

Two Swords and Two Standards

Ann Lyon¹

It is an article of faith among the majority of United Kingdom lawyers that the criminal jury system is more capable than any other of ensuring that the guilty are convicted and the innocent acquitted. Any proposals to restrict the availability of jury trial meet vigorous opposition, and politicians seeking to do so always protest their commitment to the principle of jury trial and their confidence in the reliability and good sense of jurors.² Similarly, case law shows that the European Court of Human Rights, applying Article 6 of the European Convention to jury systems in the UK and some continental jurisdictions, operates from the premise that such a system is inherently reliable, even where there is reason to suspect actual prejudice on the part of jurors.³

¹ Lecturer, Department of Law, University of Wales Swansea. I am grateful to my colleague Helen Quane for reading this article in draft and for her many helpful comments.

² C.f. Peter Thornton QC: 'Trial by Jury: Fifty Years of Change' [2004] Crim LR 683-701. Examples of politicians' statements of faith in juries, but one may cite the recent case of Bridget Prentice, Parliamentary Under-Secretary of State for Constitutional Affairs, in replying to the question, "Why is it assumed that British juries are incapable of doing what American juries can do perfectly well [hearing complex fraud cases]?" asked by Eric Forth, Conservative MP for Bromley and Chislehurst. "No such assumption is made at all. We have every faith in **juries**. We believe that they do an excellent job, and we intend that that should continue." Commons Debates 5 July 2005, col.164.

³ *Pullar v United Kingdom* (1996) 22 EHRR 391, @.405, *Gregory v United Kingdom* (1997) 25 EHRR 577, @.593-95.

Yet a jury is only as capable as the individuals who comprise it, and the composition of any jury is decided on an arbitrary basis, deliberately so. The length of a proportion of trials – often those involving the most complex issues - is measured in months rather than days or weeks, which may cause considerable practical difficulties for the jurors involved, not least loss of income or, indeed, threats to employment resulting from a lengthy absence.⁴ If ideology – that it is the birthright of every Englishman to be tried by his peers - is stripped away, one may legitimately ask whether twelve people of widely differing backgrounds, intelligence and education, chosen at random and thrown together for one occasion, are in all or even the great majority of cases necessarily going to reach the correct verdict on the law and evidence before them, however well directed by the judge. Given current prohibitions on researching the inner working of juries,⁵ such information as becomes available about decision-making within juries frequently arises by accident, and only when suspicion arises of some irregularity.⁶ We cannot know how juries ‘typically’ arrive at their verdicts, and

⁴ On 23 March 2005 the BBC News reported the collapse of a trial involving alleged fraud in relation to the acquisition of contracts to build the Jubilee Line extension, after 21 months and an estimated cost of £60 million. The Attorney General, Lord Goldsmith, announced a public inquiry into the collapse, which was triggered in part by difficulties with the jury; illness and paternity leave among jurors had led to lengthy adjournments, and the jury was reduced to ten members after one juror became pregnant and another was arrested for benefit fraud.

⁵ In her oral answers on 5 July 2005 Bridget Prentice reported that the Government had no plans to remove this prohibition. Commons Debates, 5 July 2005, col.164.

⁶ The current position on the consideration of jury deliberations is set out by the House of Lords in *R v Smith (No.2)*, *R v Mercieca* [2005] UKHL 12, *per* Lord Carswell:

1) The general rule is that the court will not investigate, or receive evidence about, anything said in the course of a jury’s deliberations while they are considering their verdict;

so form a considered view on the reliability of the jury system *as a system*, as distinct from the reliability of a specific jury in a decided case.

By contrast, neither the European Court nor the domestic courts show similar delicacy towards the court-martial system, the subject of several Article 6 challenges in recent years. In *Findlay v United Kingdom* the European Court found an appearance of absence of independence and impartiality for Article 6 purposes,⁷ based on the multiple roles of a non-legally-qualified ‘Convening Officer’ at different stages of the court-martial process. As a result of *Findlay*, the Convening Officer was abolished, his functions divided among separate bodies, and a requirement expressly imposed that these functions be carried out by legally-qualified personnel or on the basis of legal advice.⁸ Since then, attention has shifted to ‘the court’, the panel of serving

2) An exception may arise if an allegation is made which tends to show that the jury as a whole declined to deliberate at all, but decided the case by means such as drawing lots or tossing a coin;

3) The common law has recognised exceptions to the rule, confined to situations where the jury is alleged to have been affected by extraneous influences, such as contact with persons who may have passed on information which should not have been before the jury;

4) Contempt of Court Act 1981 s.8(1) is not a bar to the court itself carrying out necessary investigations of such matters as bias or irregularity in the jury’s consideration of the case.

In *R v Karakaya* [2005] EWCA Crim 346 the fact that during an overnight adjournment one of the jurors in a trial for rape had downloaded articles dealing with the credibility of rape complainants and taken them into the jury room when deliberations were resumed only emerged because the documents were left in the room after the verdict and were found by the court staff when tidying up.

