STATUTORY INSTRUMENTS

2009 No. 1211

The Armed Forces (Summary Appeal Court) Rules 2009

PART 11

EVIDENCE

CHAPTER 1

General

Application and interpretation of Part 11

58. The provisions of this Part apply in relation to any proceedings in which an issue of fact falls to be determined, unless otherwise stated.

Rules of evidence

59.—(1) The rules of evidence applicable in a trial on indictment in England and Wales shall apply, to the extent that they—

(a) are capable of applying; and

(b) are not applied, with or without modifications, by any other enactment or subordinate legislation (whenever passed or made).

(2) In this rule, "rules of evidence" includes rules conferring or restricting any discretion to exclude admissible evidence.

(3) No person may be required—

(a) to answer any question which he could not be required to answer in a trial on indictment in England and Wales; or

(b) to produce any document which he could not be required to produce in such a trial.

(4) The court may take judicial notice of—

(a) matters of which judicial notice could be taken in a trial on indictment in England and Wales; and

(b) matters within the general service knowledge of the court.

Oral testimony to be given on oath

60.—(1) Oral testimony shall be given on oath.

(2) This rule is subject to section 5 of the Oaths Act 1978 (affirmation);

Proof by written statement

61.—(1) Without prejudice to rule 59, section 9 of the 1967 Act (proof by written statement) shall apply, as modified by paragraph (2), in relation to a statement made—

(a) in the United Kingdom by any person, or

(b) outside the United Kingdom by a person subject to service law or a civilian subject to service discipline,

as it applies in criminal proceedings in relation to a statement made in the United Kingdom.

(2) In its application by virtue of this rule, section 9 of the 1967 Act shall have effect as if—

(a) subsection (2)(c) required service of the statement on the court administration officer (as well as each of the other parties to the proceedings);

(b) in subsection (2)(d), the reference to the parties' solicitors were to their legal representatives;

(c) subsections (5) and (8) were omitted; and

(d) in subsection (6), the references to the court were to the judge advocate.

(3) An application to the court under section 9(4)(b) of the 1967 Act—

(a) may be made in preliminary proceedings; and

(b) if made in appeal proceedings, shall be determined by the judge advocate.

(4) Section 89 of the 1967 Act (offence of making a false statement tendered in evidence) shall apply in relation to a statement tendered in evidence in proceedings of the court by virtue of section 9 of that Act, wherever made, as it applies in relation to a statement tendered in evidence in criminal proceedings by virtue of that section.

Proof by formal admission

62.—(1) Without prejudice to rule 59, section 10 of the 1967 Act (proof by formal admission) shall apply, as modified by paragraph (2), as it applies in relation to criminal proceedings.

(2) In its application by virtue of this rule, section 10 of the 1967 Act shall have effect as if—

(a) in subsection (1), the reference to the prosecutor were to the Director; and

(b) in subsection (2), references to an appellant's counsel or solicitor were to his legal representative.

Use of documents to refresh memory

63.—(1) A person giving oral evidence about any matter may, at any stage in the course of doing so, refresh his memory of it from a document made or verified by him at an earlier time if—

(a) he states in his oral evidence that the document records his recollection of that matter at that earlier time; and

(b) his recollection of the matter is likely to have been significantly better at that time than it is at the time of his oral evidence.

(2) Where—

(a) a person giving oral evidence about any matter has previously given an oral account, of which a sound recording was made, and he states in that evidence that the account represented his recollection of the matter at that time,

(b) his recollection of the matter is likely to have been significantly better at the time of the previous account than it is at the time of his oral evidence, and

(c) a transcript has been made of the sound recording,

he may, at any stage in the course of giving his evidence, refresh his memory of the matter from that transcript.

CHAPTER 2

Evidence of bad character

Notice of intention to adduce evidence of an appellant's bad character

64.—(1) Where, in appeal proceedings—

(a) the Director intends to adduce evidence of an appellant's bad character, or

(b) an appellant intends to adduce evidence of another appellant's bad character, or to cross-examine a witness with a view to eliciting such evidence,

he must serve on the court administration officer and all other parties to the proceedings a notice of that intention.

(2) A notice under this rule—

(a) must describe the misconduct to which the evidence relates;

(b) must state what evidence of the misconduct the party serving the notice intends to adduce or elicit;

(c) if served by the Director, must identify any witness whom he intends to call about the misconduct; and

(d) identify the paragraph or paragraphs of section 101(1) of the 2003 Act which the party serving the notice asserts to be applicable to the evidence.

(3) If served by the Director, a notice under this rule must be served not more than 14 days after the Director serves advance information in respect of the appeal to which the evidence relates.

(4) If served by an appellant, a notice under this rule must be served not more than 14 days after—

(a) the date on which the Director complies or purports to comply with article 4 of CPIA Order; or,

(b) if later, the date on which the Director discloses to the appellant the previous convictions of the co-appellant to whose misconduct the notice relates.

