

Draft Order laid before Parliament under section 35(2) of the Armed Forces Act 2001, for approval by resolution of each House of Parliament. This draft Statutory Instrument has been printed to correct a defect in the original draft and is being issued free of charge to all known recipients of that Statutory Instrument.

DRAFT STATUTORY INSTRUMENTS

2006 No.

DEFENCE

The Courts-Martial (Prosecution Appeals) Order 2006

Made - - - -

Coming into force - - *5th July 2006*

The Secretary of State for Defence makes the following Order in exercise of the powers conferred by section 31(3) of the Armed Forces Act 2001(1);

In accordance with section 35(2) of the Armed Forces Act 2001(2), a draft of this instrument was laid before Parliament and approved by resolution of each House of Parliament.

Citation, commencement and application

1.—(1) This Order may be cited as the Courts-Martial (Prosecution Appeals) Order 2006 and shall come into force on 5th July 2006.

(2) This Order shall only apply to trials by courts-martial which commence on or after 5th July 2006.

(3) For the purposes of this Order, trials by courts-martial commence immediately after the last court member has been sworn.

Interpretation

2. In this Order—

“the 1955 Acts” means the Army Act 1955(3) and the Air Force Act 1955(4);

(1) [2001.c.19](#). By virtue of subsection (3)(a) of section 31 of the Armed Forces Act 2001, the Secretary of State may, if he thinks fit to do so in consequence of a criminal justice enactment, by order make provision, in relation to service courts, which is equivalent to that made by the criminal justice enactment, subject to such modifications as he thinks fit. This Order makes provision in relation to service courts in consequence of Part 9 of the Criminal Justice Act 2003 ([c.44](#)) as amended by section 30 of the Domestic Violence, Crime and Victims Act 2004 ([c. 28](#)). Section 31(7) of the 2001 Act was amended by section 91(1) of the Crime (International Co-operation) Act 2003 ([c.32](#)).

(2) *Ibid.*

(3) [1955 c. 18](#).

(4) [1955 c. 19](#).

“the 1957 Act” means the Naval Discipline Act 1957⁽⁵⁾;

“the 1968 Act” means the Courts-Martial (Appeals) Act 1968⁽⁶⁾;

“the 2003 Act” means the Criminal Justice Act 2003⁽⁷⁾;

“charge” means a charge preferred by the prosecuting authority under section 83B of the 1955 Acts or section 52I of the 1957 Act;

“court-martial” means a court-martial convened under section 84C of the 1955 Acts or under section 53C of the 1957 Act;

“the judge advocate” means—

- (i) in the case of a court-martial convened under either of the 1955 Acts, the judge advocate appointed by or on behalf of the Judge Advocate General to be a member of the court-martial⁽⁸⁾; or
- (ii) in the case of a court-martial convened under the 1957 Act, the judge advocate appointed by or on behalf of the Judge Advocate of Her Majesty’s Fleet⁽⁹⁾;

“ruling” includes a decision, determination, direction, finding, notice, order, refusal, rejection or requirement.

Prosecution rights of appeal

3.—(1) In relation to a trial by court-martial, the prosecution is to have the rights of appeal for which provision is made by this Order.

(2) But the prosecution is to have no right of appeal under this Order in respect of—

- (a) an order that a court be dissolved, or
- (b) a ruling from which an appeal lies to the Courts-Martial Appeal Court by virtue of any other enactment.

(3) An appeal under this Order is to lie to the Courts-Martial Appeal Court.

(4) Such an appeal may be brought only with the leave of the judge advocate or the Courts-Martial Appeal Court.

General right of appeal in respect of rulings

4.—(1) This article applies where a judge advocate makes a ruling in relation to a trial by court-martial at an applicable time and the ruling relates to one or more charges on the charge sheet.

(2) The prosecution may appeal in respect of the ruling in accordance with this article.

(3) The ruling is to have no effect whilst the prosecution is able to take any steps under paragraph (4).

(4) The prosecution may not appeal in respect of the ruling unless—

- (a) following the making of the ruling, it—
 - (i) informs the court that it intends to appeal, or
 - (ii) requests an adjournment to consider whether to appeal, and
- (b) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal.

(5) 1957 c. 53.

(6) 1968 c. 20.

(7) 2003 c 44.

(8) Section 84(B)(1) of the Army Act 1955 and the Air Force Act 1955.

(9) Section 53B(1) of the 1957 Act as amended by the Naval Discipline Act 1957 (Remedial) Order 2004, S.I. 2004/66.

