
STATUTORY INSTRUMENTS

2009 No. 1059

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

PART 15

APPEALS AND REFERENCES TO THE COURT MARTIAL APPEAL COURT

Interpretation

107. In this Part, “sentence” has the same meaning as in CMAA 1968.

Right of appeal against conviction or sentence by court-martial

108.—(1) In section 8(1) of CMAA 1968 the reference to the Court Martial includes a court-martial.

(2) Where—

(a) a court-martial dealt with a person—

(i) under paragraph 3(2) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 for an offence in respect of which an order for conditional discharge had previously been made, or

(ii) under paragraph 4(8) of any of those Schedules for an offence in respect of which a community supervision order had previously been made, and

(b) the person was convicted of the offence by a Standing Civilian Court,

he is to be treated for the purposes of section 8(1) of CMAA 1968 as if he had been convicted of the offence by the court-martial.

(3) In subsection (5) of section 268 of AFA 2006 (order that fine or compensation be paid by service parent or guardian) the reference to an order under that section includes an order made by a court-martial under paragraph 13 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.

(4) No appeal shall lie from—

(a) an order by a court-martial under paragraph 14 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 requiring an offender’s service parent or guardian to enter into a recognisance; or

(b) a declaration by a court-martial that such a recognisance is forfeited (in whole or in part).

Right of appeal against activation of suspended SDA sentence by Court Martial or court-martial

109.—(1) Section 192 of AFA 2006 applies in relation to an order under article 94 (activation of suspended SDA sentence of imprisonment by Court Martial) as it applies in relation to an order under section 191 of AFA 2006.

(2) Section 192(1) to (3) of AFA 2006 apply in relation to an order under section 120(5) of AA 1955 or AFA 1955 or section 91(1) of NDA 1957 (activation of suspended sentence of imprisonment or detention by court-martial) as they apply in relation to an order under section 191 of AFA 2006.

Application for leave to appeal against sentence by court-martial where previous conviction set aside

110. Section 228(3) of AFA 2006 applies, notwithstanding anything in section 9(1) of CMAA 1968, where—

- (a) a court-martial has sentenced a person for an SDA civil offence;
- (b) the corresponding civil offence was one to which section 109 of the Powers of Criminal Courts (Sentencing) Act 2000(1) would apply;
- (c) the court imposed a sentence of life imprisonment or custody for life in accordance with section 70(3A) of AA 1955 or AFA 1955 or section 42(1A) of NDA 1957; and
- (d) any previous conviction of the person's without which section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 would not have applied to the corresponding civil offence has been subsequently set aside on appeal.

Quashing of conviction by court-martial

111. In section 12(1)(a) of CMAA 1968 (duty to allow appeal against unsafe conviction), the reference to the Court Martial includes a court-martial.

Power to re-sentence when some but not all convictions successfully appealed

112.—(1) This article applies, and section 13 of CMAA 1968 does not apply, where—

- (a) on a single occasion a person was sentenced by a court-martial in respect of two or more offences; and
- (b) the Appeal Court allows an appeal against conviction in respect of some but not all of the offences.

(2) If the appellant remains convicted of only one of the offences, the Appeal Court may pass a sentence in substitution for the sentence passed by the court-martial in respect of that offence.

(3) If—

- (a) the appellant remains convicted of two or more of the offences,
- (b) the court-martial passed more than one sentence in respect of the offences of which he remains convicted, and
- (c) any of those sentences was in respect of only one of those offences,

the Appeal Court may pass a sentence in substitution for that sentence.

(4) If—

- (a) the appellant remains convicted of two or more of the offences, and
- (b) any sentence passed by the court-martial was in respect of more than one of the offences of which he remains convicted,

the Appeal Court may pass, in substitution for that sentence, separate sentences in respect of both or all of the offences of which he remains convicted and in respect of which that sentence was passed.

(5) A sentence passed under this article in respect of an offence must be a sentence that—

- (a) the court thinks appropriate; and
- (b) the Court Martial would have had power to pass in respect of the offence if Parts 1 to 13 of AFA 2006 had been in force and that court had convicted the appellant of the offence.

(6) But the Appeal Court may not exercise its powers under this article in such a way that, taking the case as a whole, the appellant is dealt with more severely on appeal than he was dealt with by the court-martial.

Substitution of conviction on different charge otherwise than after guilty plea

113.—(1) This article applies, and section 14 of CMAA 1968 does not apply, where—

- (a) an appellant has been convicted by a court-martial of an offence to which he did not plead guilty (“offence A”);
- (b) the court-martial could lawfully have found him guilty of some other offence (“offence B”); and
- (c) it appears to the Appeal Court on an appeal against conviction that the court-martial must have been satisfied of facts which prove him guilty of offence B.

