
STATUTORY INSTRUMENTS

2009 No. 1059

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

PART 8

CUSTODY

CHAPTER 1

General

“Service offence”

34. In Part 4 of AFA 2006 (custody), any reference to a service offence includes an SDA offence.

CHAPTER 2

Custody without charge

Limitations on custody without charge of person arrested before commencement

35.—(1) In section 98(1) of AFA 2006 (limitations on custody without charge), the reference to a person arrested under section 67 includes a person who immediately before commencement—

- (a) was in military, air-force or naval custody having been arrested under section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957; and
- (b) had not been charged with an offence, within the meaning given by section 75(4) of AA 1955 or AFA 1955 or section 47A(4) of NDA 1957.

(2) Section 119(5) of AA 1955 and AFA 1955 (provision corresponding to section 301(4) of AFA 2006) apply for the purposes of section 98 of AFA 2006.

(3) Section 88(2) of NDA 1957 (provision corresponding to section 301(4) of AFA 2006) applies for the purposes of section 98 of AFA 2006, but as if—

- (a) the reference to civil custody were omitted; and
- (b) in the definition of “the appropriate rules” in section 88(3) of NDA 1957, paragraph (c) were omitted.

Authorisation by CO of custody without charge

36.—(1) In section 99 of AFA 2006 (authorisation by CO of custody without charge)—

- (a) in subsection (1) (duty to report to CO arrest and any grounds for keeping in custody), the reference to the case where a person is arrested under section 67 includes the case where—
 - (i) before commencement a person was arrested under section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957; and

- (ii) immediately before commencement, the requirement imposed by section 75A(1) of AA 1955 or AFA 1955 or section 47B(1) of NDA 1957 had not been complied with in relation to that arrest;
 - (b) in subsection (3), the reference to a report under subsection (1) includes a report under section 75A(1) of AA 1955 or AFA 1955 or section 47B(1) of NDA 1957 as respects which no determination under section 75A(3) of AA 1955 or AFA 1955 or section 47B(3) of NDA 1957 had been made before commencement.
- (2) Where, immediately before commencement, an authorisation under section 75A(4) of AA 1955 or AFA 1955 or section 47B(4) of NDA 1957 (authorisation by CO of custody without charge) has effect—
- (a) the authorisation is not affected by the coming into force of the repeal of sections 75A(4) and 47B(4) (or by section 98(1) of AFA 2006);
 - (b) for the purposes of section 100(1) of AFA 2006, the person kept in service custody under the authorisation is to be taken to be kept in service custody in accordance with section 99 of that Act; and
 - (c) for the purposes of section 100(3), (4) and (6) of that Act and section 99(7)(d) of that Act the authorisation is to be taken to have been given under section 99(4) of that Act.
- (3) Where, immediately before commencement, a person is in service custody by virtue of section 75B(4)(b) of AA 1955 or AFA 1955 or section 47C(4)(b) of NDA 1957 following the postponement of a review of his being kept in custody, section 100(6) of AFA 2006 applies as if—
- (a) the review had been postponed under section 100(3) or (4); and
 - (b) the requirement in section 100(6)(a) were to carry out the review as soon as practicable.

Extension by judge advocate of custody without charge

- 37.—**(1) In section 101(1) of AFA 2006 (power to apply to judge advocate for extension of custody without charge), the reference to a person arrested under section 67 includes a person who immediately before commencement—
- (a) was in military, air-force or naval custody having been arrested under section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957; and
 - (b) had not been charged with an offence, within the meaning given by section 75(4) of AA 1955 or AFA 1955 or section 47A(4) of NDA 1957.
- (2) Where, immediately before commencement, an order under section 75C(1) of AA 1955 or AFA 1955 or section 47D(1) of NDA 1957 (extension of custody without charge) has effect, the order—
- (a) is not affected by the coming into force of the repeal of sections 75C(1) and 47D(1); and
 - (b) has effect after commencement as if the custody in which it authorised the person to whom it relates to be kept were service custody.
- (3) Paragraph (4) applies where, immediately before commencement—
- (a) an application has been made under section 75C(1) of AA 1955 or AFA 1955 or section 47D(1) of NDA 1957; and
 - (b) the hearing stands adjourned under section 75C(3) or (8)(b) of AA 1955 or AFA 1955 or section 47D(3) or (8)(b) of NDA 1957.
- (4) The application has effect after commencement as an application under section 101(1) of AFA 2006.

