
STATUTORY INSTRUMENTS

2009 No. 1059

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

PART 10

SUMMARY DEALING

CHAPTER 1

Proceedings in progress at commencement

Summary hearing where court-martial trial declined before commencement

54.—(1) This article applies where—

- (a) a charge falls within article 46(3) (charges allocated for summary hearing); and
- (b) before commencement, the accused was given the opportunity to elect court-martial trial of the charge under section 76AA(1) of AA 1955 or AFA 1955 or section 52D(2) of NDA 1957 and declined to elect court-martial trial (or, having elected court-martial trial, withdrew the election with leave).

(2) Section 129(1) of AFA 2006 (giving of opportunity to elect Court Martial trial) must be complied with before the charge is heard summarily, despite the fact that the accused had been given the opportunity to elect court-martial trial.

(3) Where this article applies and the charge had begun to be heard summarily before commencement, in section 124(2) and 129 of AFA 2006 and paragraph (2) above references to hearing the charge summarily are to be read as references to proceeding with the hearing of the charge.

(4) The reference in paragraph (1) to a charge falling within article 46(3) includes a charge that—

- (a) would fall within article 46(3) but for the fact that it is an excluded charge; and
- (b) is an excluded charge only by reason of article 47(1)(a).

(5) A charge within paragraph (4) to which this article applies is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for summary hearing.

(6) Nothing in this article enables an officer to hear a charge summarily, or continue to do so, where summary hearing of the charge is prohibited by article 48(3) or 49.

Powers of punishment where finding reached before commencement

55.—(1) This article applies where, at commencement, an SDA finding of guilt has been recorded but punishment has not been awarded.

(2) For the purposes of paragraph (1) “an SDA finding of guilt” has been recorded if—

- (a) a finding that a charge has been proved has been recorded under section 76B(7) of AA 1955 or AFA 1955; or

(b) a finding of guilt has been recorded under section 52D(7) of NDA 1957.

(3) Where this article applies, the appropriate officer must award punishment as if the SDAs and related subordinate legislation continued in force (and had done so since commencement) and AFA 2006 were not in force.

(4) In paragraph (3) “related subordinate legislation” means—

(a) any regulations, or orders of the Secretary of State, made under the SDAs that were in force immediately before commencement; and

(b) any authorisation by the Defence Council for the purposes of section 76C(2)(e) of AA 1955 or AFA 1955 (minor punishments) that had effect immediately before commencement.

(5) The officer’s duty under paragraph (3) to award punishment includes a duty to make any other order or direction when dealing with the offender that the officer would have made under the SDAs; but this is subject to paragraph (6).

(6) If by virtue of paragraph (3) the officer imposes a sentence of detention under section 43(1)(e) of NDA 1957, the officer may not make a committal order under section 81(3) of that Act (but this does not affect his power to make an order under section 90(1) of that Act suspending the sentence).

(7) Regulations 45A, 49A and 53A of the Naval Summary Discipline Regulations (February) 2009⁽¹⁾ shall continue in force in relation to any order or direction made or proposed to be made under section 91B of NDA 1957 in pursuance of paragraph (5).

(8) In paragraph (3) the reference to “the appropriate officer” is to the officer who would have awarded punishment if the repeal of the SDAs had not come into force.

(9) The powers conferred by this article include power—

(a) for the officer who recorded the finding to exercise any power that that officer would have had, under regulations made under the SDAs, to refer the case to another officer for punishment;

(b) for an officer to whom the case is referred by virtue of sub-paragraph (a), or to whom it was referred for punishment before commencement, to exercise any power that that officer would have had under such regulations to refer the case to another officer for punishment; and

(c) accordingly, for the officer (if any) to whom the case is referred by virtue of sub-paragraph (a) or (b) to award punishment as mentioned in this article.

(10) In this article “the SDAs” means the provisions of AA 1955, AFA 1955 and NDA 1957 whose repeal came into force at commencement.