(5) If the prosecution requests an adjournment under paragraph (4)(a)(ii), the judge advocate may grant such an adjournment.

(6) Where the ruling relates to two or more charges—

- (a) any one or more of those charges may be the subject of the appeal, and
- (b) if the prosecution informs the court in accordance with paragraph (4) that it intends to appeal, it must at the same time inform the court of the charge or charges which are the subject of the appeal.

(7) Where—

- (a) the ruling is a ruling that there is no case to answer, and
- (b) the prosecution, at the same time that it informs the court in accordance with paragraph (4) that it intends to appeal, nominates one or more other rulings which have been made by a judge advocate in relation to the court-martial at an applicable time and which relate to the charge or charges which are the subject of the appeal,
that other ruling, or those other rulings, are also to be treated as the subject of the appeal.

(8) The prosecution may not inform the court in accordance with paragraph (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the charge or each charge which is the subject of the appeal, the accused in relation to that charge should be acquitted of that charge if either of the conditions mentioned in paragraph (9) is fulfilled.

(9) Those conditions are—

- (a) that leave to appeal to the Courts-Martial Appeal Court is not obtained, and
- (b) that the appeal is abandoned before it is determined by the Courts-Martial Appeal Court.

(10) If the prosecution informs the court in accordance with paragraph (4) that it intends to appeal, the ruling mentioned in paragraph (1) is to continue to have no effect in relation to the charge or charges which are the subject of the appeal whilst the appeal is pursued.

(11) If and to the extent that a ruling has no effect in accordance with this article—

- (a) any consequences of the ruling are also to have no effect,
- (b) the judge advocate may not take any steps in consequence of the ruling, and
- (c) if he does so, any such steps are also to have no effect.

(12) Where the prosecution has informed the court of its agreement under paragraph (8) and either of the conditions mentioned in paragraph (9) is fulfilled, the judge advocate or the Courts-Martial Appeal Court must order that the accused in relation to the charge or each charge concerned be acquitted of that charge.

(13) In this article “applicable time”, in relation to a trial by court-martial, means any time (whether before or after the commencement of the trial) before the time when the judge advocate starts his summing-up to the court.

Expedited and non-expedited appeals

5.—(1) Where the prosecution informs the court in accordance with article 4(4) that it intends to appeal, the judge advocate must decide whether or not the appeal should be expedited.

(2) If the judge advocate decides that the appeal should be expedited, he may order an adjournment.

(3) If the judge advocate decides that the appeal should not be expedited, he may—

- (a) order an adjournment, or
- (b) dissolve the court (if the court has been convened).

(4) If he decides that the appeal should be expedited, he or the Courts-Martial Appeal Court may subsequently reverse that decision and, if it is reversed, the judge advocate may act as mentioned in paragraph (3)(a) or (b).

Continuation of proceedings for charges not affected by ruling

6.—(1) This article applies where the prosecution informs the court in accordance with article 4(4) that it intends to appeal.

(2) Proceedings may be continued in respect of any charge which is not the subject of the appeal.

Determination of appeal by the Courts-Martial Appeal Court

7.—(1) On an appeal under article 4, the Courts-Martial Appeal Court may confirm, reverse or vary any ruling to which the appeal relates.

(2) Paragraphs (3) to (5) apply where the appeal relates to a single ruling.

(3) Where the Courts-Martial Appeal Court confirms the ruling, it must, in respect of the charge or each charge which is the subject of the appeal, order that the accused in relation to that charge be acquitted of that charge.

(4) Where the Courts-Martial Appeal Court reverses or varies the ruling, it must, in respect of the charge or each charge which is the subject of the appeal, do any of the following—

- (a) order that proceedings for that charge may be resumed at court-martial,
- (b) order that a fresh court-martial be convened to try that charge,
- (c) order that the accused in relation to that charge be acquitted of that charge.

(5) But the Courts-Martial Appeal Court may not make an order under paragraph (4)(a) or (b) in respect of a charge unless it considers it necessary in the interests of justice to do so.

(6) Paragraphs (7) and (8) apply where the appeal relates to a ruling that there is no case to answer and one or more other rulings.

(7) Where the Courts-Martial Appeal Court confirms the ruling that there is no case to answer, it must, in respect of the charge or each charge which is the subject of the appeal, order that the accused in relation to that charge be acquitted of that charge.

(8) Where the Courts-Martial Appeal Court reverses or varies the ruling that there is no case to answer, it must in respect of the charge or each charge which is the subject of the appeal, make any of the orders mentioned in paragraph (4)(a) to (c) (but subject to paragraph (5)).

