

ARMED FORCES ACT 2006

EXPLANATORY NOTES

COMMENTARY

First Group of Parts – Discipline

Part 6 – Summary Hearing and Appeals and Review

Chapter 1 – Summary Hearing

Right to elect Court Martial trial

Section 129: Right to elect Court Martial trial

277. This section requires a CO hearing a charge summarily to give the accused the opportunity to be tried by the Court Martial. If the accused chooses to be tried by the Court Martial, the CO must refer the charge to the DSP for Court Martial trial. Where two or more charges against the same accused are to be heard summarily together and the accused chooses to be tried by Court Martial in respect of one of those charges, all charges are to be referred to the DSP for trial by the Court Martial.
278. If a summary hearing has started and any charge is amended, substituted or added after the start of the proceedings, the accused must be given the opportunity to elect trial by the Court Martial in respect of that charge.

Section 130: Further consequences of election for Court Martial trial

279. This section prevents the DSP from taking certain actions where an accused has elected Court Martial trial, without the written consent of the accused. The section prevents an accused finding himself facing a charge of a type which the CO could not have heard (which will often be a more serious charge) as a result of his decision to be tried by the Court Martial.
280. The section also prevents an accused electing to be tried by the Court Martial in respect of a charge which he previously consented to the DSP referring back to the CO for a summary hearing following a previous election.

Summary hearing

Section 131: Summary hearing

281. This section gives the CO certain powers in respect of summary hearings. It allows him to dismiss the charge at any time and requires him to do so if he determines that it has not been proved. Where he determines that charge has been proved he must record that finding and award one or more of the authorised punishments. In the case of findings that more than one charge has been proved, a single award of punishment is to be made in respect of all those charges. With the exception of “minor punishments” (which may be listed in regulations) and service compensation orders only one punishment of each kind may be awarded in respect of a hearing.

Punishments available to commanding officer

Section 132: Punishments available to commanding officer

282. This section lists the punishments which are available to a CO who has found a charge proved. It also places restrictions in relation to the rank or rate of a person who may receive certain punishments from the CO.
283. Under regulations, a CO may decide the details of a minor punishment, and this provision allows for the different circumstances COs find themselves in. A CO is also permitted to delegate functions under minor punishment regulations.

Section 133: Detention: limits on powers

284. This section places limits on the amount of detention a CO may award and the circumstances in which he may do so. A CO may award up to 28 days without extended powers and 90 days with extended powers to servicemen of the lowest non-commissioned rank. However, he must have extended powers before awarding a punishment of detention of any period to a leading rate, lance corporal, lance bombardier or corporal in the RAF (or other air force). A CO has extended powers where he has applied for them and had them granted by higher authority. COs of 2* rank have inherent extended powers.

Section 134: Forfeiture of seniority: requirement for approval

285. This section requires a CO to have extended powers before awarding forfeiture of seniority. A CO has extended powers where he has applied for them and had them granted by higher authority. COs of 2* rank have inherent extended powers.

Section 135: Reduction in rank: limits on powers

286. This section deals with COs' powers to disrate naval ratings and reduce army and RAF non-commissioned servicemen in rank. A CO requires extended powers to reduce in rank, save where he proposes to reduce a lance corporal or lance bombardier (who have no equivalent ranks in the Royal Navy or RAF and are lower than the first non-commissioned rank in those forces). A CO may remove the acting rank of a non-commissioned service person that holds such a rank or one substantive rank from any other non-commissioned serviceman. A CO has extended powers for these purposes where he has applied for them and had them granted by higher authority; COs of 2* rank or above have inherent higher authority.
287. The section makes particular provision in respect of airmen. The term "airman" covers four ranks: aircraftman, leading aircraftman, senior aircraftman and junior technician. Whilst these four ranks do form a hierarchy, for some branches of the RAF a junior technician might be the lowest trained rank for his specialisation. A CO is not able to reduce a person in rank within the category of airman, so, for example, a junior technician may not be reduced to a senior aircraftman. For an RAF corporal any reduction in rank would be to the next highest rank applicable to his trade, and for which he is qualified, but still within the "catch all" category of airman.
288. The Defence Council may make regulations restricting the power to reduce in rank or disrate certain persons whose branch or trade requires them to hold a minimum rank or rate.

