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STATUTORY INSTRUMENTS

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**2009 No. 1059**

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

PART 11

TRIAL BY COURT MARTIAL

CHAPTER 1

Trial by Court Martial

**Pre-commencement selection of members of Court Martial**

74.—(1) If before commencement a person is specified by or on behalf of the Judge Advocate General to be the judge advocate for Court Martial proceedings intended to take place after commencement, the specification has effect after commencement as a specification under section 155(5) of AFA 2006.

(2) If before commencement a person is specified by or on behalf of a court administration officer to be a lay member of the court for Court Martial proceedings intended to take place after commencement, the specification has effect after commencement as a specification under section 155(6) of AFA 2006.

(3) If before commencement a judicial officer directs that the number of lay members of the court for Court Martial proceedings intended to take place after commencement must be more than the minimum required, the direction has effect after commencement as a direction under section 155(7) of AFA 2006.

(4) In this article—

“court administration officer” means a court administration officer within the meaning of section 84A of AA 1955 or AFA 1955 or section 53A of NDA 1957;

“judicial officer” means a judicial officer appointed under section 75L of AA 1955 or AFA 1955 or section 47M of NDA 1957;

“the minimum required” has the meaning given by section 155(8) of AFA 2006.

**Eligibility to be member of the court**

75. In section 157(1) of AFA 2006 (officers and warrant officers ineligible for membership of Court Martial in particular circumstances)—

(a) in paragraph (a), “commanding officer”, in relation to times before commencement, means commanding officer within the meaning of Part 2 of AFA 2001;

(b) in paragraph (c), the reference to an inquiry includes—

(i) an investigation conducted by a board of inquiry under section 135 of AA 1955 or AFA 1955;

(ii) an inquiry held under section 137 of AA 1955 or AFA 1955;

(iii) an inquiry held by the Royal Navy under the prerogative.

### **Arraignment before commencement**

76. Court Martial rules may provide that a plea offered on arraignment at a hearing under section 91A of AA 1955 or AFA 1955 or section 58A of NDA 1957 is to be treated, for such purposes as may be specified, as having been offered on arraignment before the Court Martial.

### **Power to convict of alternative offences**

77.—(1) This article applies in relation to a trial by the Court Martial, and is without prejudice to section 161 of AFA 2006.

(2) Where the Court Martial acquits a person of an SDA offence specifically charged in the charge sheet, but the allegations in the charge sheet amount to or include (expressly or by implication) an allegation of—

- (a) another SDA offence, or
- (b) a service offence,

the court may convict the person of that other SDA offence or that service offence.

(3) Where the Court Martial acquits a person of a service offence specifically charged in the charge sheet, but the allegations in the charge sheet amount to or include (expressly or by implication) an allegation of an SDA offence, the court may convict him of the SDA offence.

(4) For the purposes of this article—

- (a) an allegation of an offence under any of sections 24 to 66 or 69 of AA 1955 or AFA 1955 (“offence X”) is to be taken to include an allegation of an offence under section 68 of attempting to commit offence X;
- (b) an allegation of an offence under any of sections 2 to 39 of NDA 1957 (“offence Y”) is to be taken to include an allegation of an offence under section 40 of attempting to commit offence Y;
- (c) an allegation of a completed SDA civil offence is to be taken to include an allegation of an SDA civil offence of attempting to commit that offence.

(5) Paragraphs (2) and (3) apply in relation to a charge sheet containing more than one charge as if each charge were contained in a separate charge sheet.

(6) In this article a “completed SDA civil offence” means an offence that would be an offence to which section 1 of the Criminal Attempts Act 1981(1) applies if subsection (4) of that section had effect as modified by section 70(2A) of AA 1955 or AFA 1955 or section 42(2A) of NDA 1957.

### **Sentencing powers where election for Court Martial trial**

78.—(1) An offence of which a person has been convicted or acquitted by the Court Martial is “relevant” for the purposes of section 165 of AFA 2006 (sentencing powers where election for Court Martial trial) if the person was tried for the offence in pursuance of an election for court-martial trial.

