been considerably relaxed in recent years. The briefing notes provided to members of courts-martial certainly envisage that there can be some reduction of formality at times. The members are told that, if a plea of guilty is tendered, the accused and escort can be instructed to sit and the accused can be told to remove his head-dress. They are also told that, if the accused is unrepresented and has to be asked questions by the judge-advocate, to make sure, in terms of r 46(1) of the rules, that he understands the nature of the charges and the general effect of his plea, there is no reason why the accused and his escort should not sit for that part of the proceedings. There may indeed be some further room for relaxation and, doubtless, those who are familiar with service life and with the conduct of courts-martial today will continue to keep the remaining formalities under review.

[47] None of these matters highlighted by Lord Thomas is for the judgment of the House except in so far as it might have a bearing on whether trial by court-martial infringes the accused's art 6 rights. In the end Lord Thomas did not contend that they were, whether individually or cumulatively, of critical

significance for that core issue. When the core issue before the House is formulated in this way, then at one level the answer is straightforward. The case law of the European Court shows that, in principle, trial by court-martial does not infringe an accused's right to a fair trial under art 6.

[48] In *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 five members of the Netherlands armed forces were punished by their commanding officers for offences against military discipline. They appealed to the Supreme Military Court, which confirmed their commanding officers' decisions. The applicants brought proceedings in Strasbourg alleging breach of their rights under various articles of the Convention, including art 6. In this connection the European Court (at 657–658 (para 30)) considered the composition of the Supreme Military Court. It comprised six members: two civilian jurists, one acting as the court's president, and four military officers. The civilian jurists had to be justices of the Dutch Supreme Court or Judges of the Court of Appeal and they were appointed by the Crown on the joint advice of the ministers of justice and defence for a term of office that was similar to their judicial term. The military members were also appointed by the Crown on the recommendation of the ministers of justice and of defence but they could be dismissed by the Crown on the recommendation of the same ministers. The military members could therefore, in theory, be removed without observance of the strict requirements and legal safeguards that applied to the civilian members. On the other hand, their appointment as military members of the court was normally the last in their service career and, in their functions as judges on the court, they were not under the command of any higher authority and they were not under a duty to account for their acts to the service establishment. On assuming office, all members of the court swore an oath to be just, honest and impartial.

[49] The European Court held (at 679–680 (para 85)) that in the case of three of the applicants the charges against them fell within the criminal sphere and that the Convention therefore obliged the authorities to afford them the guarantees under art 6. The court went on to hold (at 680 (para 89)) that the Supreme Military Court constituted an independent and impartial tribunal established by law and that there was nothing to indicate that it had failed to give the three applicants a fair hearing. There was therefore no breach of art 6 in this respect, although the European Court did go on to find (at 681 (para 89)) that the applicants' rights under art 6(1) had been infringed because the proceedings in the Supreme Military Court had taken place in camera.

[50] In *Morris v UK* (2002) 34 EHRR 1253 at 1274 (para 59) the European Court said:

> 'The Court notes that the practice of using courts staffed in whole or in part by the military to try members of the armed forces is deeply entrenched in the legal systems of many Member States. It recalls its own case law which illustrates that a military court can, in principle, constitute an "independent and impartial tribunal" for the purposes of Article 6(1) of the Convention. For example, in the above-mentioned ... case [*Engel v The Netherlands (No 1)* (1976) 1 EHRR 647], the Court found that the

a Dutch Supreme Military Court, composed of two civilian Justices of the Supreme Court and four military officers, was such a tribunal. However, the Convention will only tolerate such courts as long as sufficient safeguards are in place to guarantee their independence and impartiality.'

While it is perhaps possible to detect some lack of enthusiasm in the use of b the term 'tolerate', the passage shows clearly that, in principle, a military court can constitute an independent and impartial tribunal in terms of art 6(1). What is required is that there should be sufficient safeguards of the independence and impartiality of its members. Applying that approach, I would reject Lord Thomas' submission that, of its very nature, trial of civil offences by court-martial is incompatible with art 6(1). In principle such a trial c can fully satisfy the requirements of art 6 that the tribunal should be independent and impartial and that the accused should have a fair trial.

[51] That being so, it is not necessary to 'justify' trial by court-martial, whether by reference to the history of the system here and in many other countries or by reference to the situation of the services today. Lord Thomas d suggested that the government and the armed forces wished to retain courts-martial for civil offences for no other reason than that the system exists and the staff are there to run it. I should therefore not wish to leave unmentioned the substantial arguments that can be advanced in favour of a system of trial by court-martial that covers both military and civil offences. The case is put forcefully in the witness statement dated 12 July 2001 of Air e Chief Marshal Sir Anthony Bagnall, the vice-chief of the defence staff. Before making the statement Sir Anthony had consulted senior members of all three services. Describing what he regarded as the special circumstances underpinning s 70 of the 1955 Acts and s 42 of the Naval Discipline Act 1957, he said inter alia:

f '4. First and foremost of the special circumstances of the armed forces is that the willingness and readiness of every member and unit of the armed forces to act with the greatest possible speed and efficiency is essential for the defence of the realm from outside attack, for acting in operations outside the United Kingdom and sometimes for acting in aid of the civil power (as in Northern Ireland). It is essential that this g readiness be maintained at all times, not only in times when a threat is immediate. It applies with equal importance wherever a unit is based. The Royal Air Force, for example, must be ready to act anywhere from its bases within the United Kingdom. Success in operations depends on the ability of all members of a unit to act together as a single fighting force, h in other words on operational efficiency.

5. Second, the requirements of service discipline reflect the fact that their fundamental purpose is essentially to fight. The services are armed organisations, required to train and fight in circumstances of extreme hardship, as has most recently been demonstrated in Northern Ireland, the Gulf, Kosovo and Sierra Leone.

i 6. The performance of their functions involves, not merely working together, but living together, often in conditions—whether in Northern Ireland, the Falkland Islands or Kosovo—of hardship, stress and danger.

Yet, in carrying out these functions it is of the greatest importance that they retain respect for the civilians among whom they operate, civilians who, whether in Northern Ireland or abroad, may be unsympathetic or even hostile. The fundamental purpose of a military justice system is to foster and promote the discipline and self-control required for the maintenance of the capability to act as an efficient fighting force, that is to say, operational effectiveness.

7. It is the combination of the need for utmost readiness, unit solidarity and deeply imbued self-control over long periods and often in most difficult situations which necessitate a comprehensive system of command and discipline, and require that this system should be capable of dealing fairly and, where possible, promptly with misconduct involving a criminal offence.

8. These factors make service life unique, but, while they are all important, I should make a further point about one of them. Members of the regular armed forces do not simply do a job. They are at all times members of the armed forces, very often sharing accommodation, whether barracks or temporary accommodation, even in peacetime.

