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STATUTORY INSTRUMENTS

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**2013 No. 1852**

**The Armed Forces (Retrial for Serious Offences) Order 2013**

**PART 1**

Preliminary

**Citation and commencement**

1. This Order may be cited as the Armed Forces (Retrial for Serious Offences) Order 2013 and shall come into force on 1st August 2013.

**Interpretation**

2.—(1) In this Order—

“the 1968 Act” means the Court Martial Appeals Act 1968<sup>(1)</sup>;

“the 2003 Act” means the Criminal Justice Act 2003<sup>(2)</sup>;

“the 2006 Act” means the Armed Forces Act 2006;

“Director” means Director of Service Prosecutions;

“new evidence” is to be read in accordance with article 10(2);

“programme service” has the same meaning as in section 201 of the Broadcasting Act 1990<sup>(3)</sup>;

“publication” includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme is to be taken to be so addressed), but does not include a charge sheet or other document prepared for use in particular legal proceedings;

“qualifying offence” means —

- (a) an offence under section 42 of the 2006 Act (criminal conduct) as respects which the corresponding offence under the law of England and Wales is an offence listed in Schedule 1;
- (b) an offence under section 70 of the Army Act 1955<sup>(4)</sup>, section 70 of the Air Force Act 1955<sup>(5)</sup> or section 42 of the Naval Discipline Act 1957<sup>(6)</sup> as respects which the corresponding civil offence (within the meaning of the Act in question) is such an offence;
- (c) an offence under section 1 of the 2006 Act (assisting an enemy);
- (d) an offence under section 2(1) of that Act (surrendering any place or thing to an enemy etc); or

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(1) 1968 c. 20. The short title of this Act was amended by paragraphs 1 and 53 of Schedule 8 to the 2006 Act.

(2) 2003 c. 44.

(3) 1990 c. 42.

(4) 1955 c. 18 (repealed by section 378(2) of, and Schedule 17 to, the 2006 Act).

(5) 1955 c. 19 (repealed by section 378(2) of, and Schedule 17 to, the 2006 Act).

(6) 1957 c. 53 (repealed by section 378(2) of, and Schedule 17 to, the 2006 Act).

- (e) an offence under section 3 of that Act (obstructing operations) where the offence relates to an action or operation against an enemy;

“registrar” means the registrar of the Court Martial Appeal Court appointed under section 7(1) of the 1968 Act;

“relevant programme” means a programme included in a programme service.

(2) References in this Order to acquittal are to acquittal in circumstances within article 3(1); and related expressions are to be read accordingly.

## PART 2

### Cases that may be retried

#### Cases that may be retried

**3.—(1)** This Order applies where a person has been acquitted of a qualifying offence in proceedings—

- (a) before the Court Martial;
- (b) on appeal against a conviction or finding in proceedings before the Court Martial; or
- (c) on appeal from a decision on such an appeal.

(2) In paragraph (1) references to the Court Martial include a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.

(3) Where a conviction of an offence in proceedings before a court-martial was quashed on appeal before section 12(3) of the 1968 Act (7) came into force, the appellant is to be treated for the purposes of paragraph (1) as acquitted of the offence.

(4) A person acquitted of an offence in proceedings mentioned in paragraph (1) is treated for the purposes of that paragraph as also acquitted of any qualifying offence of which he could have been convicted in the proceedings because of the first-mentioned offence being charged on the charge sheet(8), except an offence—

- (a) of which he has been convicted;
- (b) of which he has been found not guilty by reason of insanity; or
- (c) in respect of which, in proceedings where he has been found to be unfit to stand trial (within the meaning of section 166 of the 2006 Act) a finding has been made that he did the act or made the omission charged against him.

(5) In relation to proceedings before a court-martial under any of the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, the reference in paragraph (4)(c) to section 166 of the 2006 Act is to be read as a reference to section 115A of the Army Act 1955 or of the Air Force Act 1955(9), or section 62A of the Naval Discipline Act 1957(10) (as the case may be).

(6) References in paragraphs (1) and (4) to a qualifying offence do not include references to an offence which, at the time of the acquittal, was the subject of an order under article 9.

(7) This Order applies whether the acquittal was before or after the making of this Order.

(7) Section 12(3) was inserted by paragraphs 1 and 10(b) of Schedule 8 to the 2006 Act.

(8) To bring a charge under the 2006 Act a charge sheet is required to be prepared pursuant to regulation 11 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009, S.I. 2009/2055.

(9) Section 115A of each of the 1955 Acts was inserted by paragraph 1 of Schedule 2 to the Armed Forces Act 1996; repealed by Schedule 11 to the Domestic Violence, Crime and Victims Act 2004 (c. 28).

(10) Section 62A was inserted by paragraph 3 of Schedule 3 to the Domestic Violence, Crime and Victims Act 2004 (c. 28) repealed by section 378(2) of, and Schedule 17 to the 2006 Act.

(8) This Order has effect notwithstanding the restrictions on a retrial imposed by Chapter 3 of Part 2 of the 2006 Act (double jeopardy) or by article 25 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009(11).

## PART 3

### Investigation and arrest

#### Authorisation of investigations

4.—(1) This article applies to the investigation of the commission of a qualifying offence by a person acquitted of the qualifying offence in proceedings within article 3(1).

(2) A service policeman may not, for the purposes of investigating the acquitted person's alleged commission of the qualifying offence, and with or without that person's consent—

- (a) arrest or question him,
- (b) search him or premises owned or occupied by him,
- (c) search a vehicle owned by him or anything in or on such a vehicle,
- (d) seize anything in his possession, or
- (e) take his fingerprints or take a sample from him,

unless the Director has given his written consent to the investigation (whether before or after the start of the investigation).

(3) The Director may give such consent only on a written application by a service policeman of or above the rank of commander, lieutenant-colonel or wing-commander.

(4) A service policeman may make an application under paragraph (3) only if—

- (a) he is satisfied that new evidence has been obtained which would be relevant to an application under article 8(1) in respect of the qualifying offence; or
- (b) he has reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation.

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

- (a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation; and
- (b) it is in the public interest for the investigation to proceed.

(6) In giving his consent, the Director may recommend that the investigation be conducted otherwise than by officers of a specified police force.

(7) This article is subject to article 5.

#### Urgent investigative steps

5.—(1) Article 4 does not prevent a service policeman from taking any action for the purposes of an investigation if—

- (a) the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced;
- (b) the requirements of paragraph (2) are met; and
- (c) either—

- (i) the action is authorised under paragraph (3); or
  - (ii) the requirements of paragraph (5) are met.
- (2) The requirements of this paragraph are met if—
- (a) there has been no undue delay in applying for consent under article 4(2);
  - (b) that consent has not been refused; and
  - (c) taking into account the urgency of the situation, it is not reasonably practicable to obtain that consent before taking action.
- (3) A service policeman of or above the rank of lieutenant-commander, major or squadron leader may authorise the action if—
- (a) he is satisfied that new evidence has been obtained which would be relevant to an application under article 8(1) in respect of the qualifying offence to which the investigation relates; or
  - (b) he has reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation.
- (4) An authorisation under paragraph (3) must—
- (a) if reasonably practicable, be given in writing;
  - (b) otherwise, be recorded in writing by the service policeman giving it as soon as is reasonably practicable.
- (5) The requirements of this paragraph are met if—
- (a) there has been no undue delay in applying for authorisation under paragraph (3);
  - (b) that authorisation has not been refused; and
  - (c) taking into account the urgency of the situation, it is not reasonably practicable to obtain that authorisation before taking the action.
- (6) Where the requirements of paragraph (5) are met, the action is nevertheless to be treated as having been unlawful unless, as soon as reasonably practicable after the action is taken, a service policeman of or above the rank of lieutenant-commander, major or squadron leader certifies in writing that he is satisfied that, when the action was taken—
- (a) new evidence had been obtained which would be relevant to an application under article 8(1) in respect of the qualifying offence to which the investigation relates; or
  - (b) the service policeman who took the action had reasonable grounds for believing that such new evidence was likely to be obtained as a result of the investigation.

### **Arrest under warrant**

6.—(1) Where article 4 applies to the investigation of the commission of a qualifying offence, the acquitted person may not be arrested for the qualifying offence except under a warrant issued in accordance with this article.

(2) Paragraph (1) does not affect article 21(3)(b), 23(3) or any other power to arrest a person, or to issue a warrant for the arrest of a person, otherwise than for a qualifying offence.

(3) A judge advocate may issue a warrant for the acquitted person's arrest on the application of a service policeman.

(4) The judge advocate may issue the warrant only if satisfied by written information that new evidence has been obtained which would be relevant to an application under article 8(1) in respect of the acquitted person's alleged commission of the qualifying offence.

(5) Where a warrant has been issued under this article, a service policeman may arrest the acquitted person.

(6) The power of arrest conferred on a service policeman by paragraph (5) may be exercised—

- (a) personally;
- (b) by giving orders for the arrest of the acquitted person; or
- (c) where that person is subject to service law, by ordering him into arrest.

(7) The following provisions apply in relation to an arrest under paragraph (5) as they apply in relation to an arrest under section 67 of the 2006 Act<sup>(12)</sup>—

- (a) section 70 of that Act (search on arrest);
- (b) section 90 of that Act (entry for purpose of arrest);
- (c) sections 98 to 102 and 104(2) of that Act (custody without charge);
- (d) regulations for the time being in force under section 104(1)(a) or (b) of that Act or (in so far as the regulations relate to compliance with any requirement of sections 98 to 102 or of regulations under paragraph 104(1)(b) of that Act) under section 104(1)(c) of that Act.

## PART 4

### Referral and Charge

#### Referral and charge

7.—(1) This article applies where a service policeman has under article 4 investigated the commission of a qualifying offence.

(2) When the acquitted person has been arrested under article 6(5), the service policeman who exercised the power of arrest must—

- (a) request a senior service policeman to determine whether there is sufficient evidence to charge the acquitted person with the qualifying offence for which the acquitted person was arrested; and
- (b) make available or known to the senior service policeman any evidence which, it appears to the service policeman who exercised the power of arrest, may be relevant to an application under article 8(1) in respect of the qualifying offence—
  - (i) as soon as practicable after the evidence becomes available or known to him; or
  - (ii) if later, after he forms that view.

(3) The senior service policeman who is requested to make the determination under paragraph (2) must make the determination as soon as practicable after the request is made.

(4) For the purposes of this Order there is sufficient evidence to charge the acquitted person with the qualifying offence for which he was arrested if, and only if, the senior service policeman is of the opinion that the evidence available or known to him is sufficient for the case to be referred to the Director to consider whether consent should be sought for an application under article 8(1) in respect of the acquitted person.

(5) Where the senior service policeman determines that there is sufficient evidence to charge the acquitted person with the qualifying offence for which he was arrested, the senior service policeman must refer the case to the Director in accordance with this article (and section 116 of the 2006 Act does not apply).

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<sup>(12)</sup> Section 67 was amended by paragraph 2 of Schedule 3 to the Armed Forces Act 2011 (c. 18).

(6) Where the senior service policeman proposes not to refer the case under paragraph (5), he must as soon as reasonably possible consult the Director about his proposal.

(7) Where the senior service policeman refers a case under paragraph (5), he must, when he refers the case —

(a) provide the Director with—

(i) a written or oral statement specifying the qualifying offence and why he considers that there is sufficient evidence to charge that offence; and

(ii) a copy of the case papers; and

(b) notify the acquitted person's commanding officer of the referral, specifying the qualifying offence.

(8) Where the senior service policeman refers the case under paragraph (5)—

(a) the Director may direct the acquitted person's commanding officer to bring such charge as may be specified in the direction; and

(b) such charge must be for a qualifying offence for which the acquitted person was acquitted in proceedings mentioned in article 3(1).

(9) A direction given by the Director under paragraph (8)(a) is to be treated as a direction under section 121(2) of the 2006 Act for the purposes of that Act.

(10) Where the Director gives a direction under paragraph (8)(a)—

(a) a charge brought as a result of the direction is to be treated as a charge under section 122 of the 2006 Act for the purposes of that Act other than section 125 of that Act<sup>(13)</sup>; and

(b) the case is to be treated as allocated for Court Martial trial for the purposes of rules made under section 163 of the 2006 Act (Court Martial rules)<sup>(14)</sup>.

(11) In this article—

“case papers” means—

(a) all reports relating to the case written by a service police force;

(b) the following other papers relating to the case obtained by a service police force—

(i) all witness statements;

(ii) all other records of evidence, including a summary or transcript of all tape-recorded interviews;

(iii) a list of all exhibits and a statement of where any which are not documentary exhibits are held;

(iv) all documentary exhibits;

(v) all formal disciplinary records of the acquitted person held by any of Her Majesty's forces;

(vi) if no formal disciplinary record of the acquitted person is held by any of Her Majesty's forces, a list of his convictions (if any) for any service offence and of his convictions (if any) by a civilian court;

(vii) all documents to be provided to the Director in accordance with the code of practice made under the Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2009<sup>(15)</sup>; and

<sup>(13)</sup> Section 125 was amended by paragraph 6 of Schedule 3 to the Armed Forces Act 2011 (c. 18).

<sup>(14)</sup> The current Court Martial rules are contained in the Armed Forces (Court Martial) Rules 2009 (S.I. 2009/2041).

<sup>(15)</sup> S.I.2009/989.

- (c) all papers equivalent to those within paragraphs (a) and (b) prepared by a UK police force or an overseas police force and provided by that force to a service police force;
- “senior service policeman” means a service policeman of or above the rank of lieutenant-commander, major or squadron leader.

## 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.

## PART 6

### Retrial

#### Retrial

**19.**—(1) Where a person is tried pursuant to an order under article 9(1)(a), the trial must be on a charge specified in a direction of the Court Martial Appeal Court.

(2) After the end of 2 months after the date of the order, the person may not be arraigned on a charge in pursuance of such a direction unless the Court Martial Appeal Court gives leave.

(3) Where paragraph (2) applies, a prosecuting officer may apply for leave under that paragraph in the form set out as Form 5 in Schedule 2.

(4) An application under paragraph (3) must be served on the registrar and the acquitted person.

(5) The court must not give leave unless satisfied that—

- (a) the Service Prosecuting Authority has acted with due expedition; and
- (b) there is a good and sufficient cause for trial despite the lapse of time since the order under article 9(1)(a).

(6) Where the person may not be arraigned without leave, he may apply to the court—

- (a) in the form set out as Form 5 in Schedule 2 to set aside the order; and
- (b) for any direction required for restoring an earlier judgment and verdict of acquittal of the qualifying offence.

(7) An application under paragraph (6) must be served on the registrar and the prosecuting officer.

(8) Evidence given at a trial pursuant to an order under article 9(1)(a) must be given orally if it was given orally at the original trial, unless—

- (a) all the parties to the trial agree otherwise;
- (b) section 116 of the 2003 Act applies; or
- (c) the witness is unavailable to give evidence, otherwise than as mentioned in subsection (2) of that section, and section 114(1)(d) of that Act applies.

(9) For the purposes of rules made under section 163 of the 2006 Act (Court Martial rules) a trial pursuant to an order under article 9(1)(a) is to be treated as trial proceedings.

## PART 7

### Custody

#### **Custody before application under article 8(1)**

**20.**—(1) Where a person charged in accordance with article 7(10)(a) is not kept in service custody, his commanding officer must give him notice to attend before a judge advocate —

- (a) at such place, and
- (b) at such time not later than 24 hours after being released,

as the commanding officer decides.

(2) Where such a person is kept in service custody after being charged, he must be brought before a judge advocate as soon as practicable, and in any event not more than 24 hours after he is charged.

(3) For the purposes of calculating the period referred to in paragraph (1) or (2) the following are to be disregarded—

- (a) Saturday;
- (b) Sunday;
- (c) Christmas Day;
- (d) Good Friday; and
- (e) any day which is a bank holiday under the Banking and Financial Dealings Act 1971(16) in the part of the United Kingdom where the person is to appear before the judge advocate as mentioned in paragraph (1) or, where paragraph (2) applies, is for the time being detained.

(4) Where a person appears or is brought before a judge advocate in accordance with paragraph (1) or (2), the judge advocate may either—

- (a) make an order that the person should not be kept in service custody, but, if notice of an application is served on him under article 12(2), must appear before the Court Martial Appeal Court at the hearing of that application; or
- (b) make an order that the person be kept in service custody to be brought before a judge advocate under article 21(2).

(5) If the judge advocate makes an order under paragraph (4)(a), he may revoke the order and make an order authorising the person to be kept in service custody as referred to in paragraph (4)(b).

(6) In paragraph (7) the “relevant period”, in relation to a person who, pursuant to an order under paragraph (4), is released from service custody subject to requirements under section 107(3) of the 2006 Act or kept in service custody, means—

- (a) the period of 42 days beginning with the day on which the judge advocate makes the order under paragraph (4); or

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(16) 1971 c. 80.

(b) that period as extended or further extended under paragraph (8).

(7) If at the end of the relevant period no notice of an application under article 8(1) in relation to the person has been given under article 12(1), the person—

(a) if released from service custody pursuant to an order under paragraph 4(a), subject to requirements under section 107(3) of the 2006 Act, ceases to be subject to those requirements; and

(b) if in service custody pursuant to an order under paragraph (4)(b) or (5), must be released immediately.

(8) A judge advocate may, on the application of a prosecuting officer before the period mentioned in paragraph 6(a) expires, extend or further extend that period until a specified date, but only if satisfied that—

(a) the need for the extension is due to some good and sufficient cause; and

(b) the Service Prosecuting Authority has acted with all due diligence and expedition.

(9) An application under paragraph (8) must be served on the court administration officer and the acquitted person.

#### **Custody before hearing under article 13(1)**

**21.**—(1) This article applies where notice of an application is given under article 12(1).

(2) If the person to whom the application relates is in service custody under article 20(4)(b) or (5), he must be brought before a judge advocate as soon as practicable and, in any event, within 48 hours after the notice is given.

(3) If that person is not in service custody pursuant to an order under article 20(4)(b) or (5), the judge advocate may, where an application is made to the judge advocate by the prosecuting officer and served by that officer on the court administration officer and the acquitted person—

(a) issue a notice requiring the person to appear before the Court Martial Appeal Court at the hearing of the application; or

(b) issue a warrant for the person's arrest;

(4) A warrant under paragraph (3)(b) may be issued at any time whether or not a notice has previously been issued under paragraph (3)(a).

(5) Where a notice is issued under paragraph (3)(a), the time and place at which the person must appear may be specified either—

(a) in the notice; or

(b) in a subsequent direction of the judge advocate.

(6) The time or place specified may be varied from time to time by a direction of a judge advocate.

(7) A person arrested under a warrant under paragraph (3)(b) must be brought before a judge advocate as soon as practicable and in any event within 48 hours after his arrest.

(8) If a person is brought before a judge advocate under paragraph (2) or (7) the judge advocate must either—

(a) by order authorise the keeping of the person in service custody to be brought before the Court Martial Appeal Court at the hearing of the application; or

(b) order him to be released from service custody to appear before the Court Martial Appeal Court at the hearing of the application.

(9) If a person is released from service custody pursuant to an order under paragraph (8)(b), a judge advocate may revoke the order and authorise the keeping of the person in service custody as referred to in paragraph (8)(a).

(10) For the purposes of calculating the period referred to in paragraph (2) or (7), the following are to be disregarded—

- (a) Saturday;
- (b) Sunday;
- (c) Christmas Day;
- (d) Good Friday; and
- (e) any day which is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom where the person is for the time being detained.

**Provision supplementary to articles 20 and 21**

**22.**—(1) Where a judge advocate authorises the keeping of a person in service custody under article 20(4) or 21(8)—

- (a) section 105(2) to (4) of the 2006 Act,
- (b) section 108(4) of that Act (so far as it relates to section 105(2) to(4)), and
- (c) section 108(1) and (5) to (8) of that Act,

shall apply as they apply to the power of a judge advocate by order under section 105(2) of the 2006 Act to authorise the keeping of an accused in service custody.

(2) Section 107 of the 2006 Act shall apply to an order under article 20(4)(a) or article 21(8)(b) as it applies where, at a hearing under section 105(1) of that Act, a judge advocate does not authorise keeping the accused in service custody.

(3) Rules made under section 112 of the 2006 Act (Custody proceedings rules) shall apply to proceedings under articles 20 and 21 as they apply to proceedings under section 105(1), or to an application under section 107(4), of the 2006 Act.

(4) Paragraphs (1) to (3) are subject to articles 20(7) and 21(2).

(5) Where a person is to appear or be brought before a judge advocate pursuant to article 20 or 21—

- (a) the prosecuting officer must serve notice of the need for such a hearing on the court administration officer; and
  - (b) the prosecuting officer must as soon as is practicable provide a copy of the charge sheet and case papers to the court administration officer.
- (6) On receipt of the charge sheet and case papers the court administration officer must—
- (a) forward them to the Judge Advocate General and request him to specify a judge advocate for the proceedings; and
  - (b) appoint a time and place for the commencement of the proceedings before the judge advocate.

(7) The court administration officer must serve notice of any time or place appointed by him for the commencement of the proceedings on—

- (a) each person to whom the proceedings relate;
- (b) the legal representative (if any) of each person;
- (c) the commanding officer of such person;
- (d) the Director; and
- (e) any such person as the Judge Advocate General may direct.

(8) The court administration officer must forward to the registrar a copy of any record made in the proceedings.

(9) In paragraph (5)(b) case papers has the same meaning as in article 7(11).

### **Taking a person into service custody**

**23.**—(1) Where—

- (a) a judge advocate authorises keeping the person in service custody, and
- (b) that person is not before the judge advocate when the order is made,

the judge advocate must order him to surrender himself forthwith to service custody.

(2) Where a person surrenders himself into service custody in compliance with an order under paragraph (1), a judge advocate must authorise his detention in service custody.

(3) A person who has been ordered to surrender to service custody under paragraph (1) may be arrested without a warrant by a service policeman if he fails without reasonable cause to surrender to custody in accordance with the order.

(4) A person arrested under paragraph (3) must be brought as soon as practicable, and, in any event, not more than 24 hours after he is arrested, before a judge advocate and the judge advocate must authorise the keeping of the person in service custody.

(5) For the purposes of calculating the period referred to in paragraph (4), the following are to be disregarded—

- (a) Saturday;
- (b) Sunday;
- (c) Christmas Day;
- (d) Good Friday;
- (e) any day which is a bank holiday under the Banking and Financial Dealings Act 1971(17) in the part of the United Kingdom where the person is for the time being detained.

### **Bail and custody during and after hearing**

**24.**—(1) The Court Martial Appeal Court may, at any adjournment of a hearing under article 13(1)—

- (a) remand the person to whom the application relates on bail; or
- (b) remand him in custody.

(2) At a hearing at which the Court Martial Appeal Court—

- (a) dismisses the application, and
- (b) also gives the prosecuting officer leave to appeal against its decision or the prosecuting officer gives notice that he intends to apply for such leave,

the court may make such order as it sees fit for the custody or bail of the person pending determination of the appeal.

(3) For the purpose of paragraph (2), the determination of an appeal is pending—

- (a) until any application for leave to appeal is disposed of, or the time within which it must be made expires;
- (b) if leave to appeal is granted, until the appeal is disposed of.

(4) The court may at any time, as it sees fit—

- (a) revoke bail granted under this article and remand the person in custody; or

(b) vary an order under paragraph (2).

(5) Where—

(a) the court revokes a person's bail under paragraph (4), and

(b) that person is not before the court when his bail is revoked,

the court must order him to surrender forthwith to custody.

(6) Where a person surrenders himself into custody in compliance with an order under paragraph (5), the court must remand him in custody.

(7) The Court Martial Appeal Court (Bail) Order 2009(18) shall apply to orders made by the Court Martial Appeal Court under paragraph (2) as if they were orders made under that Order.

### **Service custody after hearing where retrial ordered**

**25.**—(1) At a hearing at which the Court Martial Appeal Court makes an order for a person to be retried under article 9(1)(a) it may—

(a) by order authorise the keeping of that person in service custody—

(i) for such period, ending not later than 8 days after the order is made, as the court think appropriate; or

(ii) if the person is legally represented and consents, for such period, not exceeding 28 days, as the court think appropriate; or

(b) require that person to comply with such requirements as seem to the court to be necessary for a purpose mentioned in section 107(3) of the 2006 Act.

(2) Where the person is in service custody the court may under paragraph (1)(b) impose a requirement that must be complied with before the person may be released.

(3) An order under paragraph (1)(a) is to be treated, for the purposes of Part 4 of the 2006 Act, as made under section 105(2) of that Act.

(4) A requirement imposed under paragraph (1)(b) is to be treated for the purposes of Part 4 of that Act, as imposed under section 107(3) of that Act (and where appropriate, by virtue of section 107(3)(a) of that Act).

## **PART 8**

### **Supplementary**

#### **Service of documents**

**26.** Rules made under section 49 of the 1968 Act(19) (Rules of court) are to apply to the service of documents under this Part as if they were documents required to be served under those Rules.

#### **Functions of the Director**

**27.**—(1) Section 365(4) of the 2006 Act does not apply to the provisions of this Order.

(2) In the absence of the Director, his functions under those provisions may be exercised by a prosecuting officer authorised by him.

(3) An authorisation under paragraph (2)—

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(18) S.I. 2009/992.

(19) Section 49 was amended by paragraph 9 of Schedule 1 to the Constitutional Reform Act 2005 (c. 4).

- (a) may relate to a specified prosecuting officer or to a prosecuting officer of a specified description; and
- (b) may be general or relate to a specified function or specified circumstances.

#### **Powers exercisable by a single judge of the Court Martial Appeal Court**

**28.**—(1) The following powers under this Order may be exercised by a judge of the Court Martial Appeal Court in the same manner as they may be exercised by the Court Martial Appeal Court and subject to the same provisions—

- (a) to order under article 14(1)(a) the production of any document, exhibit or thing;
- (b) to order under article 14(1)(b) 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 Martial Appeal Court;
- (c) to extend under article 13(6) the time for service;
- (d) to delay under article 16(8) the requirement of service on the acquitted person of an application for restrictions on publication; and
- (e) to give under article 13(3) a direction relating to attendance by live link.

(2) A single judge may, for the purposes of exercising any of the powers specified in paragraph (1), sit in such place as he appoints and may sit otherwise than in open court.

(3) Where a single judge exercises one of the powers set out in paragraph (1), the registrar must serve notice of the single judge's decision on all parties to the application under article 8(1).

#### **Powers exercisable by the registrar**

**29.**—(1) The registrar may require the Judge Advocate General, the judge advocate for any proceedings under this Order, or the court administration officer to furnish the Court Martial Appeal Court with any document (in addition to the record of proceedings) or information which the registrar considers the court may require for the purposes of exercising its jurisdiction under this Order.

(2) The following powers may be exercised by the registrar in the same manner as the Court Martial Appeal Court and subject to the same provisions—

- (a) to order under article 14(1)(a) the production of any document, exhibit or thing;
- (b) to order under article 14(1)(b) 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 Martial Appeal Court;
- (c) to extend under article 13(6) the time for service; and
- (d) to give under article 13(3) a direction relating to attendance by live link.

(3) Where the registrar exercises any of the powers set out in paragraph (2) the registrar must serve notice of that decision on all parties to the application under article 8(1).

(4) Where the registrar has refused an application to exercise any of the powers referred to in paragraph (2), the applicant may have it determined by a judge of the Court Martial Appeal Court by serving a notice of renewal in the form set out as Form 6 in Schedule 2 within 14 days of the day on which notice of the registrar's decision is served on the applicant, unless that period is extended by the Court Martial Appeal Court.

#### **Determination by the Court Martial Appeal Court**

**30.**—(1) Where a judge of the Court Martial Appeal Court has refused an application to exercise any of the powers referred to in article 28, the applicant may have that application determined by

the Court Martial Appeal Court by serving a notice of renewal in the form set out as Form 6 in Schedule 2.

(2) A notice under paragraph (1) must be served on the registrar within 14 days of the day on which notice of the single judge's decision is served on the applicant, unless that period is extended by the Court Martial Appeal Court.

(3) If a notice under paragraph (1) is not served on the registrar within the period specified in paragraph (2) or such extended period as the Court Martial Appeal Court has allowed, the application must be treated as having been refused by the Court Martial Appeal Court.

### **Abandonment of the application**

**31.**—(1) An application under article 8(1) may be abandoned by the prosecuting officer before the hearing of that application by serving notice of abandonment in the form set out as Form 7 in Schedule 2 on the registrar and the acquitted person.

(2) On receiving notice of abandonment the registrar must—

- (a) date it;
- (b) serve a dated copy on the prosecuting officer and the acquitted person; and
- (c) treat the application as if it had been refused or dismissed by the Court Martial Appeal Court.

17th July 2013

*Mark Francois*  
Minister of State  
Ministry of Defence