⁷ (1995) 21 E.H.R.R., CD7-20.

⁸ The changes are contained in the Armed Forces Act 1996, which came into force on 1 April 1997. See Lyon: ‘After *Findlay*: a consideration of some aspects of the military justice system,’ (1998) *Crim LR* 109.

personnel who determine the guilt or innocence of the defendant, and, with the Judge Advocate, a civilian holding office under the Judge Advocate General (JAG) and who conducts the trial,⁹ pass sentence.

Background

The role of the court combines those of magistrates and jurors. In the Army and RAF there are two types of court-martial. A District Court-Martial (DCM), composed of an officer of at least the rank of Major (Army) or Squadron Leader (RAF) as President and two members, may try offences for which the maximum sentence is two years' imprisonment. A General Court-Martial (GCM), composed of President of at least the rank of Colonel (Group Captain),¹⁰ and four members, may try any offence except those set out in Army Act 1955 and Air Force Act 1955 s.70(4).¹¹

⁹ Since April 1997 the role of the Judge Advocate has mirrored that of the judge in Crown Court trials, except that he does not sentence alone. Until *Grieve v United Kingdom*, App. No. 57067/00, Judge Advocates in Naval Courts-Martial were serving officers qualified as barristers. Since then the civilian Judge Advocates who already acted in Army and RAF courts-martial have conducted naval trials. Most Judge Advocates are qualified to the same level as circuit judges and sit in the Crown Court as Recorders or Assistant Recorders.

¹⁰ See QR 6.102.

¹¹ Murder, rape and certain other serious offences when committed within the United Kingdom, which are triable only by the ordinary courts. The section numbers are the same in both Acts. Hereafter all references to the Army and Army Act 1955 should be taken also to refer to the RAF and Air Force Act 1955 unless the contrary is specified.

The President is now responsible only for the ‘ceremonial’ aspects of the trial.¹² He must ensure that the trial befits the customs and standards of the service, that officers under instruction (see below) take no part in the court’s deliberations, and acts as ‘foreman of the jury’ in determining guilt.

Officer members must have at least two years’ commissioned service (three years for a GCM), and should have attended at least one court-martial as officers under instruction, who, under oath of secrecy, observe the court’s deliberations on both verdict and sentence. Study of military law is also part of normal officer training. Generally, an officer member is at least a Captain.¹³ By the Courts-Martial (Army) (Amendment) Rules 2002,¹⁴ and parallel legislation for RAF and naval courts-martial,¹⁵ warrant officers may sit as members, except in trying commissioned officers. A GCM trying a non-commissioned serviceman is now composed of a President, two commissioned officers and two warrant officers, a DCM a President, a commissioned officer and a warrant officer. All cases discussed here were tried before this change.

A Naval Court-Martial (NCM) comprises a Captain as President, four to eight serving officers of at least three years’ commissioned experience and at least the rank of Lieutenant, or Warrant Officers, and the Judge Advocate. President and members

¹² Courts-Martial (Army) Rules (SI 1997/169) r.32(1), r.33.

¹³ If the Accused is a commissioned officer, the President must be of rank higher than his, and the members of at least equivalent rank.

¹⁴ SI 2002/230.

¹⁵ SI 2002/229 and 231.

must have attended one court-martial under instruction, and a Divisional Officers' Course including instruction on summary trials.

Following conviction all sentences are subject to review by a Reviewing Authority which, acting with the benefit of advice from the Office of the JAG, may leave the sentence unchanged, reduce or quash it. It is open to a person convicted by court-martial to bring specific facts to the Reviewing authority by way of petition. Appeal is to the Courts-Martial Appeal Court, composed of Lord Justices of the Court of Appeal, against conviction and sentence, or against sentence alone.

It should be noted that in recent years the acquittal rate in contested courts-martial has been consistently higher than in Crown Court trials. The European Court accepted statistics in *Cooper v UK*¹⁶ that the acquittal rate in RAF courts-martial in 2002 was 52% and in *Grieves v UK*¹⁷ that that in naval courts-martial, the most criticised form, was 59%. Figures for Crown Court trials during the period 1998-2002 varied between 37.4% and 44.2%.

Article 6

Early case law from Scotland, where the European Convention became part of domestic law in 1998, suggested that UK courts might well take a narrow view of the concept of an independent and impartial tribunal under Article 6. This was most obvious in the decision in *Starrs v Ruxton*¹⁸ on temporary sheriffs, who were

¹⁶ Application No.48843/99, para.77.

