
DRAFT STATUTORY INSTRUMENTS

2013 No.

The Armed Forces (Retrial for Serious Offences) Order 2013

PART 5

Application for Retrial

Application to Court Martial Appeal Court

8.—(1) Where an acquitted person has been charged with a qualifying offence, a prosecuting officer may apply to the Court Martial Appeal Court for an order—

- (a) quashing the acquitted person's acquittal in proceedings mentioned in article 3(1); and
- (b) ordering him to be retried for the qualifying offence.

(2) An application may be made under paragraph (1) only with the written consent of the Director.

(3) The Director may give his consent only if satisfied that—

- (a) there is evidence as respects which the requirements of article 10 appear to be met;
- (b) it is in the public interest for the application to proceed; and
- (c) any trial pursuant to an order on the application would not be inconsistent with obligations of the United Kingdom under Article 31 or 34 of the Treaty on European Union relating to the principle of *ne bis in idem*.

(4) Not more than one application may be made under paragraph (1) in relation to an acquittal.

Determination by the Court Martial Appeal Court

9.—(1) On an application under article 8(1) the Court Martial Appeal Court—

- (a) if satisfied that the requirements of articles 10 and 11 are met, must make the order applied for;
- (b) otherwise, must dismiss the application.

(2) The court may give its determination under paragraph (1) at the conclusion of the hearing.

(3) If determination is reserved, the registrar must as soon as practicable, serve notice of the determination on the parties to the application.

(4) If the court makes the order under paragraph (1)(a), the registrar must as soon as practicable serve notice on the court administration officer.

New and compelling evidence

10.—(1) The requirements of this article are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.

(2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).

(3) Evidence is compelling if—

- (a) it is reliable;
- (b) it is substantial; and
- (c) in the context of the outstanding issues, it appears highly probative of the case against the acquitted person.

(4) The outstanding issues are the issues in dispute in the proceedings in which the person was acquitted and, if those were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related.

(5) For the purposes of this article, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

Interests of justice

11.—(1) The requirements of this article are met if in all the circumstances it is in the interests of justice for the court to make the order under article 9(1)(a).

- (2) That question is to be determined having regard in particular to—
 - (a) whether existing circumstances make a fair trial unlikely;
 - (b) for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;
 - (c) whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by a service policeman or by the Service Prosecuting Authority to act with due diligence or expedition;
 - (d) whether, since those proceedings or, if later, since the coming into force of this Order, any service policeman or the Service Prosecuting Authority has failed to act with due diligence or expedition.
- (3) In paragraph (2)—
 - (a) references to a service policeman or the Service Prosecuting Authority include references to persons charged with corresponding duties under the law in force —
 - (i) in any part of the United Kingdom; or
 - (ii) elsewhere than in the United Kingdom;
 - (b) references to a service policeman include a provost officer within the meaning of the Army Act 1955, Air Force Act 1955 or Naval Discipline Act 1957, and any person exercising authority on behalf of such an officer;
 - (c) references to the Service Prosecuting Authority include a prosecuting authority within the meaning of the Army Act 1955, Air Force Act 1955 or Naval Discipline Act 1957, and any officer appointed by a prosecuting authority as a prosecuting officer under any of those Acts.

Notice of application to the Court Martial Appeal Court

12.—(1) A prosecuting officer who wishes to make an application under article 8(1) must give notice of the application to the registrar in the form, or in substantially the same form as, set out as Form 1 in Schedule 2.

(2) Within two days beginning with the day on which notice under paragraph (1) is given, the prosecuting officer must serve the notice of the application on the acquitted person.

(3) As soon as reasonably practicable after giving notice under paragraph (1) the prosecuting officer must give a copy of the notice of the application to the acquitted person's commanding officer.

(4) A notice given under paragraph (1) or served under paragraph (2) must, where practicable, be accompanied by—

- (a) relevant witness statements which are relied upon as forming new and compelling evidence of guilt of the acquitted person as well as any relevant witness statements from the original trial;
- (b) any unused statements which might reasonably be considered capable of undermining the application under article 8(1) or of assisting the acquitted person’s application to oppose that application under article 13(5);
- (c) a copy of the charge sheet and paper exhibits from the original trial;
- (d) copies of the transcript of the summing up and any other relevant transcripts from the original trial; and
- (e) any other documents relied upon to support the application under article 8(1).

(5) The prosecuting officer must, as soon as practicable after service of a notice under paragraph (2), file with the registrar a witness statement or certificate of service which exhibits a copy of that notice.

(6) Paragraph (2) applies whether the acquitted person is in the United Kingdom or elsewhere, but the Court Martial Appeal Court may, on application by the prosecuting officer, extend the time for service under that paragraph if it considers it necessary to do so because of that person’s absence from the United Kingdom.

Hearing

13.—(1) The Court Martial Appeal Court must consider an application under article 8(1) at a hearing.

(2) The acquitted person—

- (a) is entitled to be present at the hearing, unless he is in custody (other than service custody) elsewhere than in England and Wales or Northern Ireland; and
- (b) is entitled to be represented at the hearing, whether he is present or not.

(3) If (of its own motion or on application by a party to the proceedings) the Court Martial Appeal Court so directs, the right of the acquitted person under paragraph (2)(a) may be met by attendance by live link.

(4) The Court Martial Appeal Court may at one hearing consider more than one application (whether or not relating to the same person), but only if the offences concerned could be included in the same charge sheet.

(5) An acquitted person who wishes to oppose an application under article 8(1) must serve a response in the form set out as Form 2 in Schedule 2 on the registrar and the prosecuting officer not more than 28 days after receiving notice under article 12(2).