(11) Any reference in this Order to a sentence or punishment under a provision of AA 1955, AFA 1955 or NDA 1957 includes such a sentence or punishment awarded by virtue of this article.

Deemed disrating

56.—(1) Where a punishment awarded under article 55—

(a) is by reason of section 43(4) of NDA 1957 required to include disrating or reduction to the ranks, and

(b) does not include it,

the punishment is not invalid but is deemed to include disrating or (as the case may be) reduction to the ranks.

(1) These Regulations are made by the Defence Council under sections 43, 52E and 52F of NDA 1957 and published in the Manual of Naval Law.

(2) Where disrating is deemed by paragraph (1) to be included in a punishment, it reduces the offender to the rate that he would have been reduced to by virtue of section 43(5) of NDA 1957, had that Act continued in force.

Approval of summary punishment (NDA cases)

57.—(1) Paragraph (2) applies where—

- (a) at commencement, an SDA finding of guilt has been recorded but punishment has not been awarded;
- (b) the case is one where, under regulation 36 of the Naval Summary Discipline Regulations (February) 2009, punishment could not have been awarded without the approval of a submission under that regulation; and
- (c) at commencement, such a submission has not been made, or has been made but not approved.

(2) Punishment must not be awarded under article 55 unless a submission has been made (whether before or after commencement) and approved in accordance with that regulation.

(3) In this article “an SDA finding of guilt” has the same meaning as in article 55.

Warrant punishments

58.—(1) In this article “warrant punishment” is to be read in accordance with regulation 44 of the Naval Summary Discipline Regulations (February) 2009 (“the NSD Regulations”).

(2) A warrant punishment must not be awarded under article 55 unless a warrant has, before or after commencement—

- (a) been prepared in the format prescribed under regulation 45 of the NSD Regulations; and
- (b) been approved in accordance with regulation 40, 46, 47 or 48 of those Regulations (which shall continue in force for the purposes of this article).

(3) Regulation 49 of those Regulations (powers where punishment warrant submitted for approval) shall continue in force for the purposes of any case where—

- (a) at commencement, an SDA finding of guilt has been recorded but punishment has not been awarded; and
- (b) at a time after commencement, a punishment warrant has been submitted for approval (either before commencement or, by virtue of paragraph (2), after commencement) but the warrant has not yet been approved.

(4) Regulations 50 and 53 of the NSD Regulations (formal reading of punishment warrant, and power to modify punishment) shall continue in force in relation to any award of a warrant punishment under article 55.

CHAPTER 2

Modifications of AFA 2006 for charge current at commencement

Applications for purposes of AFA 2006 made before commencement

59.—(1) Paragraph (2) applies where either of the following applications is made before commencement—

- (a) an application for permission for the purposes of section 54 of AFA 2006 (permission to hear charge summarily);
- (b) an application for extended powers for the purposes of section 133(1) or (2), 134, 135(1) or 136(1)(b) of that Act (extended powers of punishment).

(2) The application, and any grant of the application or notification of its grant (whenever made), are to be treated as validly made if made in accordance with any provision of AFA 2006 or of rules under that Act that would apply if the application had been made after commencement.

(3) Paragraph (4) applies where—

- (a) before commencement, an application for permission to award extended detention was made in accordance with regulation 30 of the Custody and Summary Dealing (Army) Regulations 2006⁽²⁾ or regulation 17 of the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000⁽³⁾; and
- (b) (before or after commencement) the application is treated by higher authority as an application under section 133(3) of AFA 2006 for extended powers for the purposes of section 133(1).

(4) Any grant of those extended powers, or notification of their grant, in response to the application is to be treated as validly made if made in accordance with any provision of AFA 2006 or of rules under that Act that applies in relation to the grant of applications for such powers made after commencement.

(5) Nothing in paragraphs (3) and (4) invalidates the treatment of the application as an application for permission to award extended detention under the regulations mentioned in paragraph (3) (a) (whether that treatment was as well as or instead of treating the application as mentioned in paragraph (3)(b)).