Persons arrested while in custody

38.—(1) This article applies where before commencement a person, while kept in military, air-force or naval custody without being charged with an offence (within the meaning given by section 75(4) of AA 1955 or AFA 1955 or 47A(4) of NDA 1957), was arrested under section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957 for another offence.

(2) Paragraph (3) applies if, immediately before commencement, the requirement imposed by section 75A(1) of AA 1955 or AFA 1955 or section 47B(1) of NDA 1957 had not been complied with both in relation to the arrest for that other offence and the original arrest (and accordingly the duty in section 99(1) of AFA 2006 as modified by this Part applies).

(3) Where this paragraph applies, the reference in section 99(2)(a) of AFA 2006 to a service offence for which the person is under arrest includes the offence for which the person was originally arrested.

(4) Where the duty in section 99(3) of AFA 2006 (as modified by this Part) arises, the reference in section 99(4)(a) to a service offence for which the person is under arrest includes the offence for which the person was originally arrested.

(5) In section 99(6) of AFA 2006 the reference to the arrest is to be read as to the arrest for the offence for which the person was originally arrested.

(6) If an application is made under section 101 of AFA 2006 (as modified by this Part) in respect of the person, the reference in section 101(4) to the arrest is to be read as to the arrest for the offence for which the person was originally arrested.

(7) Any reference in section 102(1) to (7) of AFA 2006 to the arrest is to be read as to the arrest for the offence for which the person was originally arrested.

Custody without charge: other cases

39.—(1) This article applies where immediately before commencement a person—

(a) was in military, air-force or naval custody having been delivered into that custody under—

(i) section 187(2) or (3), 188(2) or 190A(3) of AA 1955 or AFA 1955;

(ii) section 103(3), 108(2), 109(1) or (3) of NDA 1957; or

(iii) paragraph 4(2) or (3), 5(3) or 6(2) of Schedule 2 to RFA 1996; and

(b) had not been charged with an offence, within the meaning given by section 75(4) of AA 1955 or AFA 1955 or section 47A(4) of NDA 1957.

(2) Sections 98 to 102 of AFA 2006 (as modified by this Part) shall apply as if the person had been arrested under section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957 at the time he was delivered into military, air-force or naval custody.

CHAPTER 3

Custody after charge

Custody after charge

40.—(1) In sections 105(1), (4), (5) and (7) and 106(3) of AFA 2006 (custody after charge), references to a person's being "charged" with an offence include a person's being informed in accordance with regulations of the Defence Council that a charge is to be reported to the person's commanding officer under section 76(1) of AA 1955 or AFA 1955 or section 52B(1) of NDA 1957.

(2) Where, immediately before commencement, an order under section 75F(2) of AA 1955 or AFA 1955 or section 47G(2) of NDA 1957 (order authorising custody after charge) has effect, the order has effect after commencement—

