
STATUTORY INSTRUMENTS

2009 No. 1059

The Armed Forces Act 2006
(Transitional Provisions etc) Order 2009

PART 9

INVESTIGATION, CHARGING AND MODE OF TRIAL

“Service offence”, “Schedule 2 offence”

42.—(1) In Part 5 of AFA 2006 (investigation, charging and mode of trial), any reference to a service offence includes an SDA offence.

(2) Paragraph (1) does not apply in relation to section 113(4) of that Act (definition of “Schedule 2 offence”); but in that Part “Schedule 2 offence” includes the following SDA offences—

- (a) an offence under section 24 of AA 1955 or AFA 1955 or section 2 of NDA 1957 (misconduct in action);
 - (b) an offence under subsection (1)(a), (b), (c), (d) or (f) of section 25 of AA 1955 or AFA 1955 or of section 3 of NDA 1957 (assisting the enemy);
 - (c) an offence under section 26(1) of AA 1955 or AFA 1955 or section 4(1) of NDA 1957 (obstructing operations);
 - (d) an offence under section 30, 31 or 32 of AA 1955 or AFA 1955 or section 5, 9 or 10 of NDA 1957 (looting, mutiny, failure to suppress mutiny);
 - (e) an offence under section 37 of AA 1955 or AFA 1955 or section 16 of NDA 1957 (desertion) where the accused intends to avoid a period of active service within the meaning of section 8 of AFA 2006;
 - (f) an offence under section 44A(1)(f) of AA 1955 or AFA 1955 or section 29A(1)(f) of NDA 1957 (causing sequestration etc of aircraft) where the offender acts wilfully or with wilful neglect;
 - (g) an offence under section 48A of AA 1955 or AFA 1955 or section 19 of NDA 1957 (loss or hazarding of ship);
 - (h) an offence under section 49 of AA 1955 or AFA 1955 or section 20 of NDA 1957 (dangerous flying etc) where the offender acts wilfully or with wilful neglect;
 - (i) an offence under section 68 of AA 1955 or AFA 1955 or section 40 of NDA 1957 of attempting to commit an offence within any of sub-paragraphs (a) to (h) above;
 - (j) an SDA civil offence as respects which the corresponding civil offence is an offence mentioned in paragraph (3) below.
- (3) The offences referred to in paragraph (2)(j) are—
- (a) an offence within any sub-paragraph of paragraph 12 of Schedule 2 to AFA 2006;

- (b) an offence under any of sections 1 to 7, 9 to 11, 16, 17, 19 to 24, 26 to 29 and 32 of the Sexual Offences Act 1956⁽¹⁾;
- (c) an offence under section 128 of the Mental Health Act 1959⁽²⁾;
- (d) an offence under section 1 of the Indecency with Children Act 1960⁽³⁾;
- (e) an offence under section 4 or 5 of the Sexual Offences Act 1967⁽⁴⁾;
- (f) an offence under section 1 of the Criminal Attempts Act 1981⁽⁵⁾, or at common law, of attempting to commit an offence within any of sub-paragraphs (a) to (e) above;
- (g) an offence under section 1 of the Criminal Law Act 1977⁽⁶⁾, or at common law, of conspiracy to commit an offence within any of sub-paragraphs (a) to (e) above;
- (h) an offence at common law of incitement to commit an offence within any of sub-paragraphs (a) to (e) above;
- (i) an offence under Part 2 of the Serious Crime Act 2007⁽⁷⁾ where the offence (or one of the offences) which the offender intended or believed would be committed is an offence within sub-paragraph (a) above.

Duties and powers of commanding officers in relation to allegations etc

43.—(1) The duty in section 113(1) of AFA 2006 (CO to ensure service police aware of possibility serious offence committed) applies where at commencement an officer is aware of an allegation or circumstances within section 113(2).

(2) The duty in section 114(1) of AFA 2006 (CO to ensure service police aware of certain circumstances) applies where an officer of a description prescribed for the purposes of section 114 is, at commencement, aware of circumstances of a description so prescribed.

(3) Where—

- (a) at commencement, an officer is aware of an allegation or circumstances within section 115(2), and
- (b) section 115(1)(b) applies,

the duty in section 115(4) of AFA 2006 (duty of CO with respect to investigation of service offences) applies; but this is subject to section 115(5).

(4) In section 119(2) of AFA 2006 (circumstances in which, subject to section 119(3), a CO has initial powers in respect of a case), the reference to the commanding officer's becoming aware of an allegation such as is mentioned there includes the commanding officer's being aware at commencement of such an allegation.