Section 136: Fine: maximum amount

289. This section deals with a CO's powers to fine. A CO may fine, without extended powers, an officer or warrant officer 14 days' pay and any other person 28 days' pay (the section explains how a day's pay is to be calculated). With extended powers he can fine an officer or warrant officer up to 28 days' pay. A CO has extended powers where he

has applied for them and had them granted by higher authority. COs of 2* rank have inherent extended powers.

Section 137: Service compensation orders: maximum amount

290. This section sets out the maximum amount for a service compensation order (or a combination of them) that may be awarded by a CO. The maximum is currently set at £1,000. The section also provides that the Secretary of State may substitute for the sum specified another appropriate sum. However, the Secretary of State may only alter the specified sum in order to stay in line with changes to the value of money.

Section 138: Prohibited combinations of punishments

291. This section prohibits the award of certain punishments in combination with each other. It also provides that regulations may make provision about minor punishments.

Section 139: Savings for maximum penalties for offences

292. This section places restrictions on the punishments which can be awarded by a CO when he is hearing a criminal conduct charge either alone or in combination with a non-criminal conduct offence. Where a CO is hearing a criminal conduct charge on its own, he may only award detention if the Court Martial would be able to do so for that offence and any fine must not exceed that which the Court Martial could have awarded for that offence.
293. Where the CO makes an award of punishment relating to more than one offence he may not award detention unless the Court Martial could have done so for at least one of the offences; and, where the offences are criminal conduct offences, he may not award a fine greater than the total of the fines that the Court Martial could have awarded under section 42.

Chapter 2 – The Summary Appeal Court

294. The Act establishes the Summary Appeal Court (“SAC”) for the Armed Services which will replace the single-service Summary Appeal Courts that were established under the Armed Forces Discipline Act 2000. The tri-service SAC will operate in a similar manner to the single-service Summary Appeal Courts.
295. The SAC is a standing court, which means the court will exist continuously, may consider more than one case at any one time and may sit in more than one place at any one time.
296. A judge advocate presides at sittings of the SAC. The SAC hears appeals against findings made and punishments awarded at summary hearings. There is a universal right to appeal to the SAC which supplements an accused person’s right to elect trial by the Court Martial before the start of a summary hearing. This offers those who have been dealt with summarily the opportunity to appeal to a court that is compliant with the European Convention on Human Rights, thereby making the entirety of the summary process ECHR-compliant.
297. An appeal against a finding takes the form of a re-hearing and is conducted in a similar manner as an appeal that is made to the Crown Court from a decision in the magistrates’ court in England and Wales. The respondent (the other party to the appeal) is the DSP. Consequently, the rules of evidence, with appropriate modifications, mirror those in the civilian system. Where the appeal relates to punishment alone the re-hearing is only in relation to sentence.

Section 140: The Summary Appeal Court

298. This section establishes the SAC and specifies that there are no geographical constraints on where it may sit. This means it could sit in the UK or, for example, in Germany or Iraq.

Section 141: Right of appeal

299. This section provides that anyone who has had a charge against him proven at a summary hearing can appeal to the SAC. The appeal can be in respect of the finding or the punishment. The section imposes an initial 14-day time limit for bringing an appeal, starting from the day on which the punishment is awarded. The Court may extend this time limit if an application to extend it is made within the initial fourteen days. The Court may also give permission to appeal to the SAC at any time after the 14-day time limit has expired.

Section 142: Constitution of the SAC for appeals

300. This section provides that for the purpose of an appeal the SAC will be made up of a judge advocate and two other members. The second member must be a commissioned officer but the third member can be either a warrant officer or a commissioned officer. The second and third members must be qualified and eligible to sit as members of the Court in accordance with sections 143 and 144.
301. The judge advocate hearing the appeal will be specified for the hearing by or on behalf of the Judge Advocate General and the other two members will be selected by the court administration officer.

Section 143: Officers and warrant officers qualified for membership of the SAC

302. This section provides that, subject to certain exceptions, an officer is qualified to act as a member if he has held a commission in HM Forces for at least 3 years (or for periods totalling 3 years) or he was a warrant officer in HM Forces immediately before receiving his commission. There is no length of service requirement for a warrant officer as a non-commissioned officer who has attained this rank has considerable service experience (an acting warrant officer is not qualified to sit). The exceptions to these general qualifications are listed and include lawyers and service policemen; this is in order to prevent any actual or perceived bias that could arise if a person connected with the service disciplinary process is appointed as a member.