(2) The Appeal Court may, instead of allowing or dismissing the appeal, substitute for the finding in relation to offence A a finding of guilty of offence B.

(3) Where the Appeal Court exercises the power conferred by paragraph (2), it may exercise any power that it would have had if—

- (a) the court-martial had convicted the appellant of offence B instead of offence A;
- (b) the court-martial had passed, in respect of offence B (and any other offence in respect of which the sentence in respect of offence A was passed), the sentence that it passed in respect of offence A; and
- (c) the appellant had appealed against that sentence.

Substitution of conviction on different charge after guilty plea

114.—(1) This article applies, and section 14A of CMAA 1968 does not apply, where—

- (a) an appellant has been convicted by a court-martial of an offence to which he pleaded guilty (“offence A”);
- (b) if he had not so pleaded, he could lawfully have pleaded guilty to, or been found guilty of, some other offence (“offence B”); and
- (c) it appears to the Appeal Court on an appeal against conviction that the plea of guilty indicates an admission by the appellant of facts which prove him guilty of offence B.

(2) The Appeal Court may, instead of allowing or dismissing the appeal, substitute for the appellant’s plea of guilty a plea of guilty of offence B.

(3) Where the Appeal Court exercises the power conferred by paragraph (2), it may exercise any power that it would have had if—

- (a) the appellant had been charged with, and had pleaded guilty to, offence B instead of offence A;
- (b) the court-martial had passed, in respect of offence B (and any other offence in respect of which the sentence in respect of offence A was passed), the sentence that it passed in respect of offence A; and
- (c) the appellant had appealed against that sentence.

Variation of conviction so as to attract different sentence

115.—(1) On an appeal against conviction by court-martial, section 15(1) and (2) of CMAA 1968 apply notwithstanding their repeal by AFA 2006.

(2) Where the Appeal Court exercises the power conferred by section 15(1) of CMAA 1968, article 113 or 114 (as the case may be) applies as if references to guilt of offence B were to guilt of offence A in circumstances involving the lower of the two degrees of punishment mentioned in that subsection.

(3) Where the Appeal Court exercises the power conferred by section 15(2) of CMAA 1968, article 113 or 114 (as the case may be) applies as if references to guilt of offence B were to guilt of offence A subject to the exceptions or variations to which the finding substituted by the court is subject.

Effect of appeal, or application for leave to appeal, against sentence

116. Section 16A(1) of CMAA 1968 (appeal, or application for leave to appeal, against one sentence treated as appeal or application in respect of other sentences) applies where a court-martial passed two or more sentences on a person on the same occasion.

Powers of Appeal Court on appeal against sentence

117.—(1) This article applies, and section 16A(2) and (3) of CMAA 1968 do not apply, on an appeal against one or more sentences passed by a court-martial.

(2) If the appeal is against a sentence passed in respect of one offence, the Appeal Court may pass a sentence in substitution for that sentence.

(3) If the appeal is against a sentence passed in respect of two or more offences, the Appeal Court may pass, in substitution for that sentence, separate sentences in respect of both or all the offences.

(4) If the appeal is against two or more sentences, paragraph (2) or (3) (as the case may be) applies in relation to each of the sentences.

(5) A sentence passed under this article in respect of an offence must be a sentence that—

- (a) the court thinks appropriate; and
- (b) the Court Martial would have had power to pass in respect of the offence if Parts 1 to 13 of AFA 2006 had been in force and that court had convicted the appellant of the offence.

(6) But the Appeal Court may not exercise its powers under this article in such a way that, taking the case as a whole, the appellant is dealt with more severely on appeal than he was dealt with by the court-martial.

(7) If the sentence (or any of the sentences) passed by the court-martial included an order under section 120(5) of AA 1955 or AFA 1955 or section 91(1) of NDA 1957 (activation of suspended sentence), paragraphs (2) and (3) do not apply in relation to the order; but the Appeal Court may—

- (a) substitute for the order any order which the Court Martial would have had power to make under article 94 or (by virtue of article 95 or 96) section 191 of AFA 2006 if—
 - (i) Parts 1 to 13 of that Act, and this Order, had been in force at the time of the conviction by virtue of which the court-martial made the order, and
 - (ii) that conviction had been by the Court Martial;
- (b) quash the order; or
- (c) if the court-martial gave a direction under section 120(5B) of AA 1955 or AFA 1955 or section 91(2) of NDA 1957 (activated sentence to run from the end of another sentence), quash the direction.