(2) In section 165(1)(c) of AFA 2006, the reference to Court Martial trial includes court-martial trial.

(3) Section 165(5) of AFA 2006 has effect as if the cases mentioned in paragraphs (a) and (b) included the following cases—

- (a) where the court convicts a person of an offence that is relevant by virtue of this article;

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(1) 1981 c. 47.

- (b) where the court convicts a person of two or more such relevant offences the charges in respect of which—
  - (i) would have been dealt with or tried summarily together if no election for court-martial trial had been made; or
  - (ii) are under Court Martial rules to be treated as if they would have been so dealt with or tried.

### **Appeals against pre-commencement orders restricting publicity etc**

**79.** In section 163(9) of AFA 2006 (rules relating to certain appeals)—

- (a) the reference to rules made by virtue of section 163(3)(i) includes any Court Martial rules that make provision, corresponding to that mentioned in section 163(3)(i), in relation to orders and directions of courts-martial or orders or rulings made in proceedings preliminary to a court-martial trial; and
- (b) the reference to appeals made by virtue of section 163(3)(i) includes appeals made under such rules.

## CHAPTER 2

### Unfitness to stand trial and insanity

### **Continuation of hospital orders etc made before commencement**

**80.**—(1) Where immediately before commencement a hospital order or restriction order made by a court-martial by virtue of section 116A of AA 1955 or AFA 1955 or section 63A of NDA 1957 is in force, the order has effect after commencement as if made by the Court Martial by virtue of section 169 of AFA 2006.

(2) Where immediately before commencement there is in force any other order under the Mental Health Act 1983(2) made by a court-martial by virtue of section 116B of AA 1955 or AFA 1955 or section 63B of NDA 1957, the order has effect after commencement as if made by the Court Martial by virtue of Schedule 4 to AFA 2006.

(3) Where immediately before commencement a supervision order made by a court-martial under section 116A of AA 1955 or AFA 1955 or section 63A of NDA 1957 is in force, the order has effect after commencement as a service supervision order under section 169 of AFA 2006.

(4) Paragraphs (5) to (7) apply where immediately before commencement a hospital order or restriction order made by the Appeal Court is in force.

(5) If the order was made by virtue of section 16(2) of CMAA 1968, it has effect after commencement as if made by virtue of section 169 of AFA 2006 as applied by section 16(2) of CMAA 1968 (as substituted by AFA 2006).

(6) If the order was made by virtue of section 23(2) of CMAA 1968, it has effect after commencement as if made by virtue of section 169 of AFA 2006 as applied by sections 16(2) and 22(3A) of CMAA 1968 (as substituted by AFA 2006).

(7) If the order was made by virtue of section 25B of CMAA 1968, it has effect after commencement as if made by virtue of section 169 of AFA 2006 and section 25B of CMAA 1968 (as amended by AFA 2006).

(8) Paragraphs (9) to (11) apply where immediately before commencement there is in force any other order under the Mental Health Act 1983 made by the Appeal Court.

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(2) 1983 c. 20.

(9) If the order was made by virtue of section 116B of AA 1955 or AFA 1955 or section 63B of NDA 1957, as applied by section 16(4) of CMAA 1968, it has effect after commencement as if made by virtue of Schedule 4 to AFA 2006 as applied by section 16(2) of CMAA 1968 (as substituted by AFA 2006).

(10) If the order was made by virtue of section 116B of AA 1955 or AFA 1955 or section 63B of NDA 1957, as applied by section 23(4) of CMAA 1968, it has effect after commencement as if made by virtue of Schedule 4 to AFA 2006 as applied by sections 16(2) and 22(3A) of CMAA 1968 (as substituted by AFA 2006).

(11) If the order was made by virtue of section 25B of CMAA 1968, it has effect after commencement as if made by virtue of Schedule 4 to AFA 2006 and section 25B of CMAA 1968 (as amended by AFA 2006).

(12) Paragraphs (13) to (15) apply where immediately before commencement a supervision order made by the Appeal Court was in force.

(13) If the order was made by virtue of section 16(2) of CMAA 1968, it has effect after commencement as a service supervision order made by virtue of section 169 of AFA 2006 as applied by section 16(2) of CMAA 1968 (as substituted by AFA 2006).