Reversal of rulings

8. The Courts-Martial Appeal Court may not reverse a ruling on an appeal under this Order unless it is satisfied—

- (a) that the ruling was wrong in law,
- (b) that the ruling involved an error of law or principle, or
- (c) that the ruling was a ruling that it was not reasonable for the judge advocate to have made.

Appeals to the House of Lords

9.—(1) The 1968 Act is amended as follows.

(2) In section 39(1) (right of appeal) after “this Act” there is inserted “or the Courts-Martial (Prosecution Appeals) Order 2006”.

(3) In section 42(1) (bail) after “section applies” there is inserted “, other than a person appealing or applying for leave to appeal from a decision on an appeal under the Courts-Martial (Prosecution Appeals) Order 2006,”.

Restrictions on reporting

- 10.**—(1) Except as provided by this article no publication shall include a report of—
- (a) anything done under article 4 or 5,
 - (b) an appeal under this Order,
 - (c) an appeal under Part 3 of the 1968 Act in relation to an appeal under this Order, or
 - (d) an application for leave to appeal in relation to an appeal mentioned in sub-paragraph (b) or (c).
- (2) The judge advocate may order that paragraph (1) is not to apply, or is not to apply to a specified extent, to a report of—
- (a) anything done under article 4 or 5, or
 - (b) an application to the judge advocate for leave to appeal to the Courts-Martial Appeal Court under this Order.
- (3) The Courts-Martial Appeal Court may order that paragraph (1) is not to apply, or is not to apply to a specified extent, to a report of—
- (a) an appeal to the Courts-Martial Appeal Court under this Order,
 - (b) an application to that Court for leave to appeal to it under this Order, or
 - (c) an application to that Court for leave to appeal to the House of Lords under Part 3 of the 1968 Act.
- (4) The House of Lords may order that paragraph (1) is not to apply, or is not to apply to a specified extent, to a report of—
- (a) an appeal to that House under Part 3 of the 1968 Act, or
 - (b) an application to that House for leave to appeal to it under Part 3 of that Act.
- (5) Where there is only one accused and he objects to the making of an order under paragraph (2), (3) or (4)—
- (a) the judge advocate, the Courts-Martial Appeal Court or the House of Lords are to make the order if (and only if) satisfied, after hearing the representations of the accused, that it is in the interests of justice to do so, and
 - (b) the order (if made) is not to apply to the extent that a report deals with any such objection or representations.
- (6) Where there are two or more accused and one or more of them object to the making of an order under paragraph (2), (3) or (4)—
- (a) the judge advocate, the Courts-Martial Appeal Court or the House of Lords are to make the order if (and only if) satisfied, after hearing the representations of each of the accused, that it is in the interests of justice to do so, and
 - (b) the order (if made) is not to apply to the extent that a report deals with any such objection or representations.
- (7) Paragraph (1) does not apply to the inclusion in a publication of a report of—
- (a) anything done under article 4 or 5,
 - (b) an appeal under this Order,
 - (c) an appeal under Part 3 of the 1968 Act in relation to an appeal under this Order, or

- (d) an application for leave to appeal in relation to an appeal mentioned in sub-paragraph (b) or (c),
at the conclusion of the trial of the accused or the last of the accused to be tried.
- (8) Paragraph (1) does not apply to a report which contains only one or more of the following matters—
- (a) the identity of the court and the name of the judge advocate,
 - (b) the names, ages, home addresses and occupations of the accused or co-accused and witnesses,
 - (c) the charge or charges, or a summary of them, with which the accused or co-accused are charged,
 - (d) the names of the prosecutor and legal representatives in the proceedings,
 - (e) where the proceedings are adjourned, the date and place to which they are adjourned,
 - (f) any arrangements as to bail,
 - (g) whether a right to publicly funded representation was granted to the accused or any co-accused.
- (9) The addresses that may be included in a report by virtue of paragraph (8) are addresses—
- (a) at any relevant time, and
 - (b) at the time of their inclusion in the publication.
- (10) Nothing in this article affects any prohibition or restriction by virtue of any other enactment on the inclusion of any matter in a publication.
- (11) In this article—
- “programme service” has the same meaning as in the Broadcasting Act 1990⁽¹⁰⁾,
- “publication” includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme is to be taken to be so addressed), but does not include a charge sheet or other document prepared for use in particular legal proceedings,
- “relevant programme” means a programme included in a programme service,
- “relevant time” means a time when events giving rise to the charges to which the proceedings relate are alleged to have occurred.