9. The special status of members of the armed forces means that an act which may be a criminal offence under civilian criminal law also has a disciplinary aspect when committed in a service environment. The commanding officer (CO) is at the centre of the system of discipline. He is responsible for the behaviour of those under his command, both among themselves and in relation to the local community. As a result of the circumstances I have already referred to, the CO's powers of discipline are necessarily wide. He is able to deal summarily with a wide range of misconduct, including both criminal and purely service offences. His powers include limited powers of detention (basically a maximum of 28 days but up to 60 days with the permission of higher authority). A CO may typically deal with cases of minor theft or assault. These cases are often none the less of importance to discipline and morale. A minor theft, which might be insignificant in some civilian contexts, can erode trust between members of a unit and undermine the effectiveness of what should be a close-knit team. More serious cases are likely to go [to] court-martial. The CO and the service courts are uniquely placed to understand the circumstances of service life and the significance of misconduct by service personnel, especially where misconduct occurs in a service context.

10. A requirement for all criminal offences in the United Kingdom to be dealt with by civilian courts would seriously undermine the CO's authority. Moreover it seems to me that the exclusion of courts-martial from dealing with criminal cases in the United Kingdom would inevitably bring with it the exclusion of the COs from dealing with such criminal offences on a summary basis.

11. Subject to a point which I shall deal with at para 18 and following below [as to the exclusion of certain serious offences], s 70 broadly makes no distinction between criminal offences committed in the United Kingdom and those committed abroad. The fundamental reasons for this

a are the circumstances of service life which, as explained above, require a distinct system of command and discipline. Moreover the circumstances of service life, and service needs, would render artificial an exclusion of service courts for crimes in the United Kingdom. If, for example, a serviceman stole from another serviceman abroad, he could be dealt with by service discipline; but, if the theft occurred in England and the thief b was identified only after the unit had gone abroad, the case could only be dealt with by a court in the United Kingdom. If s 70 did not apply to an offence committed in England, no disciplinary action could be taken against the guilty person; nor could the service police arrest him. He would not have committed a disciplinary offence.

c 12. A distinction between criminal and service offences is also in my view artificial. The same facts may amount both to a criminal and a purely service offence. A theft may sometimes be looting; the circumstances of an assault may amount to mutiny. It would be anomalous if criminal misconduct could be dealt with, but only where the circumstances also amounted to a service offence. Nor is there a d simple distinction in terms of seriousness. Looting, mutiny and desertion may be as serious as theft or even murder.'

[52] This authoritative and up-to-date statement of the reasons why the armed forces wish to maintain the jurisdiction of courts-martial in civil offences complements passages in certain of the authorities where judges e have recognised that a distinct system of justice for the armed forces can be justified by their peculiar position. For instance, in *MacKay v R* (1980) 114 DLR (3d) 393 at 426 McIntyre J would have confined the jurisdiction of courts-martial to civil offences connected with the accused's military service and therefore found that there had been a breach of the guarantee of equality f before the law under ss 1(b) and 2 of the Canadian Bill of Rights. None the less he was clear that trial by court-martial did not infringe the serviceman's, separate, right to a fair hearing by an independent and impartial tribunal under s 2(f) of the Bill of Rights. He said (at 420–421):

'With the greatest deference for those who hold opposing views, I am unable to conclude that a trial by court martial under the provisions of g the *National Defence Act* of criminal offences, which are also offences at civil law, deprives the defendant of a fair hearing by an independent tribunal. From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same h reason. It is said that by the nature of his close association with the military community and his identification with the military society, the officer is unsuited to exercise this judicial office. It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised i against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that

fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline—which includes the welfare of their men—are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others. Furthermore, the problems and the needs of the armed services, being in many respects special to the military, may well from time to time require the special knowledge possessed by officers of experience who, in this respect, may be better suited for the exercise of judicial duty in military courts than their civilian counterparts. It has been recognized that wide powers of discipline may be safely accorded in professional associations to senior members of such professions. The controlling bodies of most professions such as those of law, medicine, accountancy, engineering, among others, are given this power. I am unable to say that the close identification of such disciplinary bodies with the profession concerned, taken with the seniority enjoyed by such officers within their professional group, has ever been recognised as a disqualifying factor on grounds of bias or otherwise. Rather it seems that the need for special knowledge and experience in professional matters has been recognized as a reason for the creation of disciplinary tribunals within the separate professions. It must also be remembered that while this appeal concerned only the armed services serving in Canada, the position of forces serving abroad not being in issue, it must be recognized that in service abroad the officers must assume the judicial role by reason of the absence of any civil legal processes. The character of the officer for independence and impartiality will surely not vary because he is serving overseas. The practical necessities of the service require the performance of this function by officers of the service and I find no offence to the Canadian Bill of Rights in this respect. I would add that there now exists a Court Martial Appeal Court, a professional Court of Appeal with a general appellate jurisdiction over the courts martial. This is, in my view, a significant safeguard and its creation is a realistic and practical step toward the provision of that protection which is required in the circumstances.'

I refer also to the dissenting opinion of L'Heureux-Dubé J in *R v Généreux* (1992) 88 DLR (4th) 110 at 156–157.

[53] Lord Thomas put at the forefront of his submissions a general argument that, because trial by court-martial infringed art 6 of the Convention, s 70 of the 1955 Acts should be declared to be incompatible with that article. Counsel for the respondents argued that this submission was totally misconceived since s 70 was a section which created an offence rather than one which conferred jurisdiction on courts-martial. In their judgment in *R v Saunby*, the appeal court accepted that argument and I would do so too. But even supposing that Lord Thomas could have founded such an argument on the reference in sub-s (3) to 'a person convicted by court-martial', the argument would necessarily have failed since, as the decision in *Morris v UK* (2002) 34 EHRR 1253 shows, it is impossible to say that in their very nature all trials by court-martial involve an infringement of the accused's art 6 rights.

[54] Since trial by court-martial does not necessarily involve an infringement of the accused's rights under art 6, the decision as to whether the court is to be regarded as an independent and impartial tribunal depends on the safeguards which are in place. It follows that the decision in these appeals depends on whether the safeguards of the independence and impartiality of the members of the courts-martial in these cases can be regarded as satisfactory.

[55] In *Findlay v UK* (1997) 24 EHRR 221 at 244–245 (para 73) the European Court recalled that—

> 'in order to establish whether a tribunal can be considered as "independent", regard must be had *inter alia* to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. As to the question of "impartiality", there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.'

In *Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465 at [103] Lord Hope of Craighead, with whom the other members of the House agreed, having surveyed the European Court, United Kingdom and Commonwealth case law on this point, concluded:

> 'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'

[56] Lord Thomas did not suggest that the members of the courts-martial in these cases had been subjectively biased. He argued, however, that the fair-minded and informed observer would conclude that the safeguards were inadequate to guarantee the independence and impartiality of the members of the courts-martial, especially having regard to the lack of security of tenure for permanent presidents and the ad hoc appointments of the other officers. Given their position as serving officers in the armed forces, the fair-minded observer would see it as possible that they would give undue weight to the need to maintain service morale and discipline and that, as officers, they would be unable fairly to judge cases involving lower ranks, especially if, say, convicting an officer or acquitting a private meant disbelieving an officer or non-commissioned officer. Courts-martial could not, therefore, be regarded as objectively impartial in terms of art 6.