(6) The Court Martial Appeal Court may extend the period for service under paragraph (5), either before or after that period expires.

(7) In paragraph (3) “live link” means an arrangement by which a person, when not in the place where the hearing is being held, is able to see and hear, and be seen and heard by, the court during the hearing (and for this purpose any impairment of eyesight or hearing is to be disregarded).

Evidence

14.—(1) For the purposes of an application under article 8(1), the Court Martial Appeal Court may, if it thinks it necessary or expedient in the interests of justice—

- (a) order the production of any document, exhibit or other thing, the production of which appears to the court to be necessary for the determination of the application; and
 - (b) order any witness who would be a compellable witness in proceedings pursuant to an order made on the application to attend for examination and be examined before the court.
- (2) Not less than 14 days before the day of the hearing under article 13(1) a party may apply to the Court Martial Appeal Court for an order under paragraph (1).
- (3) An application under paragraph (2) must be in the form set out as Form 3 in Schedule 2 and must be sent to the registrar and a copy sent to each party to the application under article 8(1).
- (4) If the Court Martial Appeal Court makes an order under paragraph (1) on its own motion or on an application from the prosecuting officer, it must serve notice and reasons for that order on all parties to the application under article 8(1).

Appeals to the Supreme Court

- 15.**—(1) The 1968 Act is amended as follows—
- (2) In section 39 (right of appeal), after subsection (1) insert—
 - “(1A) An appeal lies to the Supreme Court, at the instance of the acquitted person or the prosecuting officer, from any decision of the Appeal Court on an application under article 8(1) of the Armed Forces (Retrial for Serious Offences) Order 2013.”
 - (3) At the end of that section insert—
 - “(3) In relation to an appeal under subsection (1A), references in this Part to an accused are references to the acquitted person.”
 - (4) In section 40 (application for leave to appeal), in subsection (2) after “accused” there is inserted “or, in the case of an appeal under section 39(1A), by the prosecuting officer”.

Restrictions on publication in the interests of justice

- 16.**—(1) Where it appears to the Court Martial Appeal Court that the inclusion of any matter in a publication would give rise to a substantial risk of prejudice to the administration of justice in a retrial, the court may order that the matter is not to be included in any publication while the order has effect.
- (2) In paragraph (1) “retrial” means the trial of an acquitted person for a qualifying offence pursuant to any order made or that may be made under article 9(1)(a).
 - (3) The court may make an order under this paragraph only if it appears to it necessary in the interests of justice to do so.
 - (4) An order under this paragraph may apply to a matter which has been included in a publication published before the order takes effect, but such an order—
 - (a) applies only to the later inclusion of the matter in a publication (whether directly or by inclusion of the earlier publication); and
 - (b) does not otherwise affect the earlier publication.
 - (5) After notice of an application has been given under article 12(1) relating to the acquitted person and the qualifying offence, the court may make an order under this article only—
 - (a) of its own motion; or
 - (b) on the application of the Director.
 - (6) Before such notice has been given, an order under this article—
 - (a) may be made only on the application of the Director; and

(b) may not be made unless, since the acquittal concerned, an investigation of the commission by the acquitted person of the qualifying offence has been commenced.

(7) An application by the Director under paragraph (5) or (6) must be in the form set out as Form 4 in Schedule 2 and be served on the registrar and the acquitted person.

(8) Where, in the case of an application under paragraph (6), the Director has indicated in the form referred to in paragraph (7) that there are reasons why the acquitted person should not be notified of the application for restrictions on publication, the Court Martial Appeal Court may order that service on the acquitted person is not to be effected until notice of an application under article 8(1) is served on that person.

(9) Any order made under this article before notice of an application has been given under article 12(1) relating to the acquitted person and the qualifying offence must specify the time when it ceases to have effect.

(10) An order under this article which is made or has effect after such notice has been given ceases to have effect, unless it specifies an earlier time—

(a) when there is no longer any step that could be taken which would lead to the acquitted person being tried pursuant to an order made on the application; or

(b) if he is tried pursuant to such an order, at the conclusion of the trial.

(11) Nothing in this article affects any prohibition or restriction by virtue of any other enactment on the inclusion of any matter in a publication or any power, under an enactment or otherwise, to impose such a prohibition or restriction.

Variation or revocation of restrictions on publication

17.—(1) The Court Martial Appeal Court may at any time, of its own motion or on a written application by the Director or the acquitted person, vary or revoke an order under article 16(1).

(2) A copy of the application to vary or revoke must be sent to all parties to the application under article 8(1) unless paragraph (3) applies.

(3) If notice of an application under article 8(1) has not been given under article 12(1) and the Director has indicated in the form referred to in article 16(7) that there are reasons why the acquitted person should not be notified of the application for restrictions on publication, the Court Martial Appeal Court may order that service under paragraph (2) on the acquitted person is not to be effected until notice of an application under article 8(1) is served on that person.

(4) If the Court Martial Appeal Court varies or revokes an order for restrictions on publication of its own motion or on an application, it must serve notice and reasons for that order on all parties, unless paragraph (3) applies.

Offences in connection with publication restrictions

18.—(1) This article applies if—

(a) an order under article 16(1) is made; and

(b) while the order has effect, any matter is included in a publication, in any part of the United Kingdom, in contravention of the order.

(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 this article committed by a body corporate is proved—

- (a) to have been committed with the consent or connivance of an officer, 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 the Director of Public Prosecutions for Northern Ireland.