Offences in connection with reporting

- 11.**—(1) This article applies if a publication includes a report in contravention of article 10.
- (2) Where the publication is a newspaper or periodical, any proprietor, editor or publisher of the newspaper or periodical is guilty of an offence.
- (3) Where the publication is a relevant programme—
- (a) any body corporate or Scottish partnership engaged in providing the programme service in which the programme is included, and
 - (b) any person having functions in relation to the programme corresponding to those of an editor of a newspaper,
is guilty of an offence.
- (4) In the case of any other publication, any person publishing it is guilty of an offence.
- (5) If an offence under the article committed by a body corporate is proved—

(10) 1990 c. 42.

- (a) to have been committed with the consent or connivance of, or
 - (b) to be attributable to any neglect on the part of,
an officer, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.
- (6) In paragraph (5), “officer” means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity.
- (7) If the affairs of a body corporate are managed by its members, “director” in paragraph (6) means a member of that body.
- (8) Where an offence under this article is committed by a Scottish partnership and is proved to have been committed with the consent or connivance of a partner, he as well as the partnership shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
- (9) A person guilty of an offence under this article is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- (10) Proceedings for an offence under this article may not be instituted—
- (a) in England and Wales otherwise than by or with the consent of the Attorney General, or
 - (b) in Northern Ireland otherwise than by or with the consent of—
 - (i) before the relevant date, the Attorney General for Northern Ireland, or
 - (ii) on or after the relevant date, the Director of Public Prosecutions for Northern Ireland.
- (11) In paragraph (10) “the relevant date” means the date on which section 22(1) of the Justice (Northern Ireland) Act 2002(11) comes into force.

Miscellaneous and supplemental

- 12.**—(1) There is to be no right of appeal under this Order in respect of a ruling in relation to which the prosecution has previously informed the court of its intention to appeal under article 4(4).
- (2) Where a ruling relates to two or more charges but not all of those charges are the subject of an appeal under this Order, nothing in this Order is to be regarded as affecting the ruling so far as it relates to any charge which is not the subject of the appeal.
- (3) Where two or more co-accused are charged jointly with the same offence, the provisions of this Order are to apply as if the charge, so far as relating to each accused, were a separate charge (so that, for example, any reference in this Order to a ruling which relates to one or more charges includes a ruling which relates to one or more of those separate charges).

Date

Parliamentary Under Secretary of State
Ministry of Defence

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision, in relating to trials by court-martial, equivalent to the new prosecution right of appeal under Part 9 of the Criminal Justice Act 2003 (“the 2003 Act”). The power for the Secretary of State to make such equivalent provision in consequence of criminal justice enactments derives from section 31 of the Armed Forces Act 2001.

Article 3 establishes the right of appeal for the prosecution in relation to a trial by court-martial and provides that such an appeal, subject to the granting of leave, lies to the Courts-Martial Appeal Court.

Article 4 makes provision, equivalent to the general right of appeal in section 58 of the 2003 Act, establishing a right of appeal for the prosecution against a ruling of a judge advocate at Court-Martial which either is terminating of itself, or which would otherwise have the effect of terminating proceedings in that the prosecution would offer no, or no further, evidence.

Article 5 makes provision, equivalent to that in section 59 of the 2003 Act, in relation to appeals following either an expedited or a non-expedited route. Article 6 allows for proceedings to continue in respect of any charge which is not the subject of an appeal.

Article 7 establishes powers for the Courts-Martial Appeal Court to confirm, reverse or vary any ruling to which the appeal relates equivalent to those in section 61 of the 2003 Act. Article 8 mirrors the legal test that must be met before the Courts-Martial Appeal Court may reverse a ruling from a judge advocate at a court-martial.

Article 9 amends provisions of the Courts-Martial Appeal Act 1968 so as to provide for a right of appeal to lie to the House of Lords against any decision of the Courts-Martial Appeal Court in relation to an appeal under this Order and to mirror the provisions of the Criminal Appeal Act 1968 in relation to the granting of bail to an accused who has so appealed to the House of Lords.

Articles 10 and 11 make provision equivalent to sections 71 and 72 of the 2003 Act in relation to restrictions on reporting of appeals under this Order, and associated offences for contravention of reporting restrictions. Finally, article 12 sets out certain miscellaneous and supplemental provisions in relation to the general application of the right of appeal under the Order.

Provision for Rules of Court is not made within this Order as separate provision is made in consequence of the Criminal Procedure Rules 2005 by virtue of the power conferred on the Secretary of State in section 31(3)(c) of the Armed Forces Act 2001.