(5) If it is not reasonably practicable to serve a notice under this rule within the time prescribed by paragraph (3) or (4) (as the case may be), the notice must be served as soon as it is reasonably practicable to do so.

(6) The court may dispense with the requirement to serve a notice under this rule if satisfied that no injustice would result.

Application to exclude evidence of an appellant's bad character

65.—(1) An application under section 101(3) of the 2003 Act to exclude evidence of an appellant's bad character in appeal proceedings must be made in writing to the court administration officer and served on all other parties to the proceedings, unless a judge advocate gives leave for the application to be made orally.

(2) If made in writing, the application—

(a) must state whether a notice under rule 64 has been served on the applicant in relation to the evidence, and if so on what date; and

(b) must be made and served not more than 14 days after that date (if any), unless paragraph (3) applies.

(3) Where—

(a) the court dispenses with the requirement to serve a notice under rule 64, or

(b) such a notice is served but it is not reasonably practicable to make the application within 14 days of the service of the notice,

the application must be made as soon as is reasonably practicable.

Application for leave to adduce evidence of the bad character of a non-appellant

66.—(1) An application for leave to give evidence in appeal proceedings of the bad character of a person other than an appellant must be made in writing to the court administration officer and served on all other parties to the proceedings, unless a judge advocate gives leave for the application to be made orally.

(2) If made in writing, such an application—

(a) must describe the misconduct to which the evidence relates;

(b) must state what evidence of the misconduct the applicant seeks to adduce or elicit;

(c) if made by the Director, must identify any witness whom he intends to call about the misconduct; and

(d) must state the grounds on which the applicant asserts that the evidence is admissible.

(3) If made by the Director, an application under this rule must be made not more than 14 days after the Director serves advance information in respect of the appeal to which the evidence relates.

(4) If made by an appellant, an application under this rule must be made not more than 14 days after—

(a) the date on which the Director complies or purports to comply with article 4 of CPIA Order; or,

(b) if later, the date on which the Director discloses to the appellant the previous convictions of the person to whose misconduct the application relates.

(5) If it is not reasonably practicable to make an application under this rule within the time prescribed by paragraph (3) or (4) (as the case may be), the application must be made as soon as it is reasonably practicable to do so.

CHAPTER 3

Hearsay evidence

Notice of intention to adduce hearsay evidence

67.—(1) Where a party to appeal proceedings proposes to adduce a hearsay statement, or (in the case of an appellant) to cross-examine a witness with a view to eliciting evidence of such a statement, on the basis that the statement is admissible by virtue of—

(a) section 114(1)(d) of the 2003 Act (interests of justice),

(b) section 116 of that Act (maker of statement unavailable to give oral evidence), or

(c) section 117 of that Act (statement contained in a document),

he must serve on the court administration officer and all other parties to the proceedings a notice to that effect.

(2) A notice under this rule—

(a) must give details of the statement that the party serving the notice proposes to tender in evidence;

(b) where the statement is contained in a document which has not already been served on all the other parties, must include a copy of the document;

(c) where the notice is served by the Director and oral evidence of the statement is to be given, must identify any witness who is to give it;

(d) must specify whether the party serving the notice proposes to tender the statement by virtue of section 114(1)(d), 116 or 117 of the 2003 Act;

(e) where he proposes to tender the statement by virtue of section 114(1)(d) of that Act, must specify which of the factors mentioned in section 114(2) of that Act he considers to be relevant, and how they are relevant; and

(f) where the statement is evidence that an earlier hearsay statement was made, must specify whether he proposes to tender it by virtue of section 121(1)(a), (b) or (c) of that Act.

(3) Where a notice under this rule is served by the Director, it must be served not more than 14 days after the Director serves advance information in respect of the appeal to which the evidence relates.

(4) Where a notice under this rule is served by an appellant, it must be served not more than 14 days after the Director complies or purports to comply with article 4 of CPIA Order.

(5) Where—

(a) a notice has been served under this rule in relation to a hearsay statement, and

(b) no counter-notice has been served in accordance with rule 68 in relation to the statement,

the statement is to be treated as admissible by agreement of the parties.

(6) In this rule "hearsay statement" means a statement which—

(a) is not made in oral evidence in the proceedings; and

(b) is relied on as evidence of a matter stated in it.

Counter-notice objecting to the admission of hearsay evidence

68.—(1) Where a party serves a notice under rule 67 in relation to a statement, any other party may serve a counter-notice objecting to the admission of the statement.

(2) A counter-notice served under this rule must state—

(a) the date on which the party serving it was served with the notice under rule 67;

(b) whether he objects to the admission of the whole or only part of the statement, and if only part which part; and

(c) the grounds on which he so objects.

(3) A counter-notice served under this rule must be served on the court administration officer and all other parties to the proceedings not more than 14 days after service of the notice under rule 67.