¹⁷ Application No.57067/00

¹⁸ [2000] SLT 42

appointed by the Lord Advocate, the senior Law Officer of the Crown in Scotland, for twelve-month terms, with the possibility of renewal, to supplement sheriffs holding permanent office in trying criminal cases in Scotland. Evidence was accepted that appointment as a temporary sheriff was in practice often used as a means of assessing an individual's suitability for permanent appointment. The Scottish High Court concluded that the temporary sheriffs' lack of security of tenure, and their owing their original appointment and any renewal of appointment to the Lord Advocate, meant that there was the possibility, or the appearance of a possibility, that they might not hear the cases before them with absolute impartiality. This was so although there was no suggestion that the Lord Advocate had ever exercised or not exercised his powers in relation to temporary sheriffs for any but unimpeachable reasons.

Permanent Presidents

. From 1941 it became customary for DCM Presidents to be appointed from a pool of Permanent Presidents, each of at least the rank of Major (Squadron Leader RAF), and given two weeks' specialist training at the Office of the JAG. Appointment as a Permanent President is a final posting before retirement, typically for four years. It does not require legal training or experience, but being a member of a court-martial is a normal part of any officer's professional development. Appointments to individual courts-martial are made by the Army Court Service (ACS) for the Army, or Court-Martial Administration Unit (CMAU) for the RAF. GCM Presidents are also appointed by the ACS but not from this pool.

Starrs v Ruxton formed part of the jurisprudential background to *R v McKendry*,¹⁹ where Judge Advocate Pearson ruled that the involvement of a Permanent President in a DCM violated Article 6, because:

- a) Permanent Presidents were not appointed for sufficient time to be fully independent;
- b) They were inappropriately trained;
- c) They could be removed from their post on arbitrary grounds;
- d) The practice whereby they were reported on by higher military authority affected perceptions of their independence.

Employment of Permanent Presidents was temporarily suspended, but in *R v Spear and Hastie*, *R v Boyd*,²⁰ both involving appeals from convictions by earlier DCMs headed by Permanent Presidents, the CMAC rejected an Article 6 challenge based on the *McKendry* ruling, by giving greater weight to established practice than had the Scottish Higher Court. Not only was there no evidence of any subjective bias arising from the use of Permanent Presidents in DCMs, but practice in relation to their employment, in particular that they enjoyed effective security of tenure and lived their professional lives largely in isolation from their Service, provided the objective guarantees of independence and impartiality that European jurisprudence required.²¹ The CMAC also took a robust approach to the appellants' arguments that a Permanent

¹⁹ 6 March 2000, unreported.

²⁰ [2001] EWCA Crim 3. John Spear and Philip Hastie, both Lance Sergeants in the Irish Guards, were jointly convicted of assaulting a Guardsman (Private) in their company, occasioning him actual bodily harm; David Morton Boyd, an RAF Chief Technician, was convicted of assaulting a fellow senior NCO, also occasioning him actual bodily harm.

President's relatively junior rank would make him susceptible to general 'Service influence', and that his seniority in rank and experience over the members would tend to make the latter defer unduly to his views (and hence to Service influence).

[Counsel's second] argument does not go to the particular position of the PPCM [Permanent President of Courts-Martial] at all, but rather to the differences in rank among the members of the court-martial, whether the President is a PPCM or not. ...If the argument were right, it would presumably mean that Article 6(1) required that the members of a court-martial should be officers of the same rank. That cannot be the law. The notion, were it accepted, that it is reasonable to fear that between joint decision-makers of different rank there is a systematic likelihood that the more junior may be unduly influenced by the perceived views of the more senior would, surely, be an unlooked for and unwelcome side effect of the Convention's beneficent regime. We consider it perfectly reasonable to suppose that junior officers would regard it as their duty to speak with their own voice, and that the modern culture of the Service would promote that very point of view. We do not think it would be reasonable for the accused soldier to entertain any different perception.

The CMAC added that Counsel's first point was in effect an allegation of actual bias, rather than an allegation that there might be an appearance of bias.

It is not, or not only, a matter of the appearance of the thing or the presence or absence of objective guarantees. It is a delicate way of saying that such

²¹ See *In re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700.

medium-ranking officers are relatively prone to take a prosecution line. That is quite a serious allegation, for which there is not a whisper of any supporting evidence. And in our view it is simply patronising to suggest that an officer in the rank of lieutenant-colonel, or his equivalent in the Royal Air Force, will have his judgement on the concrete facts of an individual case affected by anything so amorphous as “general army influence”.

Morris v United Kingdom,²² represented a ‘root and branch challenge’ to the court-martial system as a whole. At a DCM on 28 May 1997, Dean Morris, a Trooper (Private) in the Life Guards pleaded guilty to being absent without leave for a period of three and a half years, and was sentenced to nine months’ detention and dismissal from the service. His petition to the Reviewing Authority was rejected,²³ leave to appeal to the CMAC against conviction and sentence was refused and he therefore made application to the European Court on the basis that the proceedings contravened Article 6(1) in that entire structure of the court-martial system lacked the

²² Application No.38784/97.