[57] A submission of this kind requires one, as a starting-point, to consider what is meant by the requirement that a tribunal should be independent and impartial. As the European Court noted in *Morris v UK* (2002) 34 EHRR 1253 at 1274 (para 58) the concepts of independence and objective impartiality are closely linked. In the present cases, in substance, the court-martial must be guarded from the risk of influence by the prosecution and guarded from the risk of influence by the relevant service authorities, especially superior officers who might wish to secure some particular result, supposedly in the

interests of the morale or discipline of the service or of some particular unit. As a result of the abolition of the role of the convening officer by the 1996 Act, no issue was raised in these cases as to the independence of the members of the tribunal from the prosecution. On the other hand, art 6 does not require that the members of the tribunal should not share the values of the military community to which they belong any more than it requires that the judge or members of the jury in a civil court should be divorced from the values of the wider community of which they form part. What matters is that, while sharing the values of the service community, the members of the court-martial should put aside any prejudices which they may have and act—and be seen to act—independently and impartially in deciding the issues in the case before them.

[58] Lord Thomas dealt first with the position of permanent president. In *R v Spear, R v Boyd* [2001] QB 804, in the trial involving Spear and Hastie, the president of the court-martial was a permanent president, Lieutenant Colonel Stone. In the trial of Boyd the president of the court-martial was again a permanent president, Wing Commander Chambers. In the trial of Saunby also the president was a permanent president, Lieutenant Colonel de Lisle. Another permanent president, Lieutenant Colonel Hall, sat in the trial of Clarkson and English. In challenging the role of the permanent presidents in these cases Lord Thomas had, of course, to take account of the judgment of the European Court on this point in *Morris v UK* (2002) 34 EHRR 1253 at 1276–1277:

> '68 ... The Court notes that the Permanent President in the applicant's case was appointed to his post in January 1997 and was due to remain in post for four years, eight months until his retirement in September 2001. He also worked outside the chain of command. The Court considers that, in these respects, his position was similar to that of the military members of the Dutch Supreme Military Court in the above-mentioned ... case [*Engel v The Netherlands (No 1)* (1976) 1 EHRR 647]. In that case, in declaring the military court "independen[t] and impartial", the Court drew attention to the fact that the appointment of the military members was usually the last of their careers and that they were not, in their functions as judges, under the command of any higher authority or under a duty to account for their acts to the service establishment. The Court recalls that, although irremovability of judges during their terms of office must in general be considered as a corollary of their independence, the absence of a formal recognition of such irremovability in the law does not in itself imply a lack of independence, provided that it is recognised in fact and that other necessary guarantees are present. It notes also that, as highlighted by the Court Martial Appeal Court in the above-mentioned cases of [*R v Spear, R v Boyd* [2001] QB 804], although there is no "written guarantee" against premature removal of Permanent Presidents, there is no record of a Permanent President ever having been removed from office.
>
> 69 The applicant argues that the independence of the Permanent President at the applicant's court martial could have been reinforced by

formal security of tenure and by embodiment of his appointment in a legal instrument of some kind. However, the Court finds that the presence of the Permanent President did not call into question the independence of the court martial. Rather, his term of office and *de facto* security of tenure, the fact that he had no apparent concerns as to future army promotion and advancement and was no longer subject to army reports, and his relative separation from the army command structure, meant that he was a significant guarantee of independence on an otherwise ad hoc tribunal.'

[59] About two years before this judgment of the European Court, apparently giving a clean bill of Convention health to permanent presidents, in *R v McKendry* (6 March 2000, unreported) Judge-Advocate Pearson had held that the president of that particular district court-martial should stand down because he could not be regarded as independent and impartial for purposes of art 6(1). Although the judge-advocate purported to limit his ruling to the particular case, the result of it was that the use of permanent presidents was forthwith abandoned. Officers who had been serving as permanent presidents found themselves without a role. It appears that, pending the outcome of these appeals, the use of permanent presidents has not been resumed.

[60] In *R v Spear, R v Boyd* [2001] QB 804 the appeal court summarised the information given to them about the two permanent presidents, Lieutenant Colonel Stone and Wing Commander Chambers, in this way:

'[22] ... Lt-Col Stone was appointed PPCM in January 1998. His appointment was specified to run until February 2002. It was always plain that this was to be his last posting; but in fact he was deployed in a staff job within First UK Armoured Division after and because of the abolition of the PPCM regime in May 2000 following *R v McKendry*, since at that date he still had some time to serve before retirement. He had no prospects of further promotion. He had no intention of seeking employment after his retirement within the Ministry of Defence as a retired officer. No reports were made upon him in his office as PPCM; indeed there have in the Army been no reports upon any PPCM since April 1997 when the 1996 Act came into force. Lt-Col Stone worked outside any regimental or other chain of command, from his married quarters home, and eschewed the officers' mess because "to do otherwise could have compromised my position as a PPCM".

[23] There is also a statement from Group Captain Trace, who is deputy director within the Personnel Management Agency responsible for the career management of all officers of the General Duties and Operations Support Branches up to and including the rank of Wing Commander. He has perused the personal file of Wing Commander Chambers, who sat as PPCM in Boyd's case. Wing Commander Chambers was appointed PPCM in June 1998 initially for some two years, but he accepted a two-year extension. This was his last posting. He had no prospects of promotion. He worked from home, and his only contacts of any substance with the Service were for purposes of administration and welfare. No reports were made upon him in respect of his

decision-making functions as PPCM. We should add that when Boyd's applications were renewed to this court, his solicitor Mr Blades noted on the renewal form: "Since this case was heard the president has been suspended. The Royal Air Force do not appear to believe that the president is independent." There was also a suggestion that Wing Commander Chambers had at some stage been disciplined or reprimanded. This is not supported by any material of any substance which we have seen. There is no reference to any such matter in the documents emanating from the Royal Air Force. It was not pressed with any force by Mr Blades, and is not within the purview of Boyd's leave to appeal granted by us. There may be scope for some confusion since it appears from Group Captain Trace's letter that Wing Commander Chambers held office as PPCM "until the *post* was suspended on 16 February 2000" (our emphasis).'

In *R v Saunby* no particular points were made about Lieutenant Colonel de Lisle or about Lieutenant Colonel Hall.