Charges preferred by prosecuting authority: allocation for Court Martial trial

44.—(1) A charge within paragraph (3) or (4) is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for Court Martial trial.

(2) Paragraph (1) has effect subject to any provision of that Part under which, at any time after commencement, the charge ceases to be allocated for Court Martial trial.

(3) A charge is within this paragraph if—

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- (1) 1956 c. 69. Sections 1 to 7, 9 to 11, 16, 17, 19 to 24, 26 to 29 and 32 were repealed by the Sexual Offences Act 2003, section 139 and Schedule 6, paragraph 11.
 - (2) 1959 c. 72. Section 128 was repealed by the Sexual Offences Act 2003, section 139 and Schedule 6, paragraph 13.
 - (3) 1960 c. 33. The Act was repealed by the Sexual Offences Act 2003, section 139 and Schedule 6, paragraph 14.
 - (4) 1967 c. 60. Sections 4 and 5 were repealed by the Sexual Offences Act 2003, section 139 and Schedule 6, paragraph 15.
 - (5) 1981 c. 47.
 - (6) 1977 c. 45.
 - (7) 2007 c. 27.

- (a) it was preferred or substituted by the prosecuting authority under section 83B(4) or (8) of AA 1955 or AFA 1955 or section 52I(4) or (7) of NDA 1957; and
 - (b) it is current at commencement.
- (4) A charge is within this paragraph if—
- (a) the condition in sub-paragraph (a) of article 52(3) (preferment or substitution of charge under the Standing Civilian Courts Order 1997(8)) is satisfied in relation to it;
 - (b) the condition in any of sub-paragraphs (b) to (d) of that paragraph (circumstances in which charge to be tried by Standing Civilian Court rather than court-martial) is not satisfied in relation to it; and
 - (c) it is current at commencement.
- (5) For the purposes of this article a charge is “current at commencement” if, at commencement—
- (a) the accused has not already been convicted or acquitted by court-martial of the offence charged;
 - (b) the charge has not been otherwise disposed of;
 - (c) proceedings on it have not been stayed;
 - (d) the case has not been referred to the accused’s commanding officer, or the appropriate superior authority, under section 83B(2) of AA 1955 or AFA 1955 or section 52I(2) of NDA 1957;
 - (e) proceedings on the charge have not been discontinued under section 83B(8) of AA 1955 or AFA 1955 or section 52I(7) of NDA 1957, and no other charge has been substituted for it;
 - (f) the charge has not been tried by court-martial without a finding on it being recorded because it was charged as an alternative to another charge which was found proved; and
 - (g) the time limit for court-martial trial has not expired.
- (6) For the purposes of paragraph (5)(b) a charge has been “otherwise disposed of” if, under either of the following, the person who was charged could not be tried by the Court Martial in respect of the offence to which the charge related—
- (a) article 25 of this Order (double jeopardy);
 - (b) Chapter 3 of Part 2 of AFA 2006 (double jeopardy) as modified by this Order.

Effect of time limits for court-martial trial

- 45.—(1) For the purposes of article 44, the time limit for court-martial trial has expired in relation to a charge if, immediately before commencement—
- (a) trial of the charge was prohibited by section 132 of AA 1955 or AFA 1955 or section 52 of NDA 1957 (limitation of time for trial); and
 - (b) the prohibition could not have been lifted by the Attorney General’s giving consent under section 132(3A) of AA 1955 or AFA 1955 or section 52(3) of NDA 1957.
- (2) Paragraph (3) applies where—
- (a) by virtue of article 44 a charge is allocated for Court Martial trial for the purposes of Part 5 of AFA 2006;
 - (b) immediately before commencement, trial of the charge was prohibited as mentioned in paragraph (1)(a); and
 - (c) the prohibition could have been lifted as mentioned in paragraph (1)(b).

- (3) Where this paragraph applies—
- (a) the Court Martial may not without the Attorney General’s consent try the charge (or any charge substituted for it, or brought in addition to it, under section 125(2)(b) or (c) of AFA 2006); and
 - (b) the Director of Service Prosecutions may not refer the charge to the accused’s commanding officer.

Charges reported to commanding officer: allocation for summary hearing

46.—(1) A charge within paragraph (3) is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for summary hearing.

(2) Paragraph (1) has effect subject to any provision of that Part under which, at any time after commencement, the charge ceases to be allocated for summary hearing.