(14) If the order was made by virtue of section 23(2) of CMAA 1968, it has effect after commencement as a service supervision order made by virtue of section 169 of AFA 2006 as applied by sections 16(2) and 22(3A) of CMAA 1968 (as substituted by AFA 2006).

(15) If the order was made by virtue of section 25B of CMAA 1968, it has effect after commencement as a service supervision order made by virtue of section 169 of AFA 2006 and section 25B of CMAA 1968 (as amended by AFA 2006).

(16) In paragraphs (2) and (8) to (11) “order” includes a remand.

(17) In this article references to an order made by the Appeal Court include an order made by the House of Lords or the Supreme Court on an appeal brought from a decision of the Appeal Court.

### **Remission for trial**

**81.**—(1) Without prejudice to the generality of article 80, where a hospital order and restriction order made by virtue of section 116A(1)(a) of AA 1955 or AFA 1955 or section 63A(1)(a) of NDA 1957 are continued in effect by that article, the orders are to be treated for the purposes of section 171 of AFA 2006 (remission for trial) as a hospital order and restriction order made by the Court Martial which the Court Martial had power to make by virtue of section 169(1)(a).

(2) Where—

(a) a person has been remitted for court-martial trial under section 116B(5) of AA 1955 or AFA 1955 or section 63B(5) of NDA 1957, and

(b) the trial has not begun by commencement,

the person is to be treated as having been remitted under section 171(1) of AFA 2006 for trial by the Court Martial.

(3) The first reference in paragraph (1) to a hospital order and restriction order made as mentioned there includes—

(a) a hospital order and restriction order made by virtue of section 16(1)(b) or 23(2)(a) of CMAA 1968;

(b) a hospital order and restriction order made by virtue of section 25B(1) of that Act in a case in which a finding within section 116A(1)(a) of AA 1955 or AFA 1955 or section 63A(1)(a) of NDA 1957 was made by a court-martial.

**Finding that defendant who is unfit to stand trial did the act or made the omission charged**

**82.**—(1) Section 167 of AFA 2006 (duty to find whether defendant who is unfit to stand trial did the act or made the omission charged) applies (as well as in the case mentioned in subsection (1)) where—

- (a) under section 115A of AA 1955 or AFA 1955 or section 62A of NDA 1957 a person has been found to be unfit to stand trial; and
- (b) by commencement no determination had been made under section 115B of AA 1955 or AFA 1955 or section 62B of NDA 1957 (determination whether defendant did the act charged).

(2) Where section 167 of AFA 2006 applies by reason of this article, the reference in subsection (2) to “the court” is to the Court Martial.

**Powers to make hospital orders etc**

**83.**—(1) Section 169 of AFA 2006 (Court Martial powers where person unfit to stand trial or not guilty by reason of insanity) applies (as well as in the case mentioned in subsection (1)) in the following cases—

- (a) where by virtue of article 82 the Court Martial finds that a defendant did the act (or made the omission) charged;
- (b) where on a trial by court-martial the defendant was found—
  - (i) to be unfit to stand trial and to have done the act (or made the omission) charged, or
  - (ii) to be not guilty by reason of insanity,

and by commencement the court had not made an order by virtue of section 116A(2) of AA 1955 or AFA 1955 or section 63A(2) of NDA 1957.

(2) Where section 169 of AFA 2006 applies by reason of this article—

- (a) the reference in subsection (2) to “the court” is to the Court Martial;
- (b) subsection (6) is to be treated as omitted;
- (c) the functions referred to in subsection (6) are to be exercised by—
  - (i) the judge advocate who was judge advocate for the court-martial; or
  - (ii) if that judge advocate made an interim hospital order by virtue of section 116B of AA 1955 or AFA 1955 or section 63B of NDA 1957, that or any other judge advocate.

**CHAPTER 3**

**Variation of court-martial sentence**

**Variation of court-martial sentence**

**84.** Where under Court Martial rules the Court Martial varies a court-martial sentence, the sentence as varied must be a sentence that the court-martial could have passed.