(8) In relation to an offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 (failure to comply with requirements of a community supervision order) as respects which the court-martial imposed a fine under paragraph 4(10) of that Schedule, any reference in this article to a sentence which the Court Martial would have had power to pass in respect of the offence is to be read as a reference to any punishment in rows 2 to 7 of the Table in Part 1 of Schedule 3 to AFA 2006.

Term of sentence

118.—(1) In section 17(1) of CMAA 1968 (term of sentence) the reference to a sentence passed by the Appeal Court under section 13, 14, 14A or 16A of that Act includes a sentence passed under article 112, 113, 114 or 117.

(2) In relation to a sentence passed by the Appeal Court in substitution for a sentence passed by a court-martial, the reference in section 17(1) of CMAA 1968 to the day on which the Court Martial passed sentence is to the day on which the court-martial passed sentence.

Retrial authorised by Appeal Court

119.—(1) Where the Appeal Court has made (whether before or after commencement) an order under section 19 of CMAA 1968 (power to authorise retrial) on quashing a conviction by court-martial, subsection (3) of that section applies without the amendments made by AFA 2006.

(2) In paragraph (1), the reference to a conviction by court-martial includes a finding of not guilty by reason of insanity.

(3) Where—

- (a) before commencement, the Appeal Court made an order under section 19 of CMAA 1968 for the retrial of a person on a charge, and
- (b) the charge is current at commencement,

the charge is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for Court Martial trial.

(4) For the purposes of this article a charge is “current at commencement” if, at commencement—

- (a) neither article 25 of this Order (saving of existing bars to service proceedings) nor Chapter 3 of Part 2 of AFA 2006 (double jeopardy) as modified by this Order prohibits the trial of the person by the Court Martial for the offence to which the charge relates;
- (b) proceedings on the charge have not been stayed; and
- (c) proceedings on the charge have not been discontinued under section 83B(8) of AA 1955 or AFA 1955 or section 52I(7) of NDA 1957, and no other charge has been substituted for it.

(5) In section 20(1) of CMAA 1968 (requirement of leave for arraignment more than three months after making of order for retrial) the reference to an order under section 19 of that Act includes one made before commencement.

Appeal against finding of not guilty by reason of insanity

120.—(1) In section 21(1) of CMAA 1968 (appeal against finding of not guilty by reason of insanity) the reference to the Court Martial includes a court-martial.

(2) In relation to an appeal brought by virtue of paragraph (1), the references to the Court Martial in section 22(2) and (3A) of CMAA 1968 are to be read as references to the court-martial.

(3) Paragraph (4) applies, and section 22(3) of CMAA 1968 does not apply, where the Appeal Court substitutes a finding of guilty of an offence for a finding by court-martial of not guilty by reason of insanity.

(4) The Appeal Court shall have the like powers of sentencing the appellant, and other powers, as the Court Martial would have had if Parts 1 to 13 of AFA 2006 had been in force and that court had convicted the appellant of the offence on the date when the court-martial found him not guilty by reason of insanity; and section 17 of CMAA 1968 applies as in the case of a sentence passed by the Appeal Court under article 112, 113, 114 or 117.

Appeal against finding of unfitness to stand trial

121.—(1) In section 24(1) of CMAA 1968 (appeal against finding of unfitness to stand trial) the reference to the Court Martial includes a court-martial.

(2) Where, before commencement, the Appeal Court allowed an appeal under section 24 of CMAA 1968, paragraph (b) of section 25(2) of that Act applies as if the court had made an order under paragraph (a) of that subsection.

(3) Where section 20 of CMAA 1968 applies by virtue of paragraph (2) above—

- (a) the Appeal Court is to be regarded for the purposes of that section as having made an order under section 25(2)(a) of that Act on the date on which the court allowed the appeal; and
- (b) references in that section to the setting aside of the order under section 19 of that Act are to be read as references to a direction by the Appeal Court that paragraph (2) above shall cease to apply.

Appeal against order made in cases of insanity or unfitness to stand trial

122.—(1) In section 25A(1) of CMAA 1968 (appeal against hospital order etc) the reference to the Court Martial includes a court-martial.

(2) For the purposes of that subsection as it applies in relation to an order made by a court-martial, the reference in section 25A(2) of CMAA 1968 to a service supervision order is to be read as a reference to a supervision order.

(3) In relation to an appeal under section 25A of CMAA 1968 by virtue of paragraphs (1) and (2) above, references in section 25B(1) of that Act to the Court Martial are to be read as references to the court-martial.

(4) For the purposes of section 25B(1) of CMAA 1968 (disposal of appeal against hospital order etc) as modified by paragraph (3) above, the court-martial shall be regarded as having had power to make a service supervision order (as defined by section 170 of AFA 2006) if it had power to make a supervision order.