- (3) A charge is within this paragraph if—
- (a) it is a charge which—
 - (i) was reported to an officer under section 76(1) of AA 1955 or AFA 1955 or section 52B(1) of NDA 1957; or
 - (ii) was required to be dealt with as if it had been so reported (by reason of section 83BB(3) or (4) of AA 1955 or AFA 1955 or section 52II(3) or (4) of NDA 1957); or
 - (iii) was substituted under section 76(3) or 76B(3) of AA 1955 or AFA 1955 or section 52B(3) or 52D(4B) of NDA 1957;
 - (b) it is current at commencement; and
 - (c) it is not an excluded charge within the meaning of article 47.
- (4) For the purposes of this article a charge is “current at commencement” if, at commencement—
- (a) the charge has not been summarily dealt with or tried;
 - (b) the charge has not been dismissed under section 76(5)(a) of AA 1955 or AFA 1955 or section 52B(5)(a) of NDA 1957;
 - (c) further proceedings with respect to it have not been stayed under section 76(4) of AA 1955 or AFA 1955 or section 52B(4) of NDA 1957;
 - (d) no direction for dismissal or stay of further proceedings has been made in relation to it under section 76A(2) of AA 1955 or AFA 1955 or section 52C(2) of NDA 1957;
 - (e) no other charge has been substituted for it under section 76(3) or 76B(3) of AA 1955 or AFA 1955 or section 52B(3) or 52D(4B) of NDA 1957;
 - (f) the time limit for court-martial trial has not expired (see article 48); and
 - (g) if the case to which the charge relates has been referred to the prosecuting authority, the charge is not prevented by paragraph (5) or (6) from being current.
- (5) The charge referred to in paragraph (4)(g) (“the original charge”) is prevented by this paragraph from being current if the prosecuting authority has preferred a charge (“the PA’s charge”) and—
- (a) has not subsequently referred the case to the accused’s commanding officer or the appropriate superior authority under section 83B(2) or 83BB(2A) of AA 1955 or AFA 1955 or section 52I(2) or 52II(2A) of NDA 1957; and
 - (b) has not (either before or after preferring the PA’s charge) referred a part of the case to which the original charge relates to the accused’s commanding officer under section 83BB(2A) of AA 1955 or AFA 1955 or section 52II(2A) of NDA 1957.

(6) The charge referred to in paragraph (4)(g) is prevented by this paragraph from being current if the prosecuting authority has informed the accused's commanding officer that the prosecuting authority has decided—

- (a) not to prefer any charge; and
 - (b) (if there was no election for court-martial trial) not to refer the case, or any part of it to which the charge relates, back to the accused's commanding officer under section 83BB(2A) of AA 1955 or AFA 1955 or section 52II(2A) of NDA 1957.
- (7) For the purposes of paragraph (4)(a) the charge has been summarily dealt with or tried if—
- (a) it has been dismissed within the meaning of section 76B(2) of AA 1955 or AFA 1955, or the accused has been acquitted of it under section 52D(6) of NDA 1957; or
 - (b) a finding that the charge has been proved has been recorded under section 76B(7) of AA 1955 or AFA 1955, or a finding of guilt in respect of it has been recorded under section 52D(7) of NDA 1957.

Exceptions to allocation for summary hearing

47.—(1) For the purposes of article 46(3)(c) and paragraph (2) below an “excluded charge” is any of the following—

- (a) a charge which is not capable of being heard summarily (within the meaning given by section 52 of AFA 2006 as modified by articles 14 and 15); but this is subject to paragraph (3) below;
- (b) a charge where—
 - (i) the case to which the charge relates was referred to the prosecuting authority by higher authority under section 76A(1) of AA 1955 or AFA 1955 or section 52C(1) of NDA 1957; and
 - (ii) there has been no referral back of the case, or of a part of the case to which the charge relates, under section 83B(2) or 83BB(2A) of AA 1955 or AFA 1955 or section 52I(2) or 52II(2A) of NDA 1957;
- (c) a charge as respects which the accused—
 - (i) elected court-martial trial; and
 - (ii) has not withdrawn that election with leave;
- (d) a charge where—
 - (i) the charge has been referred to higher authority under section 76(5)(b) or 76B(4) of AA 1955 or AFA 1955 or section 52B(5)(b) or 52D(5) of NDA 1957;
 - (ii) it has not been referred back under section 76A(3) or (4) of AA 1955 or AFA 1955 or section 52C(3) or (3A)(a) or (b) of NDA 1957 to be dealt with or tried summarily; and
 - (iii) the case to which the charge relates has not been referred to the prosecuting authority;
- (e) a charge against a civilian.