[61] So far as Lieutenant Colonel Stone is concerned, Lord Thomas accepted that the position was as outlined by the appeal court. In particular he accepted that, since 1997, in the army there had been no reports on permanent presidents. That being so, in the appeals of Spear and Hastie Lord Thomas was not able to distinguish *Morris v UK*. Since he did not argue that, on its facts, this aspect of the decision in *Morris v UK* had been wrong, Lord Thomas' submissions on behalf of these appellants were really of a more general nature, dealing with the perceived weaknesses in the role of any officer as a member of a court-martial.

[62] In the case of the appellant Boyd, however, Lord Thomas argued that the position was not so straightforward as the account given by the appeal court would suggest. Unlike the army permanent presidents, in particular the permanent president in *Morris v UK*, Royal Air Force permanent presidents, such as Wing Commander Chambers, remained subject to reports. Mr Havers accepted that, for some reason that he could not explain, the air force had indeed continued the practice of preparing reports on officers who were serving as permanent presidents. In my view that practice is undesirable and, as the army experience shows, unnecessary. It would be better if it were discontinued. Lord Thomas went on to submit that, contrary to the conclusion of the appeal court, an examination of the reports on Wing Commander Chambers written in August 1999 and August 2000 suggested that the practice of reporting had indeed jeopardised his independence. He pointed out that in one report the permanent president's function was said to be one on which 'the service's disciplinary ethos is based' and comments were then made as to the enthusiasm which Wing Commander Chambers brought to his role—for example, it was said that he 'relishes the challenge each court brings'. In 1999 the Air Secretary noted that he was well suited to continue to his retirement in 2000 'when consideration could again be given as to whether the post should be held by a recently retired officer ...' In fact, Wing Commander Chambers' retirement date was extended for two years from December 2000 and so that particular issue did not arise, but it might be

thought, said Lord Thomas, that an assessment of his performance as a permanent president would have been relevant to the decision as to whether or not his period of service should be extended. Thus the reporting process, with its possible consequences for his future, could have affected his independence and impartiality.

[63] As Mr Havers pointed out, however, while the reports make various comments on the way that Wing Commander Chambers tackled his role as a permanent president, these are better seen as referring to the administrative aspects of the job, such as checking the trial facilities and briefing the other participants. Crucially, there was not the slightest indication that the reports bore on his actual decisions when sitting as president of a court. On the contrary, the reports recognise that that role is one in which the permanent president is 'isolated and unsupervised' and which requires independence which the Air Secretary 'honour[s] and respect[s]', there being only an administrative and welfare linkage. The reporting officer recognises the limitation on his role since he is not—

> 'allowed any direct insight into the way [Wing Commander Chambers] has discharged his duties. Indeed a key ingredient is the ability to work without supervision.'

In these circumstances I readily conclude that neither the fact that Wing Commander Chambers was subject to reports of this nature, nor the actual reports themselves that were made on him, give the slightest reason for considering that his independence or impartiality as a member of the appellant Boyd's court-martial was compromised. On the contrary, all involved in making these reports were well aware of the need not to intrude upon the decisions reached by him when sitting as president. Even had anyone wished to intrude, the oath of secrecy taken by the members of courts-martial would have made it impossible to investigate those decisions.

[64] That being so, there is nothing in the particular circumstances of the cases of Spear and Hastie or of Boyd which would be a reason to reach a different result from the European Court in *Morris v UK* on the issue of the independence and impartiality of the officers acting as president of their courts-martial. I respectfully agree with and adopt the reasoning of the European Court on this point. I would accordingly reject Lord Thomas' argument that these appellants' rights under art 6(1) were infringed because the presidents of their courts-martial were permanent presidents.

[65] When he turned to the position of the other officers on the courts-martial, Lord Thomas was able to claim support for his argument from the relevant aspect of the decision of the European Court in *Morris v UK* (2002) 34 EHRR 1253 at 1277–1278:

> '70 In contrast to the Permanent President, the two serving officers who sat on the applicant's court martial were not appointed for any fixed period of time. Rather, they were appointed on a purely ad hoc basis, in the knowledge that they would return to their ordinary military duties at the end of the proceedings. Although the Court does not consider that the ad hoc nature of their appointment was sufficient in itself to render the make-up of the court martial incompatible with the independence

requirements of Article 6(1), it made the need for the presence of safeguards against outside pressures all the more important in this case.

71 The Court recognises that certain safeguards were in place in the present case. For example, the presence of the legally qualified, civilian judge advocate in his enhanced role under the 1996 Act was an important guarantee, just as the presence of two civilian judges in the Dutch Supreme Military court was found to be in the above-mentioned ... case [*Engel v The Netherlands (No 1)* (1976) 1 EHRR 647]. This was particularly so since the applicant's guilt, upon which the judge advocate would have had no vote, was not at issue before the court martial. As indicated at paragraph 69 above, the presence of the Permanent President provided another guarantee. The Court notes also the protection offered by the statutory and other rules about eligibility for selection to a court martial and the oath taken by its members.

72 However, the Court considers that the presence of these safeguards was insufficient to exclude the risk of outside pressure being brought to bear on the two relatively junior serving officers who sat on the applicant's court martial. In particular, it notes that those officers had no legal training, that they remained subject to army discipline and reports, and that there was no statutory or other bar to their being made subject to external army influence when sitting on the case. This is a matter of particular concern in a case such as the present where the offence charged directly involves a breach of military discipline. In this respect, the position of the military members of the court martial cannot generally be compared with that of a member of a civilian jury who is not open to the risk of such pressures.'

Lord Thomas submitted that the House should follow this part of the decision of the European Court in *Morris v UK* and that, indeed, it would be unprecedented for a court not to do so where the decision of the European Court was so recent.

[66] In reaching its decisions the European Court always pays careful attention to the facts of the case as explained to it. In the jargon of the subject, its decisions are said to be 'fact-sensitive'. As can be seen from the passage in question, the decision in *Morris v UK* is no exception. For whatever reason, however, the European Court was given rather less information than the House about the safeguards relating to the officers serving on courts-martial. And, like the European Court, the House must have regard to all the relevant factual information presented to it when deciding whether the safeguards of the independence and impartiality of the members of the courts-martial were adequate.

[67] It is true that, apart from any permanent president, the officers selected to serve on courts-martial are appointed only ad hoc. As the European Court points out, that is not in itself sufficient to make the court incompatible with the independence requirements of art 6(1). Indeed, in performing the role only occasionally, the members of a court-martial resemble jurors and should bring to the task the freshness of approach which is one of the benefits of the jury system. Of course, as individuals and as officers in the armed forces,

those asked to sit on a court-martial may well have certain prejudices. Jurors too have prejudices and, as McIntyre J rightly pointed out in *MacKay v R* (1980) 114 DLR (3d) 393 at 420–421 (see para [52], above) the same can be said of those appointed to judicial office in civilian society. In the light of their experience of jury trial, however, courts in countries which operate with juries have concluded that the safeguards of the oath and the judge's directions are generally sufficient to ensure that jurors put aside their prejudices and reach a just verdict on the evidence. Indeed, as Lord Hope observed in *Montgomery v HM Advocate, Coulter v HM Advocate* [2001] 2 LRC 569 at 605, the entire system of trial by jury is based on the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict according to the evidence. The European Court too has recognised that the jurors' oath, to faithfully try the case and to give a true verdict according to the evidence, and their obligation to have regard to the directions given by the presiding judge will generally be sufficient to safeguard their independence and impartiality. This is so even in cases where there is reason to believe that one or more members of the jury may actually be prejudiced against the accused. I refer to the well-known decisions in *Pullar v UK* (1996) 22 EHRR 391 at 405 (para 40) and *Gregory v UK* (1997) 25 EHRR 577 at 593–595 (paras 43–48).