Permissions for purposes of AA 1955 or AFA 1955 to award extended detention

60.—(1) This article applies where—

- (a) permission to award extended detention was granted before commencement under regulation 30 of the Custody and Summary Dealing (Army) Regulations 2006 or regulation 17 of the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000;
- (b) article 55 does not apply; and
- (c) punishment is awarded after commencement under AFA 2006.

(2) Where this article applies, the commanding officer is to be taken to have extended powers for the purposes of section 133(1) of AFA 2006.

Certain consequences of election for court-martial trial

61.—(1) This article applies to a charge allocated for Court Martial trial where—

- (a) the charge is so allocated by virtue of article 44 and the case to which it relates was referred to the prosecuting authority following an election for court-martial trial; or
- (b) the charge is so allocated by virtue of article 47(1)(c) and (2) (election for court-martial trial).

(2) Section 130 of AFA 2006 (consequences of election for Court Martial trial) applies where this article applies to a charge, and in that section—

- (a) the reference in subsection (2)(a) to “that charge” includes a reference to a charge to which this article applies; and
- (b) subsection (2)(b) and (3) are to be read accordingly (but subject to paragraph (3) below).

(2) These Regulations are made by the Defence Council under sections 75E, 82, 83 and 209 of AA 1955 and published in the Manual of Military Law.

(3) These Regulations are made by the Defence Council under sections 75E, 82, 83 and 209 of AFA 1955 and published in the Manual of Air Force Law. They are amended by the Pre-charge Custody and Summary Dealing (Royal Air Force) (Amendment) Regulations 2002.

(3) Where a charge to which this article applies was brought under NDA 1957, and the charge is referred to a commanding officer under section 125(2)(e) of AFA 2006—

- (a) the commanding officer may apply for extended powers for the purposes of section 133(1) or (2), 134, 135(1) or 136(1)(b) of AFA 2006; and
- (b) if the commanding officer makes such an application and is notified that it has been granted, section 130(3) of AFA 2006 (which would prevent the accused from electing Court Martial trial of the charge) is to be taken to be disapplied.

CHAPTER 3

Activation of SDA suspended sentence of service detention following civilian conviction

Activation where application for approval made before commencement

62.—(1) This article applies where at commencement—

- (a) an officer has made an application for approval, under regulation 49A of the Naval Summary Discipline Regulations (February) 2009, of an order which the officer proposes to make under section 91B of NDA 1957 (activation of sentence of detention by CO) by virtue of section 91B(1)(b) (conviction of offence in the British Islands); and
- (b) either—
 - (i) no decision has been made on the application; or
 - (ii) approval has been granted but the order has not been made.

(2) In any such case an order under section 91B(1) of NDA 1957, with or without a direction under section 91B(6)(a), may be made as if NDA 1957 continued in force (and had done so since commencement); but this is subject to paragraph (3).

(3) Paragraph (2) is subject to regulations 45A and 49A of the Naval Summary Discipline Regulations (February) 2009 (requirement for approval and for notification of order to offender), which shall continue in force for the purposes of this article.

(4) Regulation 53A of those regulations (power to withdraw order etc) shall continue in force in relation to any order or direction made by virtue of this article.

CHAPTER 4

The Summary Appeal Court

Right of appeal

63.—(1) In section 141(1) of AFA 2006 (right of appeal to Summary Appeal Court), the reference to a person in respect of whom a charge has been heard summarily and a finding that the charge has been proved has been recorded includes a person in respect of whom a charge was heard summarily, and a finding that the charge has been proved was recorded, under AA 1955, AFA 1955 or NDA 1957 before commencement.

(2) Where, immediately before commencement, a period allowed by a summary appeal court under section 83ZE(2) of AA 1955 or AFA 1955 or section 52FK(2) of NDA 1957 (extra time for appeal) is current and an appeal for which the period was allowed has not yet been brought, the period is to be treated as allowed by the Summary Appeal Court under section 141(2)(b) of AFA 2006.