(2) An excluded charge, if falling within article 46(3)(a) and (b), is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for Court Martial trial (subject to any provision of that Part under which, at any time after commencement, the charge ceases to be allocated for Court Martial trial).

(3) A charge which is not capable of being heard summarily is not an excluded charge by reason of paragraph (1)(a) if the case, or a part of the case to which the charge relates, was referred back under section 83B(2) or 83BB(2A) of AA 1955 or AFA 1955 or section 52I(2) or 52II(2A) of NDA 1957.

(4) For the purposes of paragraph (1)(e) a charge is “against a civilian” if, when the offence was committed or at any time since, the accused was a person who was not—

- (a) subject to service law (including military law, air-force law or NDA 1957);
- (b) a member of a volunteer reserve force; or
- (c) a member of an ex-regular reserve force who is subject to an additional duties commitment.

Effect of time limits for trial in relation to summary hearing

48.—(1) For the purposes of article 46(4), the time limit for court-martial trial has expired in relation to a charge (“the CO’s charge”) if—

- (a) a charge has been preferred by the prosecuting authority in relation to the case to which the CO’s charge relates, and the time limit for court-martial trial of the charge so preferred has expired (within the meaning given by article 45(1)); or
- (b) no charge has been so preferred, but if a charge in the same terms as the CO’s charge had been preferred by the prosecuting authority (and no trial of it had begun by commencement), that time limit would have expired.

(2) Paragraph (3) applies where a charge is allocated for summary hearing for the purposes of Part 5 of AFA 2006—

- (a) by virtue of article 46; or
- (b) by virtue of having been referred to the accused’s commanding officer under section 125(2)(e) of AFA 2006 following initial allocation of the charge (or of a charge for which it was substituted or to which it was added) for Court Martial trial under article 44 or 47(2).

(3) If the time limit for summary dealing or trial expired before commencement, the accused’s commanding officer may not hear the charge (and section 124(2) of AFA 2006 has effect subject to this).

(4) For the purposes of paragraph (3), the time limit for summary dealing or trial expired before commencement if, immediately before commencement, summary dealing with or summary trial of the charge was prohibited by section 132 of AA 1955 or AFA 1955 or section 52 of NDA 1957.

(5) If the charge is one which would not at any time have been capable of being dealt with summarily or tried summarily under AA 1955, AFA 1955 or NDA 1957, that is to be ignored for the purposes of paragraph (4).

(6) In paragraphs (4) and (5) “the charge”, in a case where a charge has been substituted for or added to a charge initially allocated for Court Martial trial, means the charge initially allocated for Court Martial trial.

(7) Paragraph (3) does not apply if—

- (a) the offence charged is such that under section 132(3A) of AA 1955 or AFA 1955 or section 52(3) of NDA 1957 the Attorney General could have consented to proceedings in respect of it; and
- (b) the Attorney General consents to the charge being heard by the commanding officer.

(8) Where under this article a commanding officer is prevented from hearing a charge, he may not hear any charge substituted for that charge.

Charges allocated for summary hearing: restriction on CO’s powers in certain cases

49.—(1) Where a charge within article 46(3)(a) is (for the purposes of Part 5 of AFA 2006) allocated for summary hearing and paragraph (2) applies, the commanding officer of the accused may not hear the charge unless—

- (a) the case, or a part of the case to which the charge relates, was referred back by the prosecuting authority under section 83B(2) or 83BB(2A) of AA 1955 or AFA 1955 or section 52I(2) or 52II(2A) of NDA 1957; or
 - (b) the case to which the charge relates has been referred to the commanding officer by a service policeman under section 116(3) of AFA 2006.
- (2) This paragraph applies where—
- (a) the allegation or circumstances which gave rise to the charge (“the circumstances”) are being or have been investigated by a service police force;
 - (b) the circumstances are being or have been investigated by a UK police force or overseas police force, and it appears to the commanding officer that that force may refer the matter to the service police; or
 - (c) the circumstances give or have given rise to the duty in section 113(1) or 114(1) of AFA 2006 (duties to inform service police).
- (3) Where under this article a commanding officer is prevented from hearing a charge, he may not hear any charge substituted for that charge.