²³ After his arrest, Morris alleged that he had gone absent as a result of an assault by an NCO in his unit, but withdrew these claims after an investigation by the Ministry of Defence Police found no evidence to substantiate them. He was offered legal aid for legal representation subject to a contribution but elected not to pay the contribution and to be represented by a non-legally-qualified ‘defending officer’ from his unit. His petition to the Reviewing Authority alleged that the lack of legal representation and the lack of knowledge on the part of his defending officer meant that a defence of duress had not been put to the court-martial, nor had the allegations of assault made known in mitigation of sentence. Leave to appeal was refused on three grounds; that a defence of duress was not available, since in all the circumstances the Applicant could never have reasonably believed that he

necessary independence from the military chain of command; the changes made as a result of *Findlay* were cosmetic and did not go far enough to remedy the bias inherent in the structure. A court composed of army officers trying charges brought by the army could not constitute an independent and impartial tribunal, particularly in relation to purely disciplinary offences such as absence without leave. Further, the persons and bodies involved in the court-martial and procedures leading up to it were all wholly or partly controlled by the Adjutant General,²⁴ who was himself subordinate to the Defence Council. For the purposes of this paper:

- 1) Although the appointment of Permanent Presidents to individual DCMs was the responsibility of the Courts-Martial Administration Officer (CMAO, now ACS), the initial appointment of an individual as a Permanent President was made by the ordinary chain of command and under the normal criteria governing ‘staff’ appointments;
- 2) The Permanent President always outranked the members of the court, and the permanence of his appointment gave him ‘an apparent experience and authority to which the junior officers were bound to defer’;
- 3) In selecting officers as members of individual courts-martial, there was nothing to prevent the CMAO from making his choice on the basis of what he considered to be the interests of the Service.

The European Court rejected the submissions concerning Permanent Presidents, ruling that their role in fact represented an important guarantee of independence from

would be killed or seriously injured if he did not go absent; that he had been properly advised to plead guilty, and that his sentence was not manifestly excessive.

²⁴ Effectively the Army’s Director of Personnel.

the chain of command, but ruled that a breach arose from the use of other serving officers as members. It noted that courts in which service personnel tried other service personnel featured in the legal systems of many Member States. Such courts were capable of compliance with Article 6(1) provided there were sufficient safeguards to guarantee independence and impartiality. They referred approvingly to the Dutch Supreme Military Court, comprising two civilian judges and four serving officers,²⁵ and drew attention to the similarities between those officers and Permanent Presidents. All were in their last appointments before retirement; in exercising judicial functions they were not under command of any higher authority and had no duty to account for their acts to the service establishment. According to *Campbell and Fell v UK*,²⁶ an absence of formal recognition of judges' irremovability during their tenure did not automatically imply lack of independence, provided such irremovability was recognised in fact and other guarantees were present. In reality, the presence of the Permanent President was a significant guarantee of independence.²⁷

²⁵ *Engel v The Netherlands*, 18 June 1976, Series A No.22.

²⁶ 28 June 1984, Series A, No.80 @80.

²⁷ Given this conclusion, there is a certain irony in the absence, as yet, of a challenge to the decision of a GCM, which deals with more serious matters than a DCM and has unlimited sentencing powers, based on the *absence* of a Permanent President. Currently, only Colonels are eligible to be appointed as Presidents of GCMs; some of these may be in their last appointments before retirement, but others may be actively seeking further promotion or an extension of their service beyond the normal retirement date. Given the relatively small incidence of GCMs in comparison with DCMs, it is clearly not a sensible use of scarce resources to create a pool of full-time Permanent Presidents from among serving Colonels, but it may be suggested that, in order to forestall an Article 6 challenge on this basis, a policy should be adopted of restricting appointment as GCM Presidents to Colonels (and, where the defendant's rank makes this necessary, more senior officers), in their final appointments before retirement.

By contrast, court-martial members were appointed on an *ad hoc* basis, returning to normal duties after the proceedings. Although this did not cast doubt on the independence of the court, it made the existence of safeguards against outside pressure more necessary. The presence of the Judge Advocate was a significant guarantee, but insufficient to exclude the risk, particularly as the members remained subject to normal service discipline and reports, and there was no formal prohibition on outside influence. The members' position was not in that respect comparable with that of civilian jurors.

That the European Court concluded that the Service authorities took insufficient care to avoid the possibility of members coming under 'Service' influence when carrying out court-martial duties, and that there was no 'formal' prohibition on such influence, is surprising when the relevant procedures are analysed in detail. Such analysis took place when the appeals in *Boyd, Spear and Hastie*, and several other cases were heard by the House of Lords (Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Lord Steyn, Lord Hutton and Lord Scott of Foscote) as *R v Saunby*,²⁸ and by the European Court in *Cooper v United Kingdom*.²⁹

Court-Martial Members and Jurors

Some six weeks before any Crown Court trial begins, a jury 'pool' for service at that time, though not for a particular trial, is chosen from among those eligible for jury service - *prima facie* all persons aged from eighteen to 70 appearing on the electoral

²⁸ [2002] UKHL 31.