(3) Where, immediately before commencement, a period allowed by a summary appeal court under section 83ZE(3) of AA 1955 or AFA 1955 or section 52FK(3) of NDA 1957 (extra time for appeal) is current and an appeal for which the period was allowed has not yet been brought, the period is to be treated as allowed by the Summary Appeal Court under section 141(3) of AFA 2006.

Appeal brought but not heard before commencement

64.—(1) This article applies where—

- (a) an appeal to a summary appeal court was brought before commencement; and
- (b) by commencement, the court had not begun to hear the appeal and the appeal had not been abandoned.

(2) For the purposes of Chapter 2 of Part 6 of AFA 2006 (appeals to the Summary Appeal Court), the appeal is to be treated as an appeal brought to the Summary Appeal Court under section 141 of AFA 2006.

(3) If before commencement a person was specified by or on behalf of the Judge Advocate General to be the judge advocate for the appeal, the specification has effect after commencement as a specification under section 142(3) of AFA 2006.

(4) If before commencement a person was specified by or on behalf of a court administration officer to be a member of the court for the appeal, the specification has effect after commencement as a specification under section 142(4) of AFA 2006.

(5) In this article “court administration officer” means a court administration officer within the meaning of section 83ZA of AA 1955 or AFA 1955 or section 52FF of NDA 1957.

Officers and warrant officers ineligible for membership of court

65. In section 144(1) of AFA 2006 (officers and warrant officers ineligible for membership of SAC in particular circumstances)—

- (a) in paragraph (a), “commanding officer”, in relation to times before commencement, means commanding officer within the meaning of Part 2 of AFA 2001;
- (b) in paragraph (c), the reference to a higher authority as mentioned there includes an officer who, in relation to the charge to which the appeal relates—
 - (i) acted as the appropriate superior authority under section 76B of AA 1955 or AFA 1955 or section 52EE of NDA 1957;
 - (ii) was the higher authority to whom a referral was made under section 76(5), 76AA(3) or 76B(4) of AA 1955 or AFA 1955 or section 52B(5) or 52D(3) or (5) of NDA 1957; or
 - (iii) was asked, as higher authority, to approve the award of any punishment;
- (c) in paragraph (f), the reference to an inquiry includes—
 - (i) an investigation conducted by a board of inquiry under section 135 of AA 1955 or AFA 1955;
 - (ii) an inquiry held under section 137 of AA 1955 or AFA 1955;
 - (iii) an inquiry held by the Royal Navy under the prerogative.

Punishments substituted for punishments imposed under AA 1955

66.—(1) This article applies to a rehearing as respects punishment held by virtue of section 146(1) (b) or (2) of AFA 2006 (rehearing by SAC) where the punishment to which the rehearing relates was imposed—

- (a) on a summary dealing under AA 1955; or
- (b) under article 55 in relation to a finding recorded under AA 1955.

(2) If only one offence has been proved, section 147(3) of AFA 2006 (power to substitute punishment) has effect as if for paragraph (b) there were substituted—

- “(b) quash that punishment and award in substitution for it any punishment which—
 - (i) would be available under Chapter 1 of this Part if a charge of the offence had just been found proved by the accused’s commanding officer and that officer had extended powers for the purposes of section 133(1) or (2) (as the case may be), 134, 135(1) and 136(1)(b); and
 - (ii) in the opinion of the court is neither more severe than the punishment originally awarded nor more severe than the most severe punishment which could have been awarded, for the offence for which the court is awarding punishment, by the officer who originally awarded punishment.”
- (3) If two or more offences have been proved, section 147(3) of AFA 2006 has effect as if for paragraphs (a) and (b) there were substituted—
 - “(a) confirm the punishments awarded; or
 - (b) quash those punishments and award in substitution for them any punishment which—
 - (i) would be available under Chapter 1 of this Part if charges of the offences had just been found proved by the accused’s commanding officer and that officer had extended powers for the purposes of section 133(1) or (2) (as the case may be), 134, 135(1) and 136(1)(b); and
 - (ii) in the opinion of the court is neither more severe than the punishments originally awarded nor more severe than the most severe punishments which could have been awarded, for the offences for which the court is awarding punishment, by the officer who originally awarded punishment.”