[68] In the cases under appeal these particular safeguards were present. The oath taken by the members of the court required them to well and truly try the accused 'according to the evidence' and to do justice according to the relevant 1955 Act 'without partiality, favour or affection'. In addition the judge-advocate gave the other members of the court-martial directions of the same kind as would have been given to a jury if the case had been tried in a civil court. There is no reason to suppose that the members of the court-martial would be any less faithful to their oath or any less diligent in applying the directions given by the judge-advocate than would the members of a jury. Indeed it is at the very least arguable that the officers on a court-martial, as members of the armed forces for whom trust and obedience to commands are particularly important, would be even more likely than civilian jurors to be true to their oath and to follow the directions given to them.

[69] In any event, the steps taken to ensure that the members of a court-martial act independently and impartially are, on one view, even more strict than with a jury. Although these additional steps were not fully explained to the European Court, they are in my view important and must be recorded at some length, even at the risk of repeating some of what has been said already about the procedure to be followed.

[70] In the first place, the officers to serve on any court-martial are always taken from another unit, the aim being to ensure that they do not know the people involved or anything about the case. When they have been nominated and the court-martial has been convened, the prospective members are sent briefing notes along with a list of the witnesses for the prosecution. The members are told to examine the list and to tell the administration office if any of the witnesses is known to them. They are told that, if they

subsequently discover that they do know someone, they should discreetly advise the judge-advocate.

[71] The briefing notes, which in certain respects reflect the provisions in Pts V and VI of the rules, give an outline of the procedure that will be followed. Paragraph 2 emphasises the central role of the judge-advocate by telling the members:

> 'The main thing to remember is that the Judge Advocate conducts the court-martial ... He will therefore decide all questions of law, practice and procedure ... He is a member of the court and his rulings and directions are binding on the other members of the court and, of course, the parties to the proceedings. Subject to the Judge Advocate's conduct of the trial, it will be the President's duty to ensure that the trial befits the traditions and standards of the Service; and, in particular, that officers and other persons under instruction do not interfere in the trial ...'

[72] The notes go on to warn the members:

> '3. When you arrive at the Courts-Martial Centre, do not speak to any unit personnel and certainly not to any unit officer who may be attending the trial in an official capacity or as a spectator. If you disregard this direction you may find yourself inadvertently talking to, for example, a witness or a lawyer involved in the case, which in turn might result in your being debarred from the trial or, indeed, the trial being prejudiced. If someone has spoken to you and you have any doubts about your position in this respect, you must tell the Judge Advocate privately before the trial commences. Any queries you may have should be addressed to the Clerk of the Court who will advise you.
>
> 4. Mention has been made above of the President's duties. Apart from that, the principal function of the President and the members is to decide, on the evidence, whether the accused is guilty or not guilty; and if guilty, then to decide, together with the Judge Advocate, the sentence to be imposed. The Judge Advocate will tell you all you need to know about the law and procedure in order to discharge those functions.'

[73] Paragraph 6 tells the members:

> 'You are exempted from occupying public accommodation at the accused's unit. Justice must manifestly be seen to be done and this aim is assisted by your being seen to avoid local unit influences.'

Paragraph 8 then advises them that:

> 'Save for resolving any queries members may have about court etiquette (eg. putting on and removal of head-dress etc.) under no circumstances must the President purport to carry out any form of briefing with other members of the court in the absence of the Judge Advocate.'

This, again, is obviously designed to support the pivotal role of the judge-advocate, while minimising any risk that the president may seek to influence the other members of the court.

[74] Paragraph 9 is to this effect:

> 'It is the C[ourt] A[dministration] O[fficer]'s duty to ensure that the officer members of the Court are qualified to act as members, ie. that they have the requisite number of years commissioned service and that they have not sat as members of a court-martial which has tried the accused before, or been involved in any investigation or inquiry into matters relating to the subject matter of the charge against the accused ... However if, before the date of trial, you think you may be ineligible ... or not qualified to sit, or know something about the accused which could prejudice your impartiality, or know someone who might be a witness in the case (you will receive prior notice from the CAO of persons who may be called as prosecution witnesses) you must not mention the matter to any other member but should tell the CAO who will, if necessary, arrange for your place on the court to be taken by someone else. If your concern about any of the above matters does not arise until you get to court, you must not talk about it to anyone else but should ask to see the Judge Advocate privately and tell him. Likewise, if during the trial you realise that you know a witness, you should tell the Judge Advocate privately without mentioning it to anyone else.'

[75] In para 20 the members are told that when the opening formalities are complete—

> 'The Judge Advocate may then publicly warn the court not to talk to anyone else about the case for as long as it continues. That includes family, friends, work associates, the prosecutor, defence counsel and, most importantly, the accused and anyone who may be a witness. To that end, other than when the Judge Advocate is sitting alone, members are not to leave the court room during the trial except to go to the lavatory, and for any overnight or luncheon adjournment; and are not to associate with Formation or Unit personnel either professionally or socially until the trial is over. Refreshments will be brought into the court room as required.
>
> 21. The President and members must not at any time, including when sitting alongside the Judge Advocate, look at papers lying on the desks of the judge advocate, prosecutor or defence counsel. Such papers might include information which the court must not see under any circumstances.'

[76] Although it appeared to be doubtful from counsel's submissions whether the practice was uniform, para 30 of the briefing notes, reflecting r 62(2), envisages that the president and members of the court may only put questions to a witness through the judge-advocate. If at the end of the witness' evidence the member feels that he must know the answer to a particular question in order to decide the guilt or innocence of the accused, then he should pass it in writing to the judge-advocate who can put it to the witness in the correct way. In para 33 the members are told that they must never take it upon themselves to visit the scene of the alleged crime before or

during the trial. If there is a need for such a visit the whole court, counsel and the accused will go to see the scene.

[77] In para 35 (drawing on r 69) the members are told that, following the addresses by counsel, the judge-advocate will sum up the evidence and direct the other members of the court on the law relating to the case. He will also summarise the main points of the evidence (para 29). The members are not to ask the judge-advocate any questions during his summing up, but they can ask in writing for further directions which the judge-advocate must give in open court.

