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STATUTORY INSTRUMENTS

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**2009 No. 1059**

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

**PART 13**

**ACTIVATION OF SUSPENDED SENTENCES**

**CHAPTER 1**

**Interpretation**

**Suspended sentences**

**93.**—(1) References in this Part to a sentence which is for the time being suspended are to a sentence which—

- (a) on a date not more than one year ago (“the suspension date”) was suspended under section 120(2) or (3) of AA 1955 or AFA 1955 or section 90(1) or (2) of NDA 1957; and
- (b) has not been activated since that date.

(2) For the purposes of paragraph (1)(b)—

- (a) a sentence of imprisonment is activated if an order in respect of it is made under section 120(5) of AA 1955 or AFA 1955, section 91(1) of NDA 1957 or article 94; and
- (b) an SDA sentence of service detention is activated if an order in respect of it is made under section 120(5) of AA 1955 or AFA 1955, section 91(1) or 91B(1) of NDA 1957 or (by virtue of any of articles 95 to 97) section 191(3) or 193(3) of AFA 2006.

(3) In paragraph (1)(a) the reference to suspension under section 90(1) of NDA 1957 includes suspension after commencement by virtue of article 55.

(4) In paragraph (2)(b) the reference to an order under section 91B(1) of NDA 1957 includes such an order made after commencement by virtue of article 55 or 62.

**CHAPTER 2**

**Activation of suspended SDA sentence by the Court Martial**

**Activation of suspended SDA sentence of imprisonment**

**94.**—(1) Where—

- (a) a sentence of imprisonment passed on a person by a court-martial is for the time being suspended, and
- (b) the Court Martial convicts the person of an offence committed since the suspension date, the court may make an order under this article determining the suspension of the sentence and committing the person to imprisonment.

(2) Paragraph (1) is subject to any provision of Court Martial rules made by virtue of section 165(6) of AFA 2006 as modified by article 78(1) (powers of Court Martial where election for trial by that court or by court-martial).

(3) An order under this article is an order—

- (a) that the suspended sentence shall take effect with the original term unaltered; or
- (b) that the suspended sentence shall take effect with the substitution of a lesser term for the original term.

(4) In paragraph (1)(a) the reference to a sentence passed by a court-martial includes a sentence passed—

- (a) by the Appeal Court before commencement; or
- (b) by the House of Lords or the Supreme Court before commencement, on an appeal brought from a decision of the Appeal Court.

#### **Activation of suspended SDA sentence of service detention on conviction by Court Martial**

95.—(1) Where—

- (a) an SDA sentence of service detention passed on a person is for the time being suspended, and
- (b) the Court Martial convicts the person of an offence committed since the suspension date, the court may make an order under section 191(3) of AFA 2006 in respect of the sentence.

(2) This article is subject to section 244 of AFA 2006 (limit on combined term of sentences) as modified by article 104.

#### **Activation of suspended NDA 1957 sentence of service detention following conviction by another court or a CO**

96.—(1) Where—

- (a) an SDA sentence of service detention passed on a person by a court-martial under NDA 1957 is for the time being suspended,
  - (b) the person—
    - (i) has been convicted of a service offence,
    - (ii) has been convicted since commencement of an SDA offence, or
    - (iii) has been convicted of an offence in the British Islands,
  - (c) the offence was committed since the suspension date, and
  - (d) the person appears or is brought before the Court Martial following the issue of a summons or warrant under paragraph (8),
- the court may make an order under section 191(3) of AFA 2006 in respect of the sentence.

(2) Paragraphs (3) to (6) apply where—

- (a) by virtue of this article the Court Martial makes an order under section 191(3) of AFA 2006 in respect of a sentence for a term of more than 90 days; and
- (b) the sentence is not one to which paragraph (5) applies (by virtue of a previous order under section 191(3) of AFA 2006).

(3) The order must be an order that the suspended sentence shall take effect with the substitution for the original term of a specified term, which must be 90 days or less.