Punishments substituted for punishments imposed under AFA 1955

67.—(1) This article applies to a rehearing as respects punishment held by virtue of section 146(1) (b) or (2) of AFA 2006 (rehearing by SAC) where the punishment to which the rehearing relates was imposed—

- (a) on a summary dealing under AFA 1955; or
- (b) under article 55 in relation to a finding recorded under AFA 1955.

(2) In its application to the rehearing, section 147(3) of AFA 2006 (power to substitute punishment) has effect as if for paragraph (b) there were substituted—

- “(b) quash that punishment and award in substitution for it any punishment which—
 - (i) would be available under Chapter 1 of this Part if a charge of the offence (or charges of the offences) had just been found proved by the accused’s commanding officer and that officer had extended powers for the purposes of section 133(1) or (2) (as the case may be), 134, 135(1) and 136(1)(b); and
 - (ii) in the opinion of the court is neither more severe than the punishment originally awarded nor more severe than the most severe punishment which could have been awarded, for the offence or offences for which the court is awarding punishment, by the officer who originally awarded punishment.”

Punishments substituted for punishments imposed under NDA 1957

68.—(1) This article applies to a rehearing as respects punishment held by virtue of section 146(1) (b) or (2) of AFA 2006 (rehearing by SAC) where the punishment to which the rehearing relates was imposed—

- (a) on a summary trial under NDA 1957; or
- (b) under article 55 in relation to a finding recorded under NDA 1957.

(2) In its application to the rehearing, section 147(3) of AFA 2006 (power to substitute punishment) has effect as if for paragraph (b) there were substituted—

- “(b) quash that punishment and award in substitution for it any punishment which—
- (i) would be available under Chapter 1 of this Part if a charge of the offence (or charges of the offences) had just been found proved by the accused’s commanding officer and that officer had extended powers for the purposes of section 133(1) or (2) (as the case may be), 134, 135(1) and 136(1)(b); and
 - (ii) in the opinion of the court is neither more severe than the punishment originally awarded nor more severe than the most severe punishment which could have been awarded, for the offence or offences for which the court is awarding punishment, by the officer who originally awarded punishment.”

(3) For the purposes of section 147(3)(b) of AFA 2006 as substituted by paragraph (2) above, the punishments in the Table in section 132 of AFA 2006 are to be taken to include—

- (a) dismissal from Her Majesty’s service;
- (b) (as an alternative to disrating or reduction in rank as permitted by row 3 of the Table) disrating, or reduction in rank, to an extent which was available to the officer who awarded punishment.

(4) Nothing in section 138 of AFA 2006 prevents the Summary Appeal Court from awarding, by virtue of this article, dismissal from Her Majesty’s service in addition to any punishment or combination of punishments permitted by that section.

(5) For the purposes of section 147(3)(b)(i) of AFA 2006 as substituted by paragraph (2) above, it is to be assumed that the charge or charges are capable of being heard summarily under AFA 2006, even if they are not in fact so capable.

Appeals from decisions of a summary appeal court

69.—(1) The appellant may question any decision of a summary appeal court under AA 1955, AFA 1955 or NDA 1957 on the ground that it was wrong in law or was in excess of jurisdiction, by applying to the Summary Appeal Court to have a case stated for the opinion of the High Court in England and Wales.

(2) Where, immediately before commencement, an application under section 83ZH(2) of AA 1955 or AFA 1955 or section 52FN(2) of NDA 1957 (application to a summary appeal court to have a case stated) has been made but a case has not been stated, the application has effect after commencement as an application to the Summary Appeal Court under paragraph (1).

CHAPTER 5

Review of summary findings and punishments

Power to review summary findings and punishments

70.—(1) In section 152(1) of AFA 2006 (power to review summary finding or punishment), the reference to the case where a charge has been heard summarily and a finding that the charge has been proved has been recorded includes—

- (a) the case where a charge was heard summarily, and a finding that the charge has been proved was recorded, under AA 1955 or AFA 1955; and
- (b) the case where a charge was tried summarily, and a finding of guilt was recorded, under NDA 1957.