[78] Paragraph 36 (reflecting r 70) deals with the members' deliberations on their verdict:

> 'While the court is deliberating on the findings, no-one is to be present except the President, members and officers under instruction. The President and members are not to separate until the finding has been reached, unless the Judge Advocate directs that in the interests of justice they may separate ... If any person has to leave the court room for personal reasons he must be told by the President not to speak to any person on any account ie on the telephone, by letter or any other means. If the court wish to hear again evidence recorded by the VCR, the Judge Advocate must be told and, on his direction, the court must be re-opened and the passage read in open court.'

Further guidance is given in para 39:

> 'The President will normally initiate the discussion on the issue of guilt or innocence. The President should ensure that every court member present gives his opinion as to the finding on each charge separately, in ascending order of seniority commencing with the junior member. A unanimous decision is preferable, but a majority of votes will decide the issue, and the finding of the majority will be recorded as the finding of the court. The President should write down the finding(s) on the record of findings sheet and sign it. Prior to re-opening the court, the President should remind any members overruled by the majority that they must now adopt the finding of the court. This is important if it becomes necessary to consider the sentence, as their personal feelings regarding guilt or innocence should not influence their decisions.'

[79] Paragraph 40 explains that, when the court is reopened and the judge-advocate returns, he looks at the record to check that the findings are not contrary to law. If he is so satisfied, the findings are announced. If he is not so satisfied, then he gives the members further directions in open court. The court will then be closed once more and the members of the court will have to reconsider its findings in the light of his directions (see r 72(3) and (4)).

[80] Paragraph 25 explains what is to happen when sentence is being considered, either after a guilty plea or following conviction:

> 'The court will close to deliberate on sentence. No-one will be present save for the members (including, of course, the Judge Advocate) and any person under instruction. The Judge Advocate will initiate discussion on the sentence and will inform the members about maximum punishments

and the principles to be observed. Sentence will be determined by a majority of votes if necessary and the opinions of the officer members will be given orally in ascending order of seniority, commencing with the junior member. The Judge Advocate will decide where he votes in the order. In the case of an equality of votes, the President has a second or casting vote which is exercisable once, i.e. he has a final, determining vote. When sentence has been decided, it is entered on the record of sentence which the Judge Advocate holds. The President and Judge Advocate will sign that record.'

[81] Once the trial has been completed, whether with an acquittal or with conviction and sentence, the president announces that the trial is concluded and the judge-advocate dissolves the court (para 42). Thereafter the court orderly is to be instructed to burn or shred all scrap paper (para 45).

[82] The various provisions which I have quoted from the briefing notes for the members of courts-martial reinforce significantly the message, proclaimed in any event by the oath and the directions of the judge-advocate, that the members are to act independently and impartially. In order to be seen to avoid local unit influences, the members are not to stay in public accommodation at the accused's unit. They are not to speak to unit personnel and especially not to any officer who may be attending the trial—at the risk of being debarred from the trial or indeed of the trial being prejudiced. They are not to associate either professionally or socially with such personnel until the trial is over. There is a veto on the president briefing the other members of the court in the absence of the judge-advocate. The members are to tell the court administration officer if they know something about the accused which could prejudice their impartiality or if they know someone who might be a witness in the case. The members are warned not to talk to anyone else about the case as long as it continues. They are not to look at any papers which are before the judge-advocate, prosecutor or defence counsel, for fear of seeing something which they ought not to. When they deliberate on conviction or sentence, the most junior member is to give his opinion orally first—again, obviously, with the aim of ensuring that the junior members express their own personal view, uninfluenced by the more senior members. In terms of the members' oath their deliberations are to be kept secret and this secrecy is further ensured by the instruction to the court orderly at the end of the proceedings to burn or shred all scrap paper. Again, the object is to prevent the members feeling, or coming under, any outside pressure during or after the trial by reason of their participation in the decision in the case.

[83] Lord Thomas did not suggest that these were other than genuine instructions to the members which they were intended to observe. Nor was it suggested that the instructions were in practice ignored or that they had been ignored in these particular cases. But if they are indeed observed, I find it hard, if not impossible, to see how anyone either in the court or, more particularly, outside the court could improperly influence the members' decision either on conviction or on sentence. Certainly, it is hard to see what more could be done to ensure that, while sitting in the court-martial, the officers act not as officers subject to command but as independent and

impartial members of the court, reaching the verdict and determining the sentence according to law but according also to their own individual conscience.

[84] Of course, the members of a court-martial are not just an ordinary jury. The difference shows itself in at least two different respects.

[85] First, the routines, the periods of boredom and the pleasures, pains and pressures of service life would be unknown to most jurors today, although they would have been familiar to many of their fathers and grandfathers. By contrast, members of a court-martial know all about them and about the society in which the accused lives and works. Lord Thomas suggested that officers on a court-martial, imbued by their training with notions of rank and discipline, would always tend to believe the evidence of a fellow officer or a non-commissioned officer rather than the evidence of a private. By contrast, he said, members of a jury, who carried no such burden of preconceptions, would be able to see more clearly and judge purely on the evidence before them. Of course, this submission was really just a matter of assertion. There was, and could be, no evidence to back it up. Indeed, it was somewhat undermined by the conviction of the appellants, Lance Sergeant Spear and Lance Sergeant Hastie in *R v Spear, R v Boyd* [2001] QB 804. Their conviction was based on the evidence of Guardsman Lane and Guardsman Bright. In accepting the guardsmen's evidence, the court-martial must have disbelieved the evidence of their superiors in rank, the two sergeants. In any event, it is possible to fashion an argument—equally a matter of assertion—that officers who are familiar with service life and who are in close contact with service personnel of all ranks may well be less impressed by mere rank and better able to gauge the underlying realities than jurors confronted for the first time with officers or non-commissioned officers telling an apparently plausible tale. Viewed in this light, the specialised knowledge and experience of the members of a court-martial could be seen as a positive advantage rather than as a disadvantage. However that may be, I see no reason to think that, when duly directed by the judge-advocate, officers on a court-martial cannot properly assess the evidence and return a true verdict based on it. I therefore reject the appellants' argument on this point.