(5) In section 25B(4) of CMAA 1968, the reference to a service supervision order includes a supervision order.

(6) In this article, “supervision order” has the meaning given by section 116A(6) of AA 1955 or AFA 1955 or section 63A(6) of NDA 1957, as the case may be.

Costs of successful appeal

123. In relation to an appeal from a court-martial, section 31 of CMAA 1968 applies without the amendment made by AFA 2006.

Reference of cases by Service authorities

124.—(1) In section 34(1) of CMAA 1968, the first reference to the Court Martial includes a court-martial.

(2) In relation to a person convicted by a court-martial, other references in section 34 of that Act to the Court Martial are to be read as references to the court-martial.

(3) Section 34(1) and (2) of CMAA 1968 apply in relation to a finding by a court-martial of not guilty by reason of insanity as they apply in relation to a conviction by court-martial.

Provision of record of proceedings of court-martial

125. In relation to an appeal or application for leave to appeal from a court-martial, section 37 of CMAA 1968 has effect as if for the words “a record of the proceedings of the Court Martial” there were substituted “a record of the proceedings of the court-martial and any petition presented by the appellant or applicant”.

Appeal to House of Lords or Supreme Court

126.—(1) In relation to an appeal brought from a decision of the Appeal Court before commencement, the reference in section 41(3) of CMAA 1968 (powers of the Supreme Court) to the powers of the Appeal Court is to be read as to the powers that the Appeal Court would have had if it had heard the appeal after commencement.

(2) Where—

- (a) the Secretary of State made an application before commencement for leave to appeal to the House of Lords or the Supreme Court, and
- (b) the Appeal Court, the House of Lords or the Supreme Court dismisses the application,

section 47(1) of CMAA 1968 applies as if the application had been made by the Director of Service Prosecutions.

(3) In relation to an appeal from a decision of the Appeal Court where the appeal to that court was brought from a court-martial, section 47(3) of CMAA 1968 applies without the amendment made by AFA 2006.

Duties of registrar with respect to appeals etc

127. In relation to an appeal or application for leave to appeal from a court-martial, section 50(1) of CMAA 1968 (duties of registrar with respect to appeals etc) applies without the amendment made by AFA 2006.

Saving for prerogative

128. In section 54(1) of CMAA 1968 (saving for right of Her Majesty to quash a conviction) the reference to the Court Martial includes a court-martial.

Review of unduly lenient sentence for SDA offence

129.—(1) Where, immediately before commencement, a reference has been made under section 113C(1) of AA 1955 or AFA 1955 or section 71AC(1) of NDA 1957 (review of unduly lenient sentence by Appeal Court) but the Appeal Court has not concluded its review of the case, the reference has effect after commencement as a reference under section 273(1) of AFA 2006.

(2) In section 273(1)(a) of AFA 2006—

- (a) the reference to a sentence passed by the Court Martial—
 - (i) includes a sentence passed by a court-martial;
 - (ii) does not include a sentence passed on an appeal under paragraph 18 of Schedule 3 to AFA 1976 or by virtue of article 134 (appeal from Standing Civilian Court);
- (b) the reference to an offence under section 42 of AFA 2006 includes an SDA civil offence.

(3) In relation to a sentence passed by the Court Martial in respect of an SDA civil offence, the reference in section 273(2) of AFA 2006 to the corresponding offence under the law of England and Wales is to be read as a reference to the corresponding civil offence.

(4) In relation to a sentence passed by a court-martial, section 273(1) of AFA 2006 has effect as if for paragraph (b) there were substituted—

“(b) that section 113C of the [Army Act 1955 \(c. 18\)](#) or the [Air Force Act 1955 \(c. 19\)](#) or section 71AC of the [Naval Discipline Act 1957 \(c. 53\)](#) applied to the case;”;

and section 273(2) and (3) of AFA 2006 do not apply.

(5) For the purposes of section 273(1)(a) of AFA 2006, the Attorney General may consider that a sentence passed by the Court Martial is unduly lenient if he considers that the sentence is not that required by article 89 (sentences required by SDAs); but this paragraph is without prejudice to section 273(6) of AFA 2006, and nothing in it limits section 273(1)(a).

(6) For the purposes of section 273(1)(a) of AFA 2006, the Attorney General may consider that a sentence passed by a court-martial is unduly lenient if he considers—

(a) that the court-martial erred in law as to its powers of sentencing; or

(b) that the sentence is not that required by section 70(3A) of AA 1955 or AFA 1955 or section 42(1A) of NDA 1957;

but nothing in this paragraph limits section 273(1)(a) of AFA 2006.