²⁹ App. No. 48843/99. Cooper was appealing from a conviction for theft by an RAF DCM.

register³⁰ - in the geographical area where the trial will take place. In most cases this is also the area in which the offence occurred.³¹ On receiving a jury summons individuals may seek exemption from service at that time, but at this stage they are not made aware of the specific trials covered by the summons, making it impossible for them to be excluded on the grounds of personal knowledge of defendants or witnesses until they report for their service.

At the relevant time in all cases considered here, court-martial members were chosen from databases of volunteers kept by the ACS and CMAU. Although there was no requirement for an officer to volunteer, the great majority did so on completing the necessary service. All officers and warrant officers with such service are now placed automatically on the database, except specialist legal officers and chaplains. Selection from the database is made at random, after excluding not only all officers involved in the procedures preliminary to the court-martial - the accused's Commanding Officer,

³⁰ However, persons aged 66-70 are absolutely entitled to be excused.

³¹ According to the Jury Central Summoning Bureau, each Crown Court has a defined area from which it selects jurors, based on the requirement in s.2(2) of the Juries Act 1974 that regard should be had to 'the convenience of the persons summoned and their place of residence, and in particular to the desirability of selecting jurors within reasonable daily travelling distance of the place where they are to attend'. The Crown Court Manual sets a limit of 1.5 hours travelling each way by public transport. Each Court's 'catchment' area is made up of a number of postcode areas, or partial areas, based partly on public transport networks. For example, Swansea Crown Court's area is postcodes SA1-SA13, which covers the city itself, together with the neighbouring towns of Neath and Port Talbot and a rural hinterland. London is treated rather differently as jurors for Old Bailey trials are drawn from the combined catchment areas of all twelve London courts.

members of the Higher Authority involved in the case,³² investigating officers and all other officers involved in inquiring into the charges - but any officer or warrant officer,³³ serving under the command of the Higher Authority, that is, within the same chain of command as the defendant,³⁴ as well as all those from the defendant's unit.³⁵ In the RAF, there is a strong recommendation that the President and members should be drawn from different RAF stations.

Thus, in courts-martial, in sharp contrast to jury trials, every effort is made at the outset to distance the President and members from the specific milieu in which the defendant moves,³⁶ and thus from 'local' influences.

³² I.e. officers on the staff of the Brigade Commander or Air Officer Commanding who referred the case as suitable for court-martial.

³³ 1955 Act s.84C(4).

³⁴ I.e. within the same Brigade (Army) or Group (RAF). A Brigade or Group is a combination of units under the command of a Brigadier or Air Vice Marshal. The number and size of the units concerned may vary quite widely, but a Brigade or Group will contain several thousand personnel.

³⁵ Taken from RAF Rules r.17.

³⁶ There is a decided reluctance in the civilian courts to depart from the norm of selecting jurors resident in the area in which the trial takes place. It was widely reported after changes in the law removing the blanket exemption of lawyers and certain other professional groups from jury service, that a London barrister with a flourishing criminal practice was summoned for jury service in London and excluded from a succession of trials because of his previous dealings with the lawyers involved. He made the eminently sensible proposal that he be permitted to carry out his jury service in a part of the country where he did not practise, but this was refused. See Marcel Berlins: 'Taking discrimination as read,' *The Guardian*, 22 June 2004.

It may also be noted that court-martial members are in practice unlikely to be under the age of 25, and have had the opportunity to develop a degree of ‘worldly wisdom’ denied to those younger. They may also be considerably better educated than many jurors. Direct entry to commissioned rank now requires two ‘A’ levels; officers commissioned from the ranks, and warrant officers, may not have traditional academic qualifications, but have reached equivalent educational standards during their service, and have high levels of practical intelligence as well as considerable experience of the world.³⁷ In particular, given the operational commitments of the British forces in recent years, many Presidents and members have experience of active service and the unique pressures it imposes on personnel and their families. They are also more likely than many jurors to have experience of the types of cases they are hearing – most commonly assaults and thefts – and the circumstances in which they are committed.