Deemed referrals under AFA 2006 s. 116(3)

- 50.**—(1) This article applies where—
- (a) before commencement a service policeman reported to the commanding officer of a person—
 - (i) that there was sufficient evidence to charge the person with an offence (“the relevant offence”), but not sufficient evidence to charge the person with an offence mentioned in article 42(2); and
 - (ii) that the service policeman was not aware of any circumstances of a description prescribed for the purposes of section 116(2)(b) of AFA 2006; and
 - (b) since that report, no service policeman has reported to the person’s commanding officer that there is sufficient evidence to charge the person with an offence mentioned in article 42(2) or that the service policeman is aware of such circumstances.
- (2) Where this article applies, the case relating to the relevant offence is to be regarded for the purposes of section 119(4) of AFA 2006 and article 49(1)(b) as having been referred to the commanding officer by a service policeman under section 116(3) of AFA 2006.
- (3) References in this article to there being sufficient evidence to charge a person with an offence have the meaning given by section 116(5) of AFA 2006.

Part of a case referred back under SDAs: power of CO to charge etc

- 51.**—(1) This article applies where—
- (a) part of a case has been referred back to a person’s commanding officer under section 83BB(2A) of AA 1955 or AFA 1955 or section 52II(2A) of NDA 1957; and
 - (b) immediately after commencement, no charge relating to that part of the case is regarded for the purposes of Part 5 of AFA 2006 as allocated for Court Martial trial, Service Civilian Court trial or summary hearing.
- (2) The part of the case is to be treated for the purposes of section 119(5) of AFA 2006 (by virtue of which a CO has power to bring a charge, etc, in respect of a case referred to him by the DSP) as a case referred to the commanding officer under section 121(4) of that Act.

Charges directed to be tried by a Standing Civilian Court

52.—(1) A charge within paragraph (3) is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for Service Civilian Court trial.

(2) Paragraph (1) has effect subject to any provision of that Part under which, at any time after commencement, the charge ceases to be allocated for Service Civilian Court trial.

(3) A charge is within this paragraph if—

- (a) it was preferred or substituted under article 6(1)(b), 13(1)(a) or (c) or 44(1)(a) or (c) of the Standing Civilian Courts Order 1997(9);
- (b) no determination under article 13(1)(d) of that Order (charge to be tried by court-martial) has been made in respect of it;
- (c) the accused either—
 - (i) has not elected court-martial trial of the charge and is not treated under article 17 of that Order as having done so; or
 - (ii) has withdrawn such an election;
- (d) the court has not referred the case to the prosecuting authority under paragraph 6 of Schedule 3 to AFA 1976 (unfitness to stand trial and insanity); and
- (e) the charge is current at commencement.

(4) For the purposes of this article a charge is “current at commencement” if, at commencement—

- (a) the accused has not already been convicted or acquitted of the offence charged;
- (b) the charge has not been otherwise disposed of;
- (c) proceedings on it have not been stayed;
- (d) proceedings on the charge have not been discontinued, and no other charge has been substituted for it;
- (e) the charge has not been tried by a Standing Civilian Court without a finding on it being recorded because it was charged as an alternative to another charge which was found proved; and
- (f) the time limit for trial by a Standing Civilian Court has not expired.

(5) For the purposes of paragraph (4)(b) a charge has been “otherwise disposed of” if, under either of the following, the person who was charged could not be tried by the Service Civilian Court in respect of the offence to which the charge related—

- (a) article 25 of this Order (double jeopardy);
- (b) Chapter 3 of Part 2 of AFA 2006 (double jeopardy) as modified by this Order.

Effect of time limits for court-martial trial in relation to SCC

53.—(1) For the purposes of article 52, the time limit for trial by a Standing Civilian Court has expired in relation to a charge if, immediately before commencement—

- (a) trial of the charge was prohibited by section 7(4) of AFA 1976 or section 132(3) of AA 1955 or AFA 1955 (limitation of time for trial); and
- (b) the prohibition could not have been lifted by the Attorney General’s giving consent under section 132(3A) of AA 1955 or AFA 1955.

(2) Paragraph (3) applies where—

(9) S.I. 1997/172.

- (a) by virtue of article 52 a charge is allocated for Service Civilian Court trial for the purposes of Part 5 of AFA 2006;
 - (b) immediately before commencement, trial of the charge was prohibited as mentioned in paragraph (1)(a); and
 - (c) the prohibition could have been lifted as mentioned in paragraph (1)(b).
- (3) Where this paragraph applies—
- (a) the Service Civilian Court may not without the Attorney General’s consent try the charge (or any charge substituted for it, or brought in addition to it, under section 126(2)(b) or (c) of AFA 2006); and
 - (b) if the charge (or any charge so substituted or brought) is allocated for trial by the Court Martial under section 126(2)(e) of AFA 2006, the Court Martial may not without the Attorney General’s consent try it (or any charge substituted for it, or brought in addition to it, under section 125(2)(b) or (c) of that Act).