(2) Where an order under section 91B(1) of NDA 1957 (activation by officer of suspended sentence of detention) has been made in respect of a sentence of detention passed by a court-martial,

the order is to be treated for the purposes of section 152 of AFA 2006 as a punishment which may be reviewed under that section.

(3) Paragraph (2) is without prejudice to section 195(1) of AFA 2006 as modified by article 98(1) (by virtue of which an order under section 91B(1) of NDA 1957 activating a suspended sentence of detention passed at a summary trial may be reviewed under section 152).

(4) References in this article to an order under section 91B(1) of NDA 1957 include such an order made after commencement by virtue of article 55 or 62.

Power to complete review begun before commencement

71.—(1) In section 152(2) of AFA 2006 (persons who are to carry out review), any reference to a review under section 152 includes the completion of a pre-commencement review.

(2) In this article a “pre-commencement review” means a review that had begun to be carried out before commencement under section 115 of AA 1955 or AFA 1955 or section 71B of NDA 1957 but was not completed by commencement.

(3) In section 152(3) to (7) of AFA 2006 any reference to the carrying out of a review under section 152 includes the completion of a pre-commencement review by virtue of this article.

Powers on a review carried out or completed under AFA 2006

72.—(1) This article applies where a review is carried out, or completed, under section 152 of AFA 2006 in respect of—

- (a) a finding under AA 1955, AFA 1955 or NDA 1957;
- (b) a punishment awarded in respect of such a finding; or
- (c) an order under section 91B(1) of NDA 1957 (including such an order made after commencement by virtue of article 55 or 62).

(2) Section 152(3) of AFA 2006 has effect as if for paragraph (b) there were substituted—

- “(b) the person to whom the review relates has not brought an appeal to a summary appeal court under section 83ZE of AA 1955 or AFA 1955 or section 52FK of NDA 1957 or an appeal to the Summary Appeal Court under section 141, and the period provided by section 141(2) has ended.”

(3) Section 152(5) of AFA 2006 has effect as if for paragraph (b) there were substituted—

- “(b) the person to whom the review relates has brought an appeal to a summary appeal court under section 83ZE of AA 1955 or AFA 1955 or section 52FK of NDA 1957 or an appeal to the Summary Appeal Court under section 141.”

(4) Where this article applies and an appeal was brought to a summary appeal court, section 152(6) of AFA 2006 has effect as if for paragraph (a) there were substituted—

- “(a) the appeal is in the course of being heard, or is to be heard, by the Summary Appeal Court, and”.

(5) Where this article applies and an appeal was brought to a summary appeal court, section 152(7) of AFA 2006 has effect—

- (a) as if in paragraph (a) the reference to the Summary Appeal Court included a reference to a summary appeal court; and
- (b) in a case where the hearing of the appeal was completed by a summary appeal court, as if both references to “the court” in paragraph (b), and the second reference to “the court” in the words after that paragraph, were to the summary appeal court.

Powers where review completed before commencement

73.—(1) Paragraph (2) applies where—

- (a) before commencement, a review of a finding or punishment was carried out under section 115 of AA 1955 or AFA 1955 or section 71B of NDA 1957;
- (b) the finding or punishment was not quashed on the review; and
- (c) by commencement, no reference has been made under subsection (5A) or (5B) of section 115 of AA 1955 or AFA 1955 or of section 71B of NDA 1957.

(2) Subsections (3) to (7) of section 152 of AFA 2006 shall apply (with the modifications made by article 72) as if the review had been carried out under that section.

(3) Where, immediately before commencement, leave for a reference has been granted under subsection (5A) or (5B) of section 115 of AA 1955 or AFA 1955 or of section 71B of NDA 1957 but the reference has not been made, the leave has effect after commencement as leave granted by the Summary Appeal Court under section 152(4) or (7) of AFA 2006.