No minimum level of education - or literacy or understanding of English - is normally asked of jurors, and these may vary considerably between members of the same jury. Indeed, recent legislation aims to open jury service to everyone between eighteen and 70, unless they have been sentenced to more than five years’ imprisonment, or to any period of imprisonment within the last ten years, or suffer from mental handicap or

³⁷ A serviceman is highly unlikely to reach warrant officer rank after less than fourteen years service; typically he will have around fifteen years service and be in his mid-30s when promoted to Warrant Officer Class 2. To be eligible for promotion to Sergeant, a soldier must pass an educational exam of GCSE standard, and for promotion to Warrant Officer Class 2 there is a further exam at ‘A’ level standard (similar requirements in the RAF and Royal Navy). A serviceman may be commissioned from the ranks at any stage, but a significant proportion of army officers risen from the ranks have been granted commissions after serving as warrant officers.

mental illness.³⁸ Not only must this affect the ability of a jury to deal with evidence and issues of law, it has implications for the way in which jurors work together in reaching a verdict. Given the restrictions on research, the 'group dynamics' of juries remain obscure, but it is not unrealistic to suppose that personality clashes, groups of jurors 'ganging up' on others, certain individuals opting out of discussions and others becoming dominant by reason of force of character, must occur from time to time. The President and members of a court-martial are likely to make a much more homogenous group; as the numbers are much smaller, there is also less danger of their splitting into sub-groups.

Some weeks before the court-martial in which they are involved, President and members are sent standard Briefing Notes, and a list of prosecution witnesses; they are asked to notify the ACS if any of these are known to them, and will then be excluded from that trial. They are also instructed that if at any subsequent stage they become aware that a person involved in the trial is known to them they should inform the Judge Advocate immediately.

The content of the Army and RAF Briefing Notes was considered with approval in *Saunby* and *Cooper*. Both versions set out the procedure at each stage of the court-martial; they repeatedly stress the importance of the members maintaining their independence from service influences and detail the mechanisms which ensure this. The seriousness of their role is strongly emphasised, as is the need for the court to reach a decision solely on the basis of the evidence before them, and to cast any extraneous influences from their minds.

³⁸ Criminal Justice Act 2003 s.321 and s.33.

The Briefing Notes give guidance on deliberations, on both verdict and sentencing. The President should normally initiate discussion on guilt or innocence, ensuring that every member gives his opinion, on each charge separately and in ascending order of seniority. A unanimous decision is preferable, but a majority may decide the issue. After a decision is reached, the President should remind any members overruled by the majority that they must adopt the finding of the court, and previous views on guilt or innocence should not influence decisions on sentencing.³⁹ When deliberating on sentence, the Judge Advocate initiates discussion and informs the members about punishments and sentencing principles. Sentence may be determined by majority if necessary. Again, opinions should be given orally in ascending order of seniority. The Judge Advocate should decide where he votes in the order. Where there is equality of votes, the President has a casting vote.⁴⁰

Contrast the pamphlet sent to prospective jurors with the jury summons and the video shown to them at the beginning of their service. These concentrate largely on administrative matters, such as procedures for obtaining reimbursement of expenses, and very much ‘play down’ the seriousness of their role, ‘in order not to frighten them off,’ one jury bailiff admitted to me. Of fourteen pages of text in *You and Your Jury Service*, eight deal with purely administrative matters, three with court procedure, and only two full pages with deliberations and warnings about the requirements of impartiality and secrecy. In respect of deliberations, *You and your Jury Service* is very non-specific (@9):

³⁹ Briefing Notes para.38.

⁴⁰ Briefing Notes para.25.

When the judge has summoned up, an usher will take you and the other jurors to the jury room to decide your verdict. You may take to the jury room:

- Any notes you have made [during the trial]
- A copy of the indictment, if you have been given one
- Any exhibits you have been given

At some stage you and the other jurors must choose someone to be the foreman or forewoman. This juror will be in charge of your discussions in the jury room and speak for the jury when you return to the courtroom.

The great majority of jurors have no previous experience of jury service, and some may lack experience of reaching a collective decision on any matter of major significance. *You and your Jury Service* gives no guidance which might assist. For example, ensuring that all twelve jurors participate fully in the discussions is left entirely to the consciences and personalities of the jurors themselves. There is also no guidance on the basis on which a foreman should be chosen. The Briefing Notes are much more specific, instructing the President on what he should do and the members on what to expect. The President will certainly have experience of chairing meetings as well as previous court-martial experience. In addition, President and members have the great benefit of having observed deliberations in a previous court-martial as officers under instruction. Admittedly, the Court Service website offers much useful information for prospective jurors, of similar rigour to the Briefing Notes, but this is not provided as a matter of routine. Instead, the prospective juror must take the initiative in seeking it out, and must have IT access, and sufficient IT skills to find it.

During the trial, jurors live at home and travel to and from court daily. They are kept apart from others in the court building during the day's proceedings, but although they are instructed not to discuss the proceedings with family, friends or the press, and warned that it is an offence for anyone outside the jury to attempt to influence them,⁴¹ and that they will be liable for contempt if they reveal the content of deliberations,⁴² no active steps are taken to prevent this except in specific and unusual cases. The jury system relies on jurors paying heed to the warnings given in the leaflet and by the trial judge.