[86] The members of a court-martial perform a role in deciding sentence which is no part of a jury's function in the United Kingdom. I accept that, in determining sentence, the members will indeed have regard to such issues as the impact of the offence on service morale and discipline. They will, inevitably, be more aware of these effects than a civil judge would be. Therefore, while the safeguards of the independence and impartiality of the members should mean that they approach their verdict in much the same way as jurors in a civil trial, it cannot be assumed that, when passing sentence, the court-martial will necessarily give exactly the same weight to these service factors as would a Crown Court judge. The sentences which a court-martial passes may therefore not coincide exactly with the sentences which a civil judge would pass on the same facts. In my view that does not call the decisions of the courts-martial into question, either generally or in terms of art 6. Any difference in sentencing does not mean that the members are not independent or impartial, but merely that, though both independent and

impartial, they may assess the various factors differently. Even in the civil system it is recognised that judges or magistrates may use their knowledge of local conditions, such as the prevalence of a particular crime in a given area, in determining sentence. Similarly, in the sphere of professional discipline the courts acknowledge that a tribunal made up of senior members of the profession will have advantages in determining the appropriate penalty. It could not be suggested that, for this reason alone, in these cases the judge, magistrates or tribunal members are lacking in independence or impartiality. There is no more reason to accept such a suggestion in the case of the members of courts-martial. There are, besides, two additional points to bear in mind. The first is that the judge-advocate advises the other members on sentence and also has a vote on sentence. He will be able to bring to bear his informed view as a lawyer on what sentence would be suitable. The second safeguard is that any sentence imposed by the court-martial is subject not only to review by the reviewing authority but also to appeal, on the ground that it is not appropriate, with the leave of the appeal court. The members of the appeal court are civil judges and are in a position to correct any inappropriate punishment that the court-martial may impose by reason of the members' military background.

[87] All these matters must be kept in mind when considering the particular characteristics of the members of the court-martial to which the European Court attached importance in *Morris v UK* (2002) 34 EHRR 1253.

[88] The first was that the officer members had no legal training. That applies also in the present cases and indeed must apply in virtually all cases. As the briefing notes show, officers who may be called upon to sit on courts-martial are given some training by being allowed to sit and observe proceedings, including the members' deliberations. This should mean that, when they are eventually asked to sit, they should not find the procedures wholly unknown or strange, but it goes no further than that. While in *Morris v UK* the Third Chamber seem to have regarded the lack of formal legal training as a significant defect, as I have already noted, in *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 the European Court held that the Dutch Supreme Military Court was an independent and impartial tribunal, even though four of the six members were military officers with no legal training. Given the other safeguards which were in place in the present cases, I see no reason to conclude that the absence of legal training undermined the members' independence and impartiality.

[89] The European Court attached importance to the fact that the officers, other than the permanent president, remained subject to army discipline and reports. In so far as the members of the courts-martial in the present cases also remained subject to service discipline, they simply shared the characteristic of all serving members of the armed forces. It must have been equally true of the military members of the Dutch Supreme Military Court in *Engel v The Netherlands*. Moreover, the fuller information available to the House about the safeguards in place to protect the independence of the members of courts-martial shows clearly, in my view, that, just like the Dutch officers in *Engel v The Netherlands*, the officers in these cases would not have been under the command of any higher authority in their function as

members of the courts-martial. Indeed, as Mr Havers pointed out, contrary to the assumption of the European Court, there was even a formal legal bar to any superior officer trying to influence their decision, since this would have constituted the criminal offence of attempting to pervert the course of justice.

[90] It is true, of course, that, as in *Morris v UK*, so also in these cases, leaving aside the permanent presidents, the officers sitting on the courts-martial would have remained subject to reports. Lord Thomas indeed drew attention to a number of such reports where mention is made of the fact that, during the year in question, the officer concerned had sat as a member of a court-martial. In itself that must be unobjectionable since the information that the particular officer has had this experience may be relevant at some future date if, for instance, consideration is being given to appointing a permanent president. What would be objectionable would be any report which made reference, whether favourable or unfavourable, to an officer's decisions when sitting on a court-martial. But Lord Thomas could point to no report where this had been done. The only report which referred to an officer's performance in relation to a court-martial was one relating to Flight Lieutenant Hudson: 'Her foray into the court-martial arena has brought particular accolades for her thoughtful and incisive contribution to the legal process.' The report showed that Flight Lieutenant Hudson had acted not only as junior member on several courts-martial but also as assistant defending officer to an airman tried by a general court-martial. It appears that the comment may well have related to this second role. In any event the report makes no comment on any decision reached by Flight Lieutenant Hudson when sitting as a member of a court-martial. Indeed counsel for the respondents showed the House a number of statements from officers concerned with personnel matters who had read thousands of annual reports and had never seen mention of such a thing. That being so, again with the benefit of this more detailed information, I would not share the view of the European Court in *Morris v UK* that the independence and impartiality of officers sitting on courts-martial are compromised by the fact that they remain subject to the system of annual reports.

[91] For all these reasons I consider that those charged with administering the system of courts-martial have been at pains to put in place a series of practical safeguards which are designed to secure the independence and impartiality of those sitting on these courts. Nor is this surprising. There is not a little force in the point made by the appeal court in *R v Saunby* that, if service factors are to be seen as an aspect or function of the public interest, they will themselves require that the court-martial process should be, and should be seen to be, fair and impartial and, so far as possible, to achieve accurate results. Otherwise both servicemen and the public would lose confidence in it, with consequential effects on good order and discipline.

[92] Having regard in particular to the additional information which was not before the European Court, I would therefore hold that the safeguards built into the system are indeed such that no fair-minded and informed observer who had considered them would conclude that there was a real possibility that the courts-martial in these cases lacked independence or

impartiality in this respect. In other words they were, objectively, independent and impartial. I would accordingly reject the art 6 challenge based on the role of the officer members.

[93] In *Morris v UK* (2002) 34 EHRR 1253 at 1278–1279 the European Court went further, however, and held that the role played by the reviewing authority was in itself a reason for saying that the court-martial in that case had not been an independent and impartial tribunal:

> '[73] In relation to the applicant's complaints about the role played by the "reviewing authority", the Court recalls that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal". The principle can also be seen as a component of the "independence" required by Article 6(1). In [*Findlay v UK* (1997) 24 EHRR 221], the role played by the "confirming officer" under the pre-1996 Act court martial system was found to be contrary to this well-established principle.
>
> [74] In the present case, the applicant's sentence and conviction were subject, under changes introduced by the 1996 Act, to automatic review by the "reviewing authority". The Court notes that the authority was empowered to quash the applicant's conviction and the sentence imposed by the court martial. More importantly, it had powers to reach any finding of guilt which could have been reached by the court martial and to substitute any sentence which would have been open to the court martial, not being in the authority's opinion more serious than that originally passed. Any substituted verdict or sentence was treated as if it had been reached or imposed by the court martial itself.
>
> [75] The Court considers that the very fact that the review was conducted by such a non-judicial authority as the "reviewing authority" is contrary to the principle cited at paragraph 73 above. The Court is particularly concerned by the fact that the decision whether any substituted sentence was more or less severe than that imposed by the court martial would have been left to the discretion of that authority. The Court's concerns are not answered by the Government's argument that the existence of the review serves the interests of convicted soldiers such as the applicant, nor by the essentially fair procedure followed by the authority when conducting its review.
>
> [76] The Court is of the view that the fundamental flaws which it has identified were not corrected by the applicant's subsequent appeal to the Courts Martial Appeal Court, since that appeal did not involve any rehearing of the applicant's case but rather determined, in the form of a decision which ran effectively to two sentences, that leave to appeal against conviction and sentence should be refused.
>
> [77] For all these reasons, the Court considers that the applicant's misgivings about the independence of the court martial and its status as a "tribunal" were objectively justified.'