(7) Where, immediately before commencement, leave for a reference has been granted under section 113C(1) of AA 1955 or AFA 1955 or section 71AC(1) of NDA 1957 but the reference has not been made, the leave has effect after commencement as leave granted under section 273(4) of AFA 2006.

(8) Paragraphs (9) to (11) apply, and section 273(5) of AFA 2006 does not apply, on a reference under section 273(1) of that Act of a case in which sentence was passed by a court-martial (including a reference which by virtue of paragraph (1) above has effect as a reference under that subsection).

(9) If the court-martial passed sentence in respect of one offence, article 117(2) applies as if the reference were an appeal against the sentence; but article 117(6) does not apply.

(10) If the court-martial passed one sentence in respect of two or more offences, article 117(3) applies as if the reference were an appeal against the sentence; but article 117(6) does not apply.

(11) If the court-martial passed two or more sentences, article 117(4) applies as if the reference were an appeal against the sentences; but article 117(6) does not apply.

(12) On—

(a) a reference which by virtue of paragraph (1) has effect as a reference under section 273(1) of AFA 2006, or

(b) a reference under that subsection of a case in which sentence was passed by a court-martial, where the Attorney General applied for leave to refer the case under section 113C(1) of AA 1955 or AFA 1955 or section 71AC(1) of NDA 1957 before commencement,

section 273(7) of AFA 2006(2) applies as enacted.

(13) In section 274(1) of AFA 2006 (reference of point of law to Supreme Court), the reference to a case referred to the Appeal Court under section 273(1) of that Act includes a case referred to the Appeal Court under section 113C(1) of AA 1955 or AFA 1955 or section 71AC(1) of NDA 1957.

(14) Where—

(2) Section 273(7) of AFA 2006 is substituted by the Criminal Justice and Immigration Act 2008 (c. 4), section 145 and Schedule 25, paragraphs 10 and 28.

- (a) a point of law has been referred to the House of Lords or the Supreme Court under section 113C(4) of AA 1955 or AFA 1955 or section 71AC(4) of NDA 1957, and
- (b) neither the House of Lords nor the Supreme Court has exercised its powers under that subsection,

section 274(4) and (5) of AFA 2006 apply as if the point of law had been referred under section 274(1).

Compensation for miscarriages of justice

130.—(1) For the purposes of section 276 of AFA 2006(3) (compensation for miscarriages of justice) a person who was convicted by a court-martial is to be regarded as having been convicted by the Court Martial; but that section does not apply in relation to such a person if—

- (a) any compensation assessed to be payable to him under section 10 of AFA 1991 was paid in full before commencement; or
- (b) the Secretary of State determined under section 10(3) of that Act that there was no right to such compensation.

(2) Section 276(7A) of AFA 2006 does not apply in relation to a conviction as respects which an application for compensation was made under section 10 of AFA 1991 before commencement.

(3) In relation to a conviction which was reversed before commencement, or a pardon which was given before commencement, the reference in section 276(3) of AFA 2006 to the date on which the conviction is reversed, or the person concerned is pardoned, is to be read as a reference to commencement.

(4) Where an application for compensation under section 10 of AFA 1991 was made before commencement but the Secretary of State did not determine under section 10(3) of that Act whether there was a right to compensation, the application is to be regarded as an application for compensation under section 276 of AFA 2006.

(5) Where the Secretary of State determined that there was a right to compensation under section 10 of AFA 1991 but the amount payable was not assessed—

- (a) the Secretary of State is to be regarded as having determined that there is a right to compensation under section 276 of AFA 2006;
- (b) any person appointed under section 10(4) of AFA 1991 to assess the amount payable is to be regarded as having been appointed under section 276(5) of AFA 2006;
- (c) section 276(6) of AFA 2006 applies as if the substitution made by the Criminal Justice and Immigration Act 2008 had not been made; and
- (d) sections 276A and 276B of AFA 2006(4) do not apply.

(6) Where the amount of any compensation payable under section 10 of AFA 1991 was assessed under that section but the compensation so assessed was not paid in full before commencement—

- (a) the amount so assessed is the amount payable under section 276 of AFA 2006, and subsection (5) of that section does not apply; and
- (b) any sums paid in pursuance of the assessment are to be regarded as having been paid under that section.

(3) Section 276 of AFA 2006 is amended by the Criminal Justice and Immigration Act 2008, section 145 and Schedule 25, paragraphs 10 and 29.

(4) Sections 276A and 276B of AFA 2006 are inserted by the Criminal Justice and Immigration Act 2008, section 145 and Schedule 25, paragraphs 10 and 30.