By contrast, court-martial members are normally at a distance from home and parent unit. They are accommodated in hotels, in sharp contrast to the normal Service practice where visiting personnel stay in the messes appropriate to their rank and are made welcome. Indeed, they are specifically forbidden to have any contact with station personnel until the trial is over. Again, the Briefing Notes are precise on this issue.⁴³ It may be strongly argued that this isolation from the normal environment concentrates the minds of President and members on the seriousness of their role and need to observe the restrictions placed on them. In any event, it can also be strongly argued that the ingrained habit of discipline means that service personnel are more likely to 'follow orders' in this and other regards than are jurors.

Jurors used to be sent to hotels for the night when deliberations on verdict were not completed in one day. This no longer happens as a matter of routine, but only at the

⁴¹ *You and your Jury Service* p.1.

⁴² *Ibid.* p.10.

⁴³ Briefing Notes para.48.

discretion of the judge, a discretion rarely exercised, even in a case such as that of the Soham murders, which aroused unusually strong emotions and attracted saturation media coverage, much of it of a kind to inspire feelings of revulsion against the defendants. It is also not uncommon for a judge to complete his summing-up on a Friday, and for the jury to have a weekend at home before beginning deliberations on a Monday. It is rare for a court-martial not to complete deliberations in a single day, but if this is not the case the isolation of the President and members would be continued.

A double standard?

There is no evidence that the President and members of courts-martial are in reality inherently biased against the defendant and his case, consciously or unconsciously, whether in consequence of ingrained habits of discipline, desire to maintain discipline for the good of the service as a whole, or career ambition. Further, the decision in a case such as *Spear and Hastie*, where two Lance-Sergeants (Corporals) were convicted on the evidence of two Guardsmen (Privates), goes against the common assumption that the court tend to assume that witnesses of higher rank are more likely to be telling the truth than their juniors.

Suspicion directed at the court-martial system arises entirely from ideology, that the trying of service personnel by courts composed of their military superiors must necessarily create bias against the defendant. The steps required before courts applying Article 6 accept that 'objective guarantees' of independence and impartiality exist to override this appearance mean in practice that there is less danger of *actual* bias, or failure to deliver a verdict solely based on law and evidence, than is the case

with a jury. This can be seen when *Cooper* is compared with Article 6 cases involving juries.

In *Cooper*, following *Morris*, the mere fact that the court was composed of serving officers under military discipline and subject to an annual appraisal and report system which affected their career prospects created an appearance of bias even though their deliberations took place in secret, their involvement in the court-martial could not be the subject of reports, and detailed procedures were in place to protect the court from ‘service influence’ of any kind. In *Pullar v United Kingdom*⁴⁴ that one of the jurors worked for the same small firm in which one of two principal witnesses was a partner did not create any suspicion of subjective bias, since the court could not inquire into what had happened in the jury room and thus there was no positive evidence to displace the presumption of absence of such bias. It seems that the Court of Session, and the European Court, took a somewhat cavalier attitude to the issue of bias,⁴⁵ concluding that any appearance of objective bias was dispelled by the normal low-level guarantees of objectivity; the oath taken by the jurors, the judge’s directions and the fact that this juror was only one among fifteen. However, although the juror was but a junior employee in the witness’s firm, under notice of redundancy at the time of the trial, the firm had fifteen employees, the witness was a familiar figure to the juror, and they were on sufficiently friendly terms to walk together to the court on the first day of the trial. It is submitted that if the juror regarded the witness as a ‘good boss’,

⁴⁴ *Pullar v United Kingdom* (1996) 22 EHRR 391.

⁴⁵ As did the Clerk of Perth Sheriff Court, where the trial took place, since both juror and witness reported their acquaintanceship after they became aware of one another’s involvement, but their concerns were brushed aside.

the way in which his mind assimilated the witness's evidence must have been affected, probably unconsciously. Subsequently, this must have affected his involvement in deliberations and verdict. Further, although this juror was but one among fifteen, neither the Court of Session nor the European Court could know what role he played in the deliberations, and it should not be forgotten that a Scottish jury may convict by simple majority.⁴⁶

Had the defendant in *Pullar* been tried by court-martial, there would never have been any question of a person in the juror's position being selected for the court. A person who had served previously with a prosecution witness would, on notifying the ACS or CMAU, have been excluded and replaced by another well before the trial began. Further, the practice recommendations issued by Lord Hope LJG after the defendant's appeal did not go as far even as the naval version of the Briefing Notes,⁴⁷ which the European Court in *Grieves* considered inadequate to dispel the appearance of bias which arose in a naval court-martial.

Pullar may be unusual, not least because the Court went against the view of the Commission, and came to its decision only by a five-four majority. The facts also represent a failure by individual court personnel to apply discretion and common sense, rather than 'structural' features of the Scottish court system, and case law suggests that it is the latter that the Court primarily concerns itself with. However, other cases suggest that the Court is considerably more prepared to examine jury trials on a case-by-case basis, allowing them some benefit of the doubt, than courts-martial.