Although Lord Thomas referred the House to this aspect of the court's

decision in *Morris v UK* and submitted that it, too, would constitute a basis for allowing the appeal, he said, frankly, that he had difficulty in supporting the reasoning.

[94] The reviewing authority is, admittedly, an unusual institution. It does not operate like an ordinary court and, at a certain level of abstract theory, its existence could seem to be inconsistent with the charge against an accused being determined by only a system of 'tribunals'. That appears to be the way in which the European Court has treated it. But if, as the court indicates, the issue can also be characterised as relating to the independence of the court-martial, I find it difficult to see how the existence of this body affects that independence. It might, of course, be different if there were any suggestion that the decisions of the courts-martial were influenced by the existence of the reviewing authority, for example, because they tended to convict more readily or to impose heavier sentences in the knowledge that the reviewing authority could always quash them. But Lord Thomas made no such submission and there is nothing whatever in the information before the House that would support it. On the contrary, Lord Thomas accepted that the provision for review could only be to the benefit, and not to the detriment, of someone who had been convicted. In particular, it could provide a quick and simple means of correcting a mistaken decision by a court-martial.

[95] The reviewing authority is a creation of the 1996 Act to replace the role of the confirming officer and of the reviewing authorities to whom a convicted person could formerly present a petition. The procedure adopted by the new reviewing authority is more transparent: the convicted person is informed of the advice of the judge-advocate and is given not only the decision of the reviewing authority but the reasons for it (see r 83). Moreover, the powers of review are particularised in the statute and, unlike the position before 1997, the convicted person can appeal against sentence. Formerly, he could appeal only against conviction, with the result that the final say on sentence lay with a non-judicial body which did not give reasons for its decisions.

[96] In reaching its conclusion on this point the European Court was particularly concerned by the fact that the decision as to whether any substituted sentence was more or less severe than that imposed by the court-martial would have been left to the discretion of the reviewing authority. When making this observation the court does not appear to have been referred to, or to have had in mind, the coda to s 71(1) of the 1955 Acts which establishes, as a matter of law, the relative positions of particular punishments in the hierarchy of punishments set out in the subsection and which deals specifically with how detention and imprisonment are to relate to one another. Particularly when these provisions are taken into account, it is hard to see how, in reality, there is likely to be any scope for the reviewing authority to exercise the kind of discretion that appears to have troubled the European Court. In truth, counsel could refer to no case where any problem as to the relative severity of two punishments had arisen. If, by chance, however, the reviewing authority were to go wrong on the point, the person affected could ask the appeal court for leave to appeal.

[97] In all the cases under appeal except that of Dodds, the reviewing

authority did not intervene, but the appellants were granted leave to appeal to the appeal court. Where they had other arguable grounds of appeal relating to conviction or sentence, the appeal court dealt with them, as well as with the art 6 grounds, in their reasoned judgments. In these circumstances I am, with due respect to the decision of the European Court in *Morris v UK*, unable to see why the mere existence of the reviewing authority, or the reduction of Dodds' period of detention, should lead to the conclusion that the determination of the charges against the appellants was not reached by a 'tribunal' that was 'independent and impartial' for the purposes of art 6. I would therefore reject the appellants' art 6 argument based on the role of the reviewing authority.

[98] Lord Thomas originally presented a separate argument to the effect that the decisions of the prosecuting authority to prosecute the appellants before a court-martial were themselves an infringement of the appellants' art 6 rights. In their judgment in *R v Saunby* the appeal court rejected that argument and accepted the respondents' opposing argument that such decisions by a prosecutor lie outside the scope of art 6(1). Before the House Lord Thomas modified the appellants' contention and argued that the infringement of art 6 arose out of the congruence of unfair factors influencing the decision to prosecute and unfair factors influencing the court-martial's decisions on conviction and sentence. He therefore accepted that he could not succeed on the prosecution point unless he succeeded in persuading the House that the courts-martial had not themselves been independent and impartial—in which event, of course, on his own submission, the appeals would have to be allowed anyway. On that approach any point relating to the decision to prosecute was subsumed in the issue relating to the fairness of the court-martial proceedings. That being so, since I have found that the court-martial proceedings did not infringe the appellants' art 6 rights, I would also reject the appellants' art 6 argument relating to the decisions to prosecute them.

[99] In these circumstances it is unnecessary to consider in these appeals to what extent art 6 applies to the decision to prosecute. In this connection Mr Havers drew the attention of the House to certain passages in the opinions in *Montgomery v HM Advocate, Coulter v HM Advocate* [2001] 2 LRC 569, but any consideration of the point would need to take account also of what was said in *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 LRC 612 and *Millar v Dickson (Procurator Fiscal, Elgin)* [2001] UKPC D4, [2002] 1 LRC 457. I would wish to reserve my opinion on the point. Certain remarks of the appeal court in *R v Saunby*, when dealing with it in their judgment, might be open to the interpretation that fairness, independence and impartiality were more readily to be expected of courts than of prosecutors for whom the sufficiency of the evidence and the public interest would be the guiding values. An unduly narrow approach of that kind to what is expected of a prosecutor would not, however, sit easily with the familiar requirement that he should act fairly and as 'a minister of justice' (see *Randall v R* [2002] UKPC 19 at [10], [2002] 1 WLR 2237 per Lord Bingham of Cornhill citing *Boucher v R* (1954) 110 Can CC 263 at 270 per Rand J). In reserving my opinion on the merits of the argument as to the scope of art 6, I would therefore not wish to

be thought to have silently endorsed the observations of the appeal court in this regard.

[100] For the respondents Mr Havers submitted that, even if the House had come to the conclusion that the members of the courts-martial had not been, objectively, independent or impartial, it would not necessarily have followed that the appeals should be allowed and the appellants' convictions quashed. The appeals against conviction might still have been refused if the evidence against the appellants had been sufficiently powerful. Had it been necessary to decide the point, I would have rejected this submission. The Crown, which always acts in the public interest, has no interest in maintaining a conviction flowing from the decision of a court which is not seen to be independent and impartial. Such a conviction should be quashed (see *Millar v Dickson (Procurator Fiscal, Elgin)* [2002] 1 LRC 457 at [16], [65], [83]–[88] per Lord Bingham, Lord Hope and Lord Clyde respectively). Depending on the circumstances, the appropriate course may be to grant an order under s 19(1) of the Courts-Martial (Appeals) Act 1968 authorising a retrial.

[101] For these reasons, as well as for those given by my noble and learned friend Lord Bingham, I would refuse the appeals.

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