(4) For the purposes of section 244 of AFA 2006 (limitation of combined term of sentences) the term of the sentence is to be treated as the term specified in the order.

(5) For the purposes of this Part, the part of the sentence that exceeds 90 days (“the excess”) is to be treated as a sentence passed by a court-martial under NDA 1957 and suspended under section 90(1) of NDA 1957 on the date when the order under section 191(3) of AFA 2006 was made; but this is subject to paragraph (6).

(6) The court may order that paragraph (5)—

- (a) shall not apply; or
- (b) shall apply only in relation to a specified part of the excess.

(7) Where—

- (a) the Court Martial makes an order under section 191(3) of AFA 2006 by virtue of this article, and
- (b) the conviction mentioned in paragraph (1)(b) is a conviction by an officer or the Summary Appeal Court,

any unserved part of any service supervision and punishment order or minor punishment awarded by the officer or the Summary Appeal Court is remitted by the making of the order.

(8) If it appears to the Court Martial—

- (a) that paragraph (1)(a) to (c) apply, and
- (b) that the offender has not been dealt with in respect of the sentence mentioned in paragraph (1)(a),

the court may issue a summons requiring him to appear at the time and place specified in it, or a warrant for his arrest.

(9) This article is subject to section 244 of AFA 2006 (limit on combined term of sentences) as modified by article 104 and (where it applies) paragraph (4).

(10) In paragraph (1)(a) the reference to a sentence passed by a court-martial under NDA 1957 includes a sentence passed—

- (a) by the Appeal Court before commencement, on appeal from a court-martial under that Act; or
- (b) by the House of Lords or the Supreme Court before commencement, on an appeal brought from a decision of the Appeal Court where the appeal to that court was from a court-martial under that Act.

## CHAPTER 3

### Activation of suspended NDA 1957 sentence of service detention by CO or SAC

#### Activation by CO

97.—(1) Where—

- (a) an SDA sentence of service detention passed on a person by an officer under NDA 1957, or the summary appeal court under that Act, is for the time being suspended, and
- (b) an officer records a finding after commencement that a charge against the person is proved in respect of an offence committed since the suspension date,

the officer may make an order under section 193(3) of AFA 2006 in respect of the sentence.

(2) Where—

- (a) an SDA sentence of service detention passed on a person by an officer under NDA 1957, or the summary appeal court under that Act, is for the time being suspended,

- (b) the person has been convicted of an offence in the British Islands committed since the suspension date, and subsequently appears before his commanding officer, and
- (c) article 62 (activation under section 91B of NDA 1957 where application for approval made before commencement) does not apply,

the officer may make an order under section 193(3) of AFA 2006 in respect of the sentence.

(3) Where an officer makes an order under section 193(3) of AFA 2006 by virtue of this article, section 194(1) to (6) of AFA 2006 (maximum term of suspended sentence of service detention activated by CO) do not apply.

(4) Rules made under section 153 of AFA 2006 (rules as to summary hearings and the activation of suspended sentences by commanding officers) may make provision requiring an order under section 193(3) of AFA 2006 to be approved before it may be made by virtue of this article.

(5) This article is subject to section 244 of AFA 2006 (limit on combined terms of sentences) as modified by article 104.

### **Powers of SAC**

**98.**—(1) In section 195(1) of AFA 2006 (order activating suspended sentence to be treated as punishment for purposes of provisions about appeals and reviews) the reference to an order under section 193 includes an order under section 91B(1) of NDA 1957 (activation of suspended sentence).

(2) In section 195(2) of AFA 2006, the reference to the case where an order under section 193 was made by virtue of a finding within section 193(2)(a) includes the case where an order under section 91B(1) of NDA 1957 was made by virtue of a finding within section 91B(1)(a) of NDA 1957.