CHAPTER 4

Evidence of service matters

Evidence of enlistment

69.—(1) A document purporting to be an enlistment paper used to enlist a person in accordance with regulations made under section 328 shall be evidence that—

(a) that person was enlisted, on the date on which the declaration in the enlistment paper purports to have been signed by him, and on the terms set out in the document; and

(b) anything recorded in the document as the answer given by him to a question in the document was given by him in answer to that question when it was put to him by or on the direction of the recruiting officer who enlisted him.

(2) A document purporting to be a copy of such a document as is mentioned in paragraph (1) and purporting to be certified to be a true copy by a person stated in the certificate to have custody of the document shall be evidence of the matters mentioned in sub-paragraphs (a) and (b) of that paragraph.

Evidence as to service etc

70. A document stating that a person—

(a) was or was not serving at any specified time or during any specified period in any part of Her Majesty's forces,

(b) was discharged from any of Her Majesty's forces at or before any specified time,

(c) held or did not hold at any specified time any specified rank, rate or appointment in any of Her Majesty's forces,

(d) had at or before any specified time been attached, posted or transferred to any part of Her Majesty's forces,

(e) at any specified time or during any specified period was or was not serving or held or did not hold any rank, rate or appointment in any particular country or place, or

(f) was or was not at any specified time authorised to use or wear any decoration, badge or emblem,

shall, if it purports to be issued by or on behalf of the Defence Council or by a person authorised by them, be evidence of the matters stated in the document.

Service records

71.—(1) A record purporting to be—

(a) made in any service record in pursuance of any Act or of Queen's Regulations, or otherwise in pursuance of naval, military, or air force duty, and

(b) signed by the commanding officer of the person to whom the record relates or by a person whose duty it was to make or keep the record,

shall be evidence of the matters stated in the record.

(2) A document purporting to be a copy of such a record (including the signature) as is mentioned in paragraph (1) and purporting to be certified to be a true copy by a person stated in the certificate to have custody of the record shall be evidence of the matters stated in the document.

Defence Council instructions, regulations and certificates

72.—(1) A document purporting to be issued by order of the Defence Council and to contain instructions or regulations given or made by the Defence Council shall be evidence of the giving of the instructions or the making of the regulations and their contents.

(2) A certificate purporting to be issued by or on behalf of the Defence Council or by a person authorised by them and stating—

(a) that a decoration of a description specified in, or as annexed to, the certificate is or is not a naval, military or air force decoration, or

(b) that a badge or emblem of a description specified in, or as annexed to, the certificate is or is not one supplied or authorised by the Defence Council,

shall be evidence of the matters stated in the certificate.

Standing or routine orders

73. A certificate purporting to be signed by a person's commanding officer or an officer authorised by the commanding officer to give the certificate, and stating the contents of, or of any part of, standing orders, or other routine orders of a continuing nature, of any of Her Majesty's forces, made for—

(a) any part of Her Majesty's forces,

(b) any area or place, or

(c) any ship, train or aircraft,

shall be evidence of the matters stated in the certificate.

CHAPTER 5

Expert evidence

Expert evidence

74.—(1) Expert evidence shall not be adduced without the leave of the judge advocate unless the party proposing to rely on it has served on every other party and the court administration officer, not less than 14 days before the date appointed for the commencement of the proceedings, a statement of the substance of the expert evidence.

(2) The statement referred to in paragraph (1) must be in writing unless every other party consents to its being made orally.

(3) Where more than one party wishes to introduce expert evidence, the judge advocate may direct the experts to—

(a) discuss the expert issues in the proceedings; and

(b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.

(4) Except for the statement prepared under paragraph (3)(b), the content of the discussion under paragraph (3)(a) may not be referred to without the judge advocate's permission.

(5) Where more than one appellant wishes to introduce expert evidence on an issue, the judge advocate may direct that the evidence on that issue is to be given by one expert only.

(6) Where the appellants cannot agree who should be the expert to give evidence under paragraph (5), the judge advocate may—

(a) select the expert from a list prepared or identified by them; or

(b) direct that the expert be selected in such other manner as the judge advocate shall direct.

(7) Where the judge advocate gives a direction under paragraph (5) for a single joint expert to be used, each of the appellants may give instructions to the expert.

(8) When an appellant gives instructions to an expert under paragraph (7) he must, at the same time, send a copy of the instructions to every other appellant.

(9) Where—

(a) a statement has been prepared for the purposes of proceedings, and

(b) the person who prepared the statement had, or may reasonably be supposed to have had, personal knowledge of the matters stated,

a statement served under paragraph (1) may be accompanied by a notice, given for the purposes of section 127 of the 2003 Act (expert evidence: preparatory work), that another person will in evidence given in the proceedings (whether orally or under section 9 of the 1967 Act, as applied by rule 61) base an opinion or inference on the statement.