- (a) as if made under section 105(2) of AFA 2006;
 - (b) as if the custody in which it authorised the accused to be kept were service custody; and
 - (c) in a case where the period of custody authorised by the order was so authorised by virtue of section 75G(7) of AA 1955 or AFA 1955 or section 47H(7) of NDA 1957, as if that period had been authorised by virtue of section 108(7) of AFA 2006.
- (3) In section 105(5) of AFA 2006 (reasons to be given for not keeping certain persons in custody), in paragraph (a)—
- (a) the reference to an offence under section 42 of that Act includes an SDA civil offence;
 - (b) the reference to the corresponding offence under the law of England and Wales includes the corresponding civil offence; and
 - (c) the reference to an offence under section 1 of the Sexual Offences Act 2003⁽¹⁾ includes an offence under section 1 of the Sexual Offences Act 1956⁽²⁾.
- (4) In section 105(7) of AFA 2006 (disapplication of section 105(1)), the reference to an order under section 105(2) includes an order under section 75F(2) of AA 1955 or AFA 1955 or section 47G(2) of NDA 1957.
- (5) Where, immediately before commencement, a requirement under section 75J(2)(b) of AA 1955 or AFA 1955 or section 47K(2)(b) of NDA 1957 has effect (requirement to secure accused's attendance at hearing), the requirement has effect after commencement as if imposed under section 107(3)(a) of AFA 2006.
- (6) Where, immediately before commencement, an application under section 75J(2A) of AA 1955 or AFA 1955 or section 47K(2A) of NDA 1957 (variation of requirement) has been made but not granted, refused or withdrawn, the application has effect after commencement as an application under section 107(4) of AFA 2006.
- (7) Where, immediately before commencement, a request under section 75G(2)(b) of AA 1955 or AFA 1955 or section 47H(2)(b) of NDA 1957 (request for review) has been made but not complied with, the request has effect after commencement as a request under section 108(2)(b) of AFA 2006.
- (8) Where before commencement a review in respect of a person's being kept in custody was carried out under section 75G(1) of AA 1955 or AFA 1955 or section 47H(1) of NDA 1957, any subsequent review under section 108(1) of AFA 2006 is to be treated for the purposes of section 108(5) and (6) of AFA 2006 as a subsequent review and not a first review.
- (9) In section 109(1) of AFA 2006 (custody during court proceedings), the reference to a review under section 108(1) which takes place between arraignment before the Court Martial or the Service Civilian Court and the conclusion of proceedings before the court includes a review which takes place—
- (a) between the arraignment of the accused under section 91A of AA 1955 or AFA 1955 or section 58A of NDA 1957 and the conclusion of proceedings before the Court Martial; or
 - (b) between the arraignment of the accused before a Standing Civilian Court and the conclusion of proceedings before the Service Civilian Court.

Arrest after charge

41.—(1) In section 110(1) of AFA 2006 (power to order arrest after charge), the reference to a person who has been “charged” with an offence includes a person who has been informed in accordance with regulations of the Defence Council that a charge is to be reported to the person's commanding officer under section 76(1) of AA 1955 or AFA 1955 or section 52B(1) of NDA 1957.

(1) 2003 c. 42.

(2) 1956 c. 69. Section 1 (rape) was repealed by the Sexual Offences Act 2003 (c. 42), section 139 and Schedule 6, paragraph 11.

(2) Where, immediately before commencement, an order under section 75K(1) of AA 1955 or AFA 1955 or section 47L(1) of NDA 1957 (arrest after charge) has effect, the order has effect after commencement as if given under section 110(1) of AFA 2006.

(3) In section 110(4) of AFA 2006 (review), the reference to a person arrested under subsection (1) includes a person who immediately before commencement—

- (a) was in service custody having been arrested under section 75K(1) of AA 1955 or AFA 1955 or section 47L(1) of NDA 1957; and
- (b) had not been brought before a judicial officer under section 75K(7)(b) of AA 1955 or AFA 1955 or section 47L(7)(b) of NDA 1957.

(4) In section 111(1)(a) of AFA 2006 (arrest at direction of court), the reference to arraignment before a court mentioned there includes arraignment—

- (a) under section 91A(2) of AA 1955 or AFA 1955 or section 58A(2) of NDA 1957; or
- (b) before a Standing Civilian Court.

(5) Where, immediately before commencement, a direction under section 75K(3) of AA 1955 or AFA 1955 or section 47L(3) of NDA 1957 (arrest at direction of court) has effect, the direction has effect after commencement as if given under section 111(1) of AFA 2006.

(6) In section 111(4) of AFA 2006 (review), the reference to a person arrested under section 111 includes a person who immediately before commencement—

- (a) was in service custody having been arrested (other than before a judicial officer or judge advocate) under section 75K(3) of AA 1955 or AFA 1955 or section 47L(3) of NDA 1957; and
- (b) had not been brought before a judicial officer or judge advocate under section 75K(8)(b) of AA 1955 or AFA 1955 or section 47L(8)(b) of NDA 1957.