(3) On an appeal against an order under section 91B(1) of NDA 1957, the Summary Appeal Court may—

- (a) if no direction under section 91B(6) of NDA 1957 was given in respect of the sentence to which the order relates—
  - (i) quash the order;
  - (ii) confirm the order; or
  - (iii) make, in substitution for the order, an order under section 193(3) of AFA 2006;
- (b) if a direction under section 91B(6) of NDA 1957 was given in respect of the sentence to which the order relates—
  - (i) quash the order (and the direction);
  - (ii) confirm the order and the direction;
  - (iii) confirm the order and quash the direction; or
  - (iv) make, in substitution for the order and direction, an order under section 193(3) of AFA 2006.

(4) Section 195(9) of AFA 2006 (period of suspended sentence served to be taken into account) applies in relation to the Summary Appeal Court's powers under paragraph (3) to substitute an order under section 193(3).

(5) The Summary Appeal Court may make an order under section 193(3) of AFA 2006 on an appeal to that court in a case in which—

- (a) section 91B(1)(a) of NDA 1957 applied; and
- (b) the officer who awarded punishment did not make an order under section 91B(1).

(6) On an appeal to the Summary Appeal Court in a case in which section 91B(1)(a) of NDA 1957 applied—

- (a) section 147(3) of AFA 2006 has effect, as regards the Summary Appeal Court's powers of punishment in respect of the officer's finding (or any substituted finding), as if any requirement that the punishment be no more severe than the punishment originally awarded were omitted; but
  - (b) the court may not exercise its powers under section 147(3) or paragraph (3) or (5) above in such a way that, taking the case as a whole, the appellant is dealt with more severely on appeal than he was dealt with by the officer.
- (7) On an appeal against an order under section 91B(1) of NDA 1957 made by virtue of section 91B(1)(b), the Summary Appeal Court may not exercise its powers under paragraph (3) above in such a way that, taking the case as a whole, the appellant is dealt with more severely on appeal than he was dealt with by the officer.
- (8) References in this article and article 99 to an order under section 91B(1) of NDA 1957 include such an order made after commencement by virtue of article 55 or 62.

### **SAC powers where suspended sentence of more than 90 days**

- 99.**—(1) This article applies where by virtue of article 98(3) the Summary Appeal Court substitutes an order under section 193(3) of AFA 2006 for an order under section 91B(1) of NDA 1957 in respect of a sentence for a term of more than 90 days.
- (2) The order must be an order that the suspended sentence shall take effect with the substitution for the original term of a specified term, which must be 90 days or less.
- (3) For the purposes of section 244 of AFA 2006 (limitation of combined term of sentences) the term of the sentence is to be treated as the term specified in the order under section 193(3).
- (4) For the purposes of this Part, the part of the sentence that exceeds 90 days is to be treated as a sentence passed by a court-martial under NDA 1957 and suspended under section 90(1) of NDA 1957 on the date when the order under section 91B(1) of NDA 1957 was made.

## **CHAPTER 4**

### **Consecutive activated sentences**

#### **Activated SDA sentence of imprisonment**

- 100.**—(1) An order under article 94 (activation of suspended SDA sentence of imprisonment) may provide that the sentence to which it relates shall take effect—
- (a) immediately;
  - (b) from the end of another term of imprisonment which the court passes on the offender on the same occasion; or
  - (c) from the end of another term of imprisonment which has been passed on the offender on a previous occasion.
- (2) In paragraph (1)(c) the reference to another term of imprisonment which has been passed on the offender does not include a term from which he has been released early under Part 2 of the Criminal Justice Act 1991(1) or Chapter 6 of Part 12 of the Criminal Justice Act 2003(2).

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(1) 1991 c. 53.  
(2) 2003 c. 44.

### **Activated sentence of service detention**

**101.** In sections 191(4) and 193(4) of AFA 2006 (powers to make activated sentence of service detention consecutive to another sentence) references to any other sentence of service detention that has been passed on a person on a previous occasion include an SDA sentence of service detention.