This draft Statutory Instrument supersedes the draft laid before Parliament on 8th May 2009 and is being issued free of charge for all known recipients of that draft.

DRAFT STATUTORY INSTRUMENTS

2009 No. 0000

DEFENCE

The Court Martial (Prosecution Appeals) Order 2009

Made - - - -	*2009*
Coming into force - -	31st October 2009

The Secretary of State makes the following Order in exercise of the powers conferred by section 323 of the Armed Forces Act 2006(**a**):

In accordance with section 373(3)(b) of the Armed Forces Act 2006, a draft of this instrument was laid before Parliament and approved by resolution of each House of Parliament.

PART 1

Preliminary

Citation, commencement, application and revocations

1.—(1) This Order may be cited as the Court Martial (Prosecution Appeals) Order 2009 and shall come into force on 31st October 2009.

(2) This Order shall only apply in relation to trial proceedings which commence after commencement.

(3) For the purposes of this Order, trial proceedings commence immediately after the last court member has been sworn.

(4) The 2006 Order and the Courts-Martial (Prosecution Appeals) (Supplementary Provisions) Order 2006(**b**) are revoked.

Interpretation

2.—(1) In this Order—

"the 1968 Act" means the Court Martial Appeals Act 1968(**c**);

"the 2006 Act" means the Armed Forces Act 2006;

"the 2006 Order" means the Courts-Martial (Prosecution Appeals) Order 2006(**d**);

(**a**) 2006 c. 52.
(**b**) S.I. 2006/1788
(**c**) 1968 c. 20. The short title of this Act is amended by paragraph 53 of Schedule 8 to the 2006 Act.
(**d**) S.I. 2006/1786

"accused" means a party in whose favour the ruling which is the subject of the appeal was made;

"appeal" means an appeal against a ruling to which article 4(1) applies and "application for leave to appeal" should be construed accordingly;

"charge" means a charge regarded for the purposes of Part 5 of the 2006 Act as allocated for Court Martial trial;

"commencement" means the date on which this Order comes into force;

"the Director" means the Director of Service Prosecutions;

"DX" means document exchange;

"interested party" means a person other than the accused who—

(a) is a party to the trial proceedings;

(b) may be affected by the decision of the judge advocate under article 5(1) as to whether or not the appeal should be expedited; and

(c) is permitted by the judge advocate or the Court Martial Appeal Court to make representations on that issue;

"the judge advocate" in relation to any proceedings, means the judge advocate specified for the proceedings under section 155(5) of the Armed Forces Act 2006;

"legal representative" means a person appointed under article 12;

"live link" means an arrangement by which a person, when not in the place where proceedings are being held, is able to see and hear, and to be seen and heard by, the court during proceedings (and for this purpose any impairment of eyesight or hearing is to be disregarded);

"programme service" has the same meaning as in the Broadcasting Act 1990(**a**);

"public interest ruling" means an order under article 4(6), 13(8) or 14(5) of the Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009(**b**);

"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;

"the registrar" means the registrar of the Court Martial Appeal Court;

"relevant programme" means a programme included in a programme service;

"relevant time" means a time when events giving rise to the charges to which the proceedings relate are alleged to have occurred;

"ruling" includes a decision, determination, direction, finding, notice, order, refusal, rejection or requirement;

"a single judge" means a single judge of the Court Martial Appeal Court;

"trial proceedings" has the same meaning as in rules made under section 163 of the 2006 Act.

PART 2

Prosecution Appeals

Prosecution rights of appeal

3.—(1) In relation to trial proceedings, the Director is to have the rights of appeal for which provision is made by this Order.

(2) But the Director is to have no right of appeal under this Order in respect of—

(**a**) 1990 c. 42.
(**b**) S.I. 2009/988

(a) a ruling that all lay members of the court be discharged; or

(b) a ruling from which an appeal lies to the Court Martial Appeal Court by virtue of any other enactment.

(3) An appeal under this Order is to lie to the Court Martial Appeal Court.

(4) Such an appeal may be brought only with the leave of the judge advocate or the Court Martial Appeal Court.

General right of appeal in respect of rulings

4.—(1) This article applies where a judge advocate makes a ruling in relation to trial proceedings at an applicable time and the ruling relates to one or more of the charges being tried.

(2) The Director may appeal in respect of the ruling in accordance with this article.

(3) The ruling is to have no effect whilst the Director is able to take any steps under paragraph (4).

(4) The Director may not appeal in respect of the ruling unless following the making of the ruling he—

(a) informs the court that he intends to appeal; or

(b) requests an adjournment to consider whether to appeal and, if such an adjournment is granted, informs the court following the adjournment that he intends to appeal.

(5) Where the ruling relates to two or more charges—

(a) any one or more of those charges may be the subject of the appeal; and

(b) if the Director informs the court in accordance with paragraph (4) that he intends to appeal, he must at the same time inform the court of the charge or charges which are the subject of the appeal.