⁴⁶ The report states only that the defendant was convicted by a majority.

⁴⁷ *Pullar v HM Advocate* [1993] SCCR 514.

This is suggested, *inter alia*, by the English case of *Sander v United Kingdom*,⁴⁸ where an Asian defendant alleged generalised racial prejudice on the part of two jurors, evidenced by jokes and banter. When the original allegation came to the judge's attention, he asked the jurors to 'examine their consciences' overnight, and to inform him by personal note submitted through the jury bailiff if any of them '[felt] that you are not able to try the case solely on the evidence and [found] that you cannot put aside any prejudices you may have'. The following morning all twelve – including the maker of the allegation - submitted a collective letter refuting the allegation of racial prejudice and stating categorically that they would try the case impartially. One juror submitted a separate letter admitting that jokes he had made might be construed as racist, but he was not racially prejudiced. On the basis of these letters the judge did not discharge the jury.

The European Court considered that the established fact that at least one juror had made comments which could be understood as jokes about Asians was not of itself evidence that the juror concerned was biased against Asians. In any case, it was impossible for the trial judge to question the jurors about those comments or their context, so there was no evidence demonstrating any *subjective* lack of impartiality. On the issue of objective impartiality, there was scope for doubt. The content of the note containing the original allegation and the later collective letter could not be reconciled; the collective denial of racism was not necessarily reliable, 'because openly admitting to racism is something which the average person would have a natural tendency to avoid.' Further, the Court did not attach much weight to the

⁴⁸ Application No.34129/96, 9th May 2000.

judge's redirection of the jury. The Court distinguished *Gregory v UK*,⁴⁹ where there was no admission by any juror of racist comments, there was no indication who had made the complaint, and the complaint itself was vague and imprecise.

When *Sander* and *Gregory* are compared with *Cooper*, it becomes clear that in the two 'civilian' cases, as in *Pullar*, a lower requirement of objective impartiality is being applied. In *Gregory* 'vague and imprecise' allegations of racial prejudice on the part of one or more unidentified jurors were not sufficient to raise 'legitimate doubts' about the impartiality of the jury as a body; in *Sander* such doubts were only raised by admissions by a specific juror that he had made comments which could be construed as racist. In *Pullar*, the standard of objective impartiality was markedly lower than in *Cooper*; the clear possibility that one of the jurors could have been influenced by his links to a principal prosecution witness were not taken seriously. In court-martial cases, the mere fact that the court are under general Service discipline raises doubts about their independence requiring stringent and specific measures to dispel. All available evidence suggests that President and members are *more* fully briefed, *more* aware of the seriousness of their role and the importance of objectivity and independence than are jurors. In particular, they have very specific training –as officers under instruction - which is *never* available to jurors. Statistics accepted by the European Court show that despite the 'suspicion' shown towards courts-martial, the acquittal rate is consistently and significantly higher than in Crown Court trials.

Conclusion

⁴⁹ 25 EHRR 577.

In cases involving ‘conventional’ courts the European Court adopts an approach of not instructing states in how they should organise their legal systems so as to comply with Article 6, but this is not at all the case with courts-martial. Is it possible that Article 6 jurisprudence pays more attention to ‘ideological’ threats to impartiality than to practical matters - witness the greater apparent concern over alleged racial prejudice in *Sander* than the ‘practical’ risk in *Pullar*? Does this lie at the root of the prevailing suspicion of courts-martial? The Convention is a product of the aftermath of the Second World War and the initial phase of the Cold War. It is clear from its drafting history that it was designed to forestall any slide from democracy towards totalitarian regimes. Those responsible appreciated that Weimar Germany did not become the Third Reich at a stroke, but by a series of incremental steps and manipulation of a democratic constitution. Given that even in established democracies the Armed Forces are under the control of government, may be used in limited circumstances in ‘aid of the civil power’, and in totalitarian societies are frequently used as instruments of state repression, perhaps it is inevitable that the Court requires a higher standard of impartiality from their justice systems, even in respect of their own personnel, than of civilian courts which it regards as a *prima facie* means of protection against state repression. This has had clear benefits for those tried by United Kingdom court-martial, but is it not now time for the cloud of suspicion to lift?

Can the jury system learn anything from the court-martial? Given the vastly greater volume of jury trials, the sheer numbers of jurors involved, it is unrealistic to suggest that the Court Service might adopt a version of the officers under instruction system, and it would run counter to current ideologies to require minimum educational

standards of jurors. Nevertheless, there seems no obvious practical reason why written guidance along the lines of the Briefing Notes should not be given routinely to jurors, particularly detailed advice on the conduct of deliberations, nor why they should not receive lists of defendants and witnesses in the trials scheduled to take place during their period of jury service in good time, so that cases like *Pullar* might be avoided.