
STATUTORY INSTRUMENTS

2009 No. 2044

The Court Martial (Prosecution Appeals) Order 2009

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) 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(1) 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(2);
- (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.

(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

(1) 2002 c. 26.

(2) 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).

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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).