Section 144: Officers and warrant officers ineligible for membership in particular circumstances

303. This section sets out the categories of officers and warrant officers who, by virtue of any involvement in the case which is the subject of the appeal or any command relationship with the accused person, may not be members of the court for that particular appeal, despite being otherwise qualified to sit as members of the SAC.

Section 145: Open court

304. This section establishes the general principle that the SAC must sit in open court. Exceptions to this principle may be provided for in SAC rules.

Section 146: Hearing of appeals

305. This section provides that an appeal against finding will be a complete rehearing of the charge so that all of the evidence in the case will be heard again. If the SAC does not quash the finding (or every finding in a case where there is more than one finding being appealed against) it will go on to rehear the evidence relevant to punishment.

However, appeals against sentence alone will be by way of a rehearing only of the evidence relevant to punishment.

306. Questions of law, procedure and practice will be decided by the judge advocate and will be binding on the court.

Section 147: Powers of the SAC

307. At an appeal against finding the SAC can confirm the finding, quash it or substitute it with a finding that another charge has been proved. Where the Court quashes the finding, it must also quash the accompanying punishment. SAC rules may set down the circumstances in which a Court may substitute a finding that another charge is proved.
308. After rehearing the evidence in respect of punishment, the SAC can confirm the punishment or quash it and substitute another punishment. A court cannot substitute a punishment unless the substituted punishment could have been awarded by the CO who awarded the original punishment at the summary hearing and the court considers that it is no more severe than the original punishment.

Section 148: Effect of substituted punishment

309. This section provides that unless the SAC directs otherwise, any punishment that it substitutes is deemed to have been awarded on the day that the CO awarded his punishment. The exception to this general rule is when the SAC awards a punishment of detention, in which case it may either direct that the punishment is to take effect at the end of any other period of service detention that has been awarded to the accused on a previous occasion, or it takes effect from the day on which the SAC awards it.

Section 149: Making of, and appeals from, decisions of the SAC

310. This section provides for decisions of the SAC to be made on the basis of a majority of the votes of the members of the court. An appellant or a respondent may apply to the High Court to have a case stated to challenge a decision of the SAC on the ground that it is wrong in law or in excess of its jurisdiction. Under the SDAs, such an application could only be made by an appellant.

Section 150: Privileges of witnesses and others

311. This section provides that a witness (or anyone else who has a duty to attend the SAC) will have the same immunities and privileges as he would have had if called before the High Court in England and Wales.

Section 151: SAC rules

312. This section provides that the Secretary of State may make rules with respect to the SAC. Such rules can apply any domestic legislation, with or without modification. They are to be made by statutory instrument, subject to the “negative resolution” procedure.

Chapter 3 – Review of Summary Findings and Punishments

Section 152: Review of summary findings and punishments

313. This section provides that a finding or a punishment awarded at a summary hearing can be reviewed at any time. The review can be carried out by the Defence Council or by any officer appointed by it to perform those functions.
314. In cases where the person to whom the finding or punishment has been awarded has not lodged an appeal to the SAC within the time limits set out in section 141(2), the reviewing authority can (with the SAC’s permission) refer a finding or punishment to the court for consideration by it as on appeal. Where the person to whom the finding or punishment has been awarded has appealed to the SAC and the hearing has not been

completed, the reviewing authority may notify the court of any matter arising from the summary hearing which he considers should be brought to the notice of the court.

315. Where the person to whom the finding or punishment has been awarded has appealed to the SAC and the court hearing has been completed, the reviewing authority may with the court's permission refer the finding or punishment to the court to be considered by it as on appeal. This may happen if the reviewing authority considers that the court should be aware of a matter arising from the summary hearing. It may happen even if the court substituted a different finding or punishment when the appeal was heard.
316. Where the reviewing authority refers a matter to the SAC for consideration the matter will be treated as if it is an appeal brought by the person to whom the finding or punishment relates. This means that the person and not the reviewing authority will be the appellant.

Chapter 4 – Summary Hearings etc Rules

Section 153: Summary hearings etc rules

317. This section provides that the Secretary of State may make regulations (by statutory instrument) with respect to the summary hearing of charges by COs and hearings as regards the making of orders activating suspended sentences of service detention passed on an offender by a CO.