Draft Order laid before Parliament under section 373(3) of the Armed Forces Act 2006, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2013 No. 0000

DEFENCE

The Armed Forces (Retrial for Serious Offences) Order 2013

Made - - - -	*2013*
Coming into force - -	*1st August 2013*

The Secretary of State makes the following Order in exercise of the powers conferred by section 323 of the Armed Forces Act 2006(**1**).

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 and commencement

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

Interpretation

2.—(1) In this Order—

"the 1968 Act" means the Court Martial Appeals Act 1968(**2**);

"the 2003 Act" means the Criminal Justice Act 2003(**3**);

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

"Director" means Director of Service Prosecutions;

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

(**1**) 2006 c. 52. Section 323 is extended by section 94 of the Criminal Justice Act 2003 (c. 44).
(**2**) 1968 c. 20. The short title of this Act was amended by paragraphs 1 and 53 of Schedule 8 to the 2006 Act.
(**3**) 2003 c. 44.

"programme service" has the same meaning as in section 201 of the Broadcasting Act 1990(**4**);

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

"qualifying offence" means —

(a) an offence under section 42 of the 2006 Act (criminal conduct) as respects which the corresponding offence under the law of England and Wales is an offence listed in Schedule 1;

(b) an offence under section 70 of the Army Act 1955(**5**), section 70 of the Air Force Act 1955(**6**) or section 42 of the Naval Discipline Act 1957(**7**) as respects which the corresponding civil offence (within the meaning of the Act in question) is such an offence;

(c) an offence under section 1 of the 2006 Act (assisting an enemy);

(d) an offence under section 2(1) of that Act (surrendering any place or thing to an enemy etc); or

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

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

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

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

PART 2

Cases that may be retried

Cases that may be retried

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

(a) before the Court Martial;

(b) on appeal against a conviction or finding in proceedings before the Court Martial; or

(c) on appeal from a decision on such an appeal.

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

(3) Where a conviction of an offence in proceedings before a court-martial was quashed on appeal before section 12(3) of the 1968 Act (**8**) came into force, the appellant is to be treated for the purposes of paragraph (1) as acquitted of the offence.

(4) A person acquitted of an offence in proceedings mentioned in paragraph (1) is treated for the purposes of that paragraph as also acquitted of any qualifying offence of which he could have been

(**4**) 1990 c. 42.
(**5**) 1955 c. 18 (repealed by section 378(2) of, and Schedule 17 to, the 2006 Act).
(**6**) 1955 c. 19 (repealed by section 378(2) of, and Schedule 17 to, the 2006 Act).
(**7**) 1957 c. 53 (repealed by section 378(2) of, and Schedule 17 to, the 2006 Act).
(**8**) Section 12(3) was inserted by paragraphs 1 and 10(b) of Schedule 8 to the 2006 Act.

convicted in the proceedings because of the first-mentioned offence being charged on the charge sheet(**9**), except an offence—

(a) of which he has been convicted;

(b) of which he has been found not guilty by reason of insanity; or

(c) in respect of which, in proceedings where he has been found to be unfit to stand trial (within the meaning of section 166 of the 2006 Act) a finding has been made that he did the act or made the omission charged against him.

(5) In relation to proceedings before a court-martial under any of the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, the reference in paragraph (4)(c) to section 166 of the 2006 Act is to be read as a reference to section 115A of the Army Act 1955 or of the Air Force Act 1955(**10**), or section 62A of the Naval Discipline Act 1957(**11**) (as the case may be).

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

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

(8) This Order has effect notwithstanding the restrictions on a retrial imposed by Chapter 3 of Part 2 of the 2006 Act (double jeopardy) or by article 25 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009(**12**).

PART 3

Investigation and arrest

Authorisation of investigations

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

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

(a) arrest or question him,

(b) search him or premises owned or occupied by him,

(c) search a vehicle owned by him or anything in or on such a vehicle,

(d) seize anything in his possession, or

(e) take his fingerprints or take a sample from him,

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

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

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

(a) he is satisfied that new evidence has been obtained which would be relevant to an application under article 8(1) in respect of the qualifying offence; or

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

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

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

(**12**) S.I. 2009/1059.

(b) he has reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation.

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

(a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation; and

(b) it is in the public interest for the investigation to proceed.

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

(7) This article is subject to article 5.

Urgent investigative steps

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

(a) the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced;

(b) the requirements of paragraph (2) are met; and

(c) either—

(i) the action