(6) Where—

(a) the ruling is a ruling that there is no case to answer, and

(b) the Director, at the same time that he informs the court in accordance with paragraph (4) that he intends to appeal, nominates one or more other rulings which have been made by the judge advocate in relation to the trial proceedings at an applicable time and which relate to the charge or charges which are the subject of the appeal,

that other ruling, or those other rulings, are also to be treated as the subject of the appeal.

(7) The Director may not inform the court in accordance with paragraph (4) that he intends to appeal, unless, at or before that time, he informs the court that he agrees that, in respect of the charge or each charge which is the subject of the appeal, the accused in relation to that charge should be acquitted of that charge if either of the conditions mentioned in paragraph (8) is fulfilled.

(8) Those conditions are—

(a) that leave to appeal to the Court Martial Appeal Court is not obtained; and

(b) that the appeal is abandoned before it is determined by the Court Martial Appeal Court.

(9) If the Director informs the court in accordance with paragraph (4) that he intends to appeal, the ruling mentioned in paragraph (1) is to continue to have no effect in relation to the charge or charges which are the subject of the appeal whilst the appeal is pursued.

(10) If and to the extent that a ruling has no effect in accordance with this article—

(a) any consequences of the ruling are also to have no effect;

(b) the judge advocate may not take any steps in consequence of the ruling; and

(c) if he does so, any such steps are also to have no effect.

(11) Where the Director has informed the court of his agreement under paragraph (7) and either of the conditions mentioned in paragraph (8) is fulfilled, the judge advocate or the Court Martial

Appeal Court must order that the accused in relation to the charge or each charge concerned be acquitted of that charge and, where appropriate, that he be released from custody.

(12) In this article "applicable time", in relation to particular trial proceedings, means any time after the commencement of those trial proceedings and before the time when the judge advocate starts his summing-up to the lay members of the court.

Expedited and non-expedited appeals

5.—(1) Where the Director informs the court in accordance with article 4(4) that he intends to appeal, the judge advocate must decide whether or not the appeal should be expedited.

(2) If the judge advocate decides that the appeal should be expedited, he may order an adjournment.

(3) If the judge advocate decides that the appeal should not be expedited, he may—

(a) order an adjournment; or

(b) discharge the lay members of the court.

(4) If he decides that the appeal should be expedited, he or the Court Martial Appeal Court may subsequently reverse that decision and, if it is reversed, the judge advocate may act as mentioned in paragraph (3)(a) or (b).

Continuation of proceedings for charges not affected by ruling

6.—(1) This article applies where the Director informs the court in accordance with article 4(4) that he intends to appeal.

(2) Proceedings may be continued in respect of any charge which is not the subject of the appeal.

Determination of appeal by the Court Martial Appeal Court

7.—(1) On an appeal under article 4, the Court Martial Appeal Court may confirm, reverse or vary any ruling to which the appeal relates.

(2) Paragraphs (3) to (5) apply where the appeal relates to a single ruling.

(3) Where the Court Martial Appeal Court confirms the ruling, it must, in respect of the charge or each charge which is the subject of the appeal, order that the accused in relation to that charge be acquitted of that charge.

(4) Where the Court Martial Appeal Court reverses or varies the ruling, it must, in respect of the charge or each charge which is the subject of the appeal, do any of the following—

(a) order that proceedings for that charge be resumed before the Court Martial;

(b) order a retrial;

(c) order that the accused in relation to that charge be acquitted of that charge.

(5) But the Court Martial Appeal Court may not make an order under paragraph (4)(c) in respect of a charge unless it considers that the accused could not receive a fair trial if an order were made under paragraph (4)(a) or (b).

(6) Paragraphs (7) and (8) apply where the appeal relates to a ruling that there is no case to answer and one or more other rulings.

(7) Where the Court Martial Appeal Court confirms the ruling that there is no case to answer, it must, in respect of the charge or each charge which is the subject of the appeal, order that the accused in relation to that charge be acquitted of that charge.

(8) Where the Court Martial Appeal Court reverses or varies the ruling that there is no case to answer, it must in respect of the charge or each charge which is the subject of the appeal, make any of the orders mentioned in paragraph (4)(a) to (c) (but subject to paragraph (5)).

Reversal of rulings

8. The Court Martial Appeal Court may not reverse a ruling on an appeal under this Order unless it is satisfied—

(a) that the ruling was wrong in law;

(b) that the ruling involved an error of law or principle; or

(c) that the ruling was a ruling that it was not reasonable for the judge advocate to have made.

Appeals to the Supreme Court

9.—(1) The 1968 Act is amended as follows.

(2) In section 39(1) (right of appeal) for "or the Courts-Martial (Prosecution Appeals) Order 2006" substitute "or the Court Martial (Prosecution Appeals) Order 2009".

(3) In section 42(1) (bail) for "Courts-Martial (Prosecution Appeals) Order 2006" substitute "Court Martial (Prosecution Appeals) Order 2009".

Restrictions on reporting

10.—(1) Except as provided by this article no publication shall include a report of—

(a) anything done under article 4 or 5;

(b) an appeal under this Order;

(c) an appeal under Part 3 of the 1968 Act in relation to an appeal under this Order; or

(d) an application for leave to appeal in relation to an appeal mentioned in sub-paragraph (b) or (c).

(2) The judge advocate may order that paragraph (1) is not to apply, or is not to apply to a specified extent, to a report of—

(a) anything done under article 4 or 5; or

(b) an application to the judge advocate for leave to appeal to the Court Martial Appeal Court under this Order.

(3) The Court Martial Appeal Court may order that paragraph (1) is not to apply, or is not to apply to a specified extent, to a report of—

(a) an appeal to the Court Martial Appeal Court under this Order;

(b) an application to that Court for leave to appeal to it under this Order; or

(c) an application to that Court for leave to appeal to the Supreme Court under Part 3 of the 1968 Act.

(4) The Supreme Court may order that paragraph (1) is not to apply, or is not to apply to a specified extent, to a report of—

(a) an appeal to that Court under Part 3 of the 1968 Act; or

(b) an application to that Court for leave to appeal to it under Part 3 of that Act.

(5) Where there is only one accused and he objects to the making of an order under paragraph (2), (3) or (4)—

(a) the judge advocate, the Court Martial Appeal Court or the Supreme Court is to make the order if (and only if) satisfied, after hearing the representations of the accused, that it is in the interests of justice to do so; and

(b) the order (if made) is not to apply to the extent that a report deals with any such objection or representations.

(6) Where there are two or more accused and one or more of them object to the making of an order under paragraph (2), (3) or (4)—

(a) the judge advocate, the Court Martial Appeal Court or the Supreme Court is to make the order if (and only if) satisfied, after hearing the representations of each of the accused, that it is in the interests of justice to do so; and

(b) the order (if made) is not to apply to the extent that a report deals with any such objection or representations.

(7) Paragraph (1) does not apply to the inclusion in a publication of a report of—

(a) anything done under article 4 or 5,

(b) an appeal under this Order,

(c) an appeal under Part 3 of the 1968 Act in relation to an appeal under this Order, or

(d) an application for leave to appeal in relation to an appeal mentioned in sub-paragraph (b) or (c),

at the conclusion of the trial of the accused or the last of the accused to be tried.

(8) Paragraph (1) does not apply to a report which contains only one or more of the following matters—

(a) the identity of the court and the name of the judge advocate;

(b) the names, ages, unit addresses and occupations of the accused or co-accused and witnesses;

(c) the charge or charges, or a summary of them, brought against the accused or co-accused;

(d) the names of the prosecuting officer and legal representatives in the appeal;

(e) where the proceedings are adjourned, the date and place to which they are adjourned;

(f) any arrangements as to release from custody subject to requirements imposed under section 107 of the 2006 Act;

(g) whether a right to publicly funded representation was granted to the accused or any co-accused.

(9) The addresses that may be included in a report by virtue of paragraph (8) are addresses—

(a) at any relevant time; and

(b) at the time of their inclusion in the publication.

(10) Nothing in this article affects any prohibition or restriction by virtue of any other enactment on the inclusion of any matter in a publication.

Offences in connection with reporting

11.—(1) This article applies if a publication includes a report in contravention of article 10.

(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, 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—

(i) before the relevant date, the Attorney General for Northern Ireland; or

(ii) on or after the relevant date, the Director of Public Prosecutions for Northern Ireland.

(11) In paragraph (10) "the relevant date" means the date on which section 22(1) of the Justice (Northern Ireland) Act 2002(**a**) comes into force.

Legal representatives

12.—(1) A party to an appeal may appoint a legal representative to act for him in relation to the appeal.

(2) A person may not be appointed as a legal representative unless—

(a) he has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990(**b**);

(b) he is an advocate or a solicitor in Scotland;

(c) he is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland; or

(d) he is a person having in any of the Channel Islands, the Isle of Man, a Commonwealth country or a British overseas territory rights and duties similar to those of a barrister or solicitor in England and Wales, and subject to punishment or disability for breach of professional rules.

(3) Any right conferred on a party to proceedings by this Order may be exercised, and any duty imposed on him by this Order discharged, by his legal representative on his behalf.

(4) A party who appoints a legal representative shall notify the court administration officer of the legal representative's name and address.

Costs

13.—(1) The Court Martial Appeal Court may if it thinks fit, direct the payment by the Secretary of State of costs to the accused or any interested party.

(2) The costs which may under paragraph 1 be directed to be paid are such sums as appear to the Court Martial Appeal Court reasonably sufficient to compensate the accused or interested party for any expenses properly incurred by him in relation to the appeal.

(**a**) 2002 c. 26.

(**b**) 1990 c. 41. Subsection (6) of section 71 of the Courts and Legal Services Act 1990 was substituted by the Access to Justice Act 1999 (c. 22), section 43, Schedule 6, paragraphs 4 and 9. Subsections (7) and (8) of section 71 of the 1990 Act were repealed by section 106, Schedule 15, Part 2, of the 1999 Act. Prospective amendments to section 71 of the 1990 Act are made to subsections (1) and (3) by the Constitutional Reform Act 2005 (c. 4), section 59(5), Schedule 11, Part 2, paragraph 4(1), (3). Prospective amendments are made to subsections (4) and (6) and a new subsection (6A) is inserted into section 71 of the 1990 Act by the Legal Services Act 2007 (c. 29), section 208(1), Schedule 21, paragraphs 83 and 94(a), (b) and (c).

(3) Where the Court Martial Appeal Court reverses or varies a ruling on an appeal, it may make such order as to the costs to be paid by the accused, to such person as may be named in the order, as it considers just and reasonable.

Miscellaneous and supplemental

14.—(1) There is to be no right of appeal under this Order in respect of a ruling in relation to which the Director has previously informed the court of his intention to appeal under article 4(4).

(2) Where a ruling relates to two or more charges but not all of those charges are the subject of an appeal under this Order, nothing in this Order is to be regarded as affecting the ruling so far as it relates to any charge which is not the subject of the appeal.

(3) Where a charge is brought in respect of the same offence against two or more co-accused, the provisions of this Order are to apply as if the charge, so far as relating to each accused, were a separate charge (so that, for example, any reference in this Order to a ruling which relates to one or more charges includes a ruling which relates to one or more of those separate charges).

PART 3

Procedural provisions

Request for adjournment

15.—(1) A request by the Director for an adjournment under article 4(4)(b) must be made to the judge advocate immediately following the making of a ruling to which article 4 refers.

(2) The judge advocate shall grant the request unless he considers it is in the interests of justice for the Director to indicate immediately whether or not he intends to seek leave to appeal.

(3) The adjournment shall be until the next court day after the day on which the ruling was given, unless the judge advocate considers that the interests of justice require a longer adjournment.

(4) Subject to article 21(7) and (8), as soon as is reasonably practicable after the Director informs the judge advocate that he intends to seek leave to appeal or requests an adjournment to consider whether to do so, the court administration officer shall provide a transcript of the ruling which is the subject of the proposed appeal to—

(a) the Director;

(b) the accused; and

(c) any interested party.

Application to the judge advocate for leave to appeal

16.—(1) The Director must inform the judge advocate immediately after the ruling or the adjournment if he intends to seek leave to appeal against a ruling and at the same time he may apply orally for leave to appeal.

(2) Before deciding whether or not to grant leave to appeal, the judge advocate shall hear oral representations from the accused.

(3) The judge advocate shall decide whether or not to give leave to appeal on the same day on which an oral application for leave to appeal is made to that judge advocate.

(4) The judge advocate may extend the period under paragraph (3) only if he considers it is in the interests of justice to do so.

(5) If the judge advocate gives leave to appeal he must issue a written certificate that he has done so and the court administration officer must forward that certificate to the registrar.

Further provision on expedited and non-expedited appeals

17.—(1) At the time when the Director informs the judge advocate that he intends to seek leave to appeal against a ruling, he must also make oral representations as to whether or not that appeal should be expedited under article 5(1).

(2) Before deciding whether or not the appeal should be expedited, the judge advocate shall hear oral representations from the accused and any interested party.

(3) The court administration officer must provide a copy of the reasons given by the judge advocate for his decision as to whether or not the appeal should be expedited, to the Director, the accused and all interested parties.

(4) The judge advocate may reverse his decision that the appeal should be expedited at any time before the notice of appeal or application for leave to appeal is served on the court administration officer under article 18(1) and must provide reasons for that reversal in writing to the Director, the accused and all interested parties.

(5) At any time after a notice of appeal or application for leave to appeal has been served on the registrar under article 18(1), the Director or accused may apply to the Court Martial Appeal Court to reverse a judge advocate's decision that the appeal should be expedited under article 5(4) and written notice of such an application must be served on—

(a) the registrar;

(b) the court administration officer;

(c) any interested party; and

(d) whichever of the following does not make the application—

(i) the Director;

(ii) the accused.

Notice of appeal or application for leave to appeal

18.—(1) Subject to article 21, a written notice of appeal (where the judge advocate has granted leave) or a written notice of application for leave to appeal shall be served on—

(a) the registrar;

(b) the court administration officer;

(c) the accused; and

(d) any interested party.

(2) The notice of appeal or application for leave to appeal must be served—

(a) where the judge advocate has decided that the appeal should be expedited under article 5(1) and that decision has not been subsequently reversed, before 5.00 pm on the next court day; or

(b) in any other case, within ten days of the day on which the Director informs the judge advocate that he intends to seek leave to appeal.

(3) The Court Martial Appeal Court may extend the period for service under paragraph (2), either before or after it expires, on application by the Director.

(4) A notice of appeal or, as the case may be, a notice of application for leave to appeal shall—

(a) specify each ruling against which the Director wants to appeal;

(b) identify each ground of appeal on which the Director relies, numbering them consecutively (if there is more than one) and concisely outlining each argument in support;

(c) summarise the relevant facts;

(d) identify any relevant authorities;

(e) include or attach any application for the following, with reasons—

(i) permission to appeal, if the Director needs the court's permission;

(ii) an extension of time within which to serve the appeal notice;

(iii) expedition of the appeal, or revocation of a direction expediting the appeal;

(f) include a list of those on whom the Director has served the appeal notice;

(g) attach—

(i) a transcript or note of each ruling against which the Director wants to appeal;

(ii) all relevant skeleton arguments considered by the judge advocate;

(iii) any written application for leave to appeal that the Director made to the judge advocate;

(iv) a transcript or note of the decision by the judge advocate on any application for permission to appeal;

(v) a transcript or note of the decision by the judge advocate on any request to expedite the appeal; and

(vi) any other document or thing that the Director thinks the court will need to decide the appeal.

Accused's response

19.—(1) Upon receiving notice of an appeal or application for leave to appeal, the accused if he wishes to oppose the appeal or application, must serve a written response ("the accused's response") on—

(a) the registrar;

(b) the court administration officer;

(c) the Director; and

(d) any interested party.

(2) An accused's response must be served on those listed in paragraph (1)—

(a) where the judge advocate has decided that the appeal should be expedited under article 5(1) and that decision has not been subsequently reversed under article 5(4), on the next court day after the day on which the notice of appeal or application for leave to appeal is served on the accused; or

(b) in any other case, within ten days of the day on which the notice of the appeal or application for leave to appeal is served on the defendant.

(3) The Court Martial Appeal Court may extend the period of service under paragraph (2) either before or after it expires.

(4) An accused's response shall—

(a) give the date on which the accused was served with the appeal notice;

(b) identify each ground of opposition on which the accused relies, numbering them consecutively (if there is more than one), concisely outlining each argument in support and identifying the ground of appeal to which each relates;

(c) summarise any relevant facts not already summarised in the appeal notice;

(d) identify any relevant authorities;

(e) include or attach any application for the following, with reasons—

(i) an extension of time within which to serve the accused's response;

(ii) a direction to attend in person any hearing that the accused could attend by live link, if the accused is in custody;

(f) identify any other document or thing that the accused thinks the court will need to decide the appeal.

Accused in custody

20.—(1) An accused in custody is not entitled to be present in person at the hearing of an appeal or application for leave to appeal, unless the Court Martial Appeal Court so directs.

(2) However, an accused in custody may participate in such a hearing, without a direction of the Court Martial Appeal Court, by way of live link.

(3) In directing whether an accused in custody shall be present in person under paragraph (1) the Court Martial Appeal Court must take into account—

(a) any representations of the Director and the accused;

(b) the availability and reliability of live link facilities;

(c) any practical difficulties with the physical attendance of the accused; and

(d) whether or not the appeal is expedited under article 5(1).

Public interest rulings

21.—(1) This article applies where a public interest ruling is the subject of an appeal or application for leave to appeal.

(2) In any appeal or application for leave to appeal against a public interest ruling, the Director need not describe the material that is the subject of the ruling in the notice of appeal or application for leave to appeal under article 18.

(3) Where the Director has reason to believe that to reveal to the accused or any interested party the category of material that is the subject of the public interest ruling would have the effect of disclosing that which the Director considers should not be disclosed, the Director need not describe the category of the material in the notice of appeal or application for leave to appeal under article 18.

(4) Where the Director has reason to believe that to reveal to the accused or to any interested party the fact that a public interest ruling has been made would have the effect of disclosing that which the Director considers should not be disclosed the Director need not serve a notice of appeal or application for leave to appeal on the accused or any interested party as otherwise required under article 18(1), unless the Court Martial Appeal Court otherwise directs.

(5) Where the Director has taken any of the measures set out in paragraphs (2), (3) and (4) the notice of appeal or application for leave to appeal served on the registrar under article 18(1)(a) must be accompanied by a confidential annex indicating that the measure or measures have been taken and giving the Director's reasons for taking them.

(6) Where the Director has taken any of the measures set out in paragraph (4), the accused shall not be entitled to be present in person at the hearing by the Court Martial Appeal Court of the appeal or application for leave to appeal, or appear by way of live link, unless the Court Martial Appeal Court otherwise directs.

(7) The court administration officer shall not provide a transcript of the ruling which is the subject of the proposed appeal to the accused or any interested party unless and until the Director has served a notice of appeal or application for leave to appeal on that person.

(8) A transcript provided by the court administration officer to an accused or interested party shall not describe or disclose—

(a) the material that is the subject of the ruling, or

(b) the category of that material,

save to the extent that the Director has described that material or category of material in the notice of appeal or application for leave to appeal served on that accused or interested party.

Supply of documentary and other exhibits

22.—(1) The registrar must, on request, supply to the Director, the accused or any interested party copies of documents or other exhibits required for the appeal or application for leave to

appeal and may make charges in accordance with scales and rates fixed for the time being by the Treasury.

(2) The registrar must, on request, make arrangements for the Director, the accused or any interested party to inspect any document or other exhibit required for the appeal.

(3) This article shall not apply to the supply of transcripts of proceedings.

(4) This article shall not require the registrar to supply to the accused or any interested party, or allow the accused or any interested party to inspect—

(a) material that is the subject of a public interest ruling,

(b) a notice of appeal or application for leave to appeal served by the Director on the registrar in accordance with article 18(1) where by virtue of article 21(4) the Director has not served it on the accused or any interested party, or

(c) a confidential annex served by the Director on the registrar in accordance with article 21(5),

unless the Court Martial Appeal Court otherwise directs.

Abandonment of proceedings

23.—(1) An appeal or application for leave to appeal (including an application for leave to appeal to the Supreme Court) may be abandoned before it is heard by the Court Martial Appeal Court by serving notice in writing (a "notice of abandonment") on the registrar.

(2) A notice of abandonment shall specify each ruling in respect of which the appeal is abandoned.

Powers exercisable by a single judge

24.—(1) The following powers may be exercised by a single judge in the same manner as they may be exercised by the Court Martial Appeal Court and subject to the same provisions—

(a) to give leave to appeal under article 3(4);

(b) to reverse, under article 5(4), a decision of the judge advocate that an appeal should be expedited;

(c) to extend, under article 18(3), the time for service of the notice of appeal or of an application for leave to appeal;

(d) to extend, under article 19(3), time for service of the accused's response;

(e) to direct, under article 20(1), that the accused in custody be present in person at the hearing of the appeal or application for leave to appeal;

(f) where the Director has served a notice of abandonment under article 23, to order the acquittal of the accused and, where appropriate, his release from custody under article 4(11), and payment of his costs under article 13.

(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 specified in paragraph (1), the registrar must serve notice of the single judge's decision on—

(a) the Director;

(b) the accused;

(c) any interested party; and

(d) the court administration officer.

Powers exercisable by the registrar

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

(a) to extend, under article 18(3), the time for service of the notice of appeal or of an application for leave to appeal; and

(b) to extend, under article 19(3), time for service of the accused's response.

(2) Where the registrar exercises one of the powers specified in paragraph (1), he must serve notice of his decision on—

(a) the Director;

(b) the accused;

(c) any interested party; and

(d) the court administration officer.

(3) Where the registrar has refused an application to exercise any of the powers specified in paragraph (1), the party making the application may have it determined by a single judge by serving a written notice of renewal.

(4) A notice of renewal shall—

(a) be served on the registrar within ten days of the day on which notice of the registrar's decision is served on the party making the application;

(b) specify the applications that the party wishes to have determined by a single judge; and

(c) a notice of renewal must be signed by, or on behalf of, the person making the application.

(5) If the notice is not signed by the party making the application and that party is in custody, the registrar shall, as soon as practicable after receiving the notice, send a copy of it to that party.

(6) If the notice of renewal is not served on the registrar within the period specified in paragraph (4), the application shall be treated as having been refused by the single judge.

Determination by full court

26.—(1) Where a single judge has refused an application to exercise any of the powers specified in article 24(1), the party making the application may have it determined by the Court Martial Appeal Court by serving a written notice of renewal.

(2) A notice of renewal shall—

(a) be served on the registrar within ten days of the day on which notice of the single judge's decision is served on the party making the application;

(b) specify the applications that the party wishes to have determined by a single judge; and

(c) a notice of renewal must be signed by, or on behalf of, the person making the application.

(3) The Court Martial Appeal Court may extend the period for service under paragraph (2) either before or after it expires.

(4) If the notice is not signed by the party making the application and that party is in custody, the registrar shall, as soon as practicable after receiving the notice, send a copy of it to that party.

(5) If the notice of renewal 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 under paragraph (3), the application shall be treated as having been refused by the court.

Notice of hearing and decision of the Court Martial Appeal Court

27.—(1) The registrar must give notice, as far in advance as reasonably practicable, of the date fixed for the hearing by the Court Martial Appeal Court of an appeal or application to—

(a) the Director;

(b) the accused;

(c) any interested party; and

(d) the court administration officer.

(2) The registrar must, as soon as reasonably practicable, serve notice of a decision of the Court Martial Appeal Court on an appeal or application on those parties listed in paragraph (1).

(3) Where a party to whom notice is required to be given under this article is in custody, notice must instead be given to the person having custody of him.

Assistance from the court administration officer

28. The registrar may require the court administration officer to furnish the Court Martial Appeal Court with any assistance or information which it may require for the purposes of exercising its jurisdiction under this Order.

Further provision on appeals to the Supreme Court

29. An application to the Court Martial Appeal Court for leave to appeal to the Supreme Court may be made—

(a) orally after the decision of the Court Martial Appeal Court from which an appeal lies to the Supreme Court; or

(b) in writing and served on the registrar within ten days of service by the registrar of notice under article 27(2).

Service

30.—(1) Where this Order requires service of a document on the registrar then, unless the registrar, a single judge or the Court Martial Appeal Court directs otherwise, the document may be served by any of the following methods—

(a) in the case of an accused or interested party who is in custody, by delivering it to the person who has custody of him;

(b) by addressing it to the registrar and delivering it at, or sending it by post, fax, electronic mail or other electronic means, to his office at the Royal Courts of Justice, London WC2A 2LL.

(2) Where this Order requires service of a document on the court administration officer then, unless the registrar, a single judge or the Court Martial Appeal Court directs otherwise, the document may be served by any of the following methods—

(a) in the case of an accused or interested party who is in custody, by delivering it to the person who has custody of him;

(b) by delivering it, or sending it by post, DX, fax, electronic mail or other electronic means, to the court administration officer.

(3) Where this Order requires the service of a document on the Director then, unless the registrar, a single judge or the Court Martial Appeal Court directs otherwise, the document may be served by any of the following methods—

(a) in the case of an accused or interested party who is in custody, by delivering it to the person who has custody of him;

(b) by post, DX, fax, electronic mail or other electronic means to—

(i) the principal office of the Service Prosecuting Authority; or

(ii) with the agreement of a prosecuting officer, that Authority's main office in Germany; or

(c) on a prosecuting officer personally, with his agreement.

(4) A person who has custody of an accused or interested party and to whom that accused or interested party delivers a document under paragraph (1)(a), (2)(a) or (3)(a) must endorse on it the date of delivery and forward it to the registrar, the court administration officer or the Director, as appropriate.

(5) Where this Order requires the service of a document on any other person then, unless the registrar, a single judge or the Court Martial Appeal Court directs otherwise, the document may be served by any of the following methods—

(a) personally, on that person or on his legal representative;

(b) by post to that person's last known place of abode, unit or place of business;

(c) by post to his legal representative's place of business;

(d) leaving it at the person's last known place of abode or place of business;

(e) if the person has—

(i) indicated that he is willing to accept service by DX, fax, electronic mail or other electronic means, and

(ii) has given a DX box number, fax number or electronic mail or other electronic means address,

by sending a copy of the document by such means to him;

(f) if the person's legal representative has—

(i) indicated that he is willing to accept service by DX, fax, electronic mail or other electronic means, and

(ii) has given a DX box number, fax number or electronic mail or other electronic means address,

by sending a copy of the document by such means to the legal representative.

(6) Where a document is served under this Order by any method other than personal service it is deemed to be served—

(a) in the case of a document left at an address, on the next court day after the day on which it was left;

(b) in the case of a document sent by post, on the fifth court day after the day on which it was posted;

(c) in the case of a document served by DX, on the fifth day after the day on which it was left at the addressee's DX box number or despatched;

(d) in the case of a document transmitted by fax, electronic mail or other electronic means, the day after it was transmitted;

(e) in any case, on the day on which the addressee responds to it if that is earlier.

(7) Where a document to be served on a person is sent or delivered to his commanding officer, his commanding officer must arrange for the document to be served on him personally as soon as is reasonably practicable.

PART 4

Transitory and transitional provisions

Transitory provision

31.—(1) Until section 23 of the Constitutional Reform Act 2005(**a**) comes into force—

(a) references in this Order to the Supreme Court are to be read as references to the House of Lords; and

(b) article 10(4)(a) and (b) is to be read, in each case, as if the words "that House" were substituted for "that Court".

(**a**) 2005 c. 4.

(2) Until paragraph 5 of Schedule 11 to that Act comes into force, the reference in article 12 to the Court of Judicature of Northern Ireland is to be read as a reference to the Supreme Court of Northern Ireland.

Transitional provisions

32.—(1) A person who was guilty of an offence under article 11 of the 2006 Order is to be treated for the purposes of this Order as if he were guilty of an offence under article 11 of this Order.

(2) Where before commencement—

(a) an order was made, in respect of a charge, under article 7(4)(b) of the 2006 Order, and

(b) no fresh court-martial was convened to try that charge,

that order is to have effect as if it were an order under article 7(4)(b) of this Order.

(3) Where before commencement an appeal was brought under the 2006 Order but not determined, it shall be treated as an appeal brought under this Order.

(4) Anything done before commencement in relation to an appeal which falls within paragraph (3), which would have been done in accordance with any provision of this Order if that provision had then been in force, is to be treated as having been done in accordance with that provision.

(5) In sections 39(1) and 42(1) of 1968 Act as amended by this Order, the references to this Order include references to the 2006 Order.

Name
Parliamentary Under Secretary of State
Ministry of Defence

Date

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision for prosecution appeals from rulings made in Court Martial trials and for the procedure to be followed in such appeals. The provisions of this order are made in consequence of those relating to prosecution appeals in Part 9 of the Criminal Justice Act 2003 (the 2003 Act). The power for the Secretary of State to make provision in consequence of criminal justice enactments derives from section 323 of the Armed Forces Act 2006 ("the 2006 Act"). This Order replaces the Courts-Martial (Prosecution Appeals) Order 2006 (S.I. 2006/1786), which made similar equivalent provision under section 31 of the Armed Forces Act 2001, for the purposes of court-martial trials prior to the establishment of the standing Court Martial under the 2006 Act. This order also replaces the Courts-Martial (Prosecution Appeals) (Supplementary Provisions) Order 2006 (S.I. 2006/1788), which made procedural provision for prosecution appeals in court-martial trials. That order was also made under section 31 of the 2001 Act, in consequence of the provisions of Part 7 of the Courts Act 2003, under which the Criminal Procedure Rules 2005 (S.I. 2005/384) were made. Those Rules provide for the procedure in civilian prosecution appeals.

The main substantive provisions of this order are contained in Part 2. Article 3 establishes the right of appeal for the Director of Service Prosecutions ("the Director") in relation to trial proceedings and provides that such an appeal, subject to the granting of leave, lies to the Court Martial Appeal Court.

Article 4 makes provision, equivalent to the general right of appeal in section 58 of the 2003 Act, establishing a right of appeal for the Director against a ruling of a judge advocate in trial proceedings.

Article 5 makes provision, equivalent to that in section 59 of the 2003 Act, in relation to the alternative expedited and non-expedited routes for appeals. Article 6 allows for proceedings to continue in respect of any charge which is not the subject of an appeal.

Article 7 establishes powers for the Court Martial Appeal Court to confirm, reverse or vary any ruling to which the appeal relates equivalent to those in section 61 of the 2003 Act. Article 8 provides the test that must be met before the Court Martial Appeal Court may reverse a ruling from a judge advocate in trial proceedings.

Article 9 amends provisions of the Court Martial Appeals Act 1968 so as to provide for a right of appeal to lie to the Supreme Court against any decision of the Court Martial Appeal Court in relation to an appeal under this Order and to mirror the provisions of the Criminal Appeal Act 1968 in relation to the granting of bail to an accused who has so appealed to the Supreme Court.

Articles 10 and 11 make provision equivalent to sections 71 and 72 of the 2003 Act in relation to restrictions on reporting of appeals under this Order, and associated offences for contravention of reporting restrictions.

Article 12 makes provision as to legal representatives.

Article 13 gives powers to the Court Martial Appeal Court to award costs.

Article 14 sets out certain miscellaneous and supplemental provisions.

Part 3 of this Order contains procedural provisions. Article 15 makes provision in relation to adjournments requested by the Director in order for him to consider whether to appeal in respect of a ruling.

Article 16 makes provision for oral applications for leave to appeal to the judge advocate. Article 17 makes provision for the procedure to be followed in relation to decisions as to whether an appeal should be expedited. Articles 18 and 19 make provision as to the content and service of notices of appeal, notices of application for leave to appeal and accuseds' responses.

Article 20 provides that an accused in custody is not entitled to attend hearings in person without a direction to that effect from the Court Martial Appeal Court, but may participate by way of live link without such a direction if he is able to see and hear the court and to be seen and heard by it.

The procedure to be followed under Part 3 is qualified by article 21 for the purposes of appeals relating to public interest rulings.

Articles 22 to 30 make further procedural provisions, including provisions in relation to the abandonment of proceedings, powers exercisable by a single judge or registrar, appeals to the Supreme Court and service of documents. Article 25 provides that applications refused by the registrar may be renewed for determination by a single judge. Article 26 provides that applications refused by a single judge may be renewed for determination by the full Court Martial Appeal Court.

Article 31 makes transitory provision. Article 32 makes transitional provisions.

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DRAFT STATUTORY INSTRUMENTS

2009 No. 0000

DEFENCE

The Court Martial (Prosecution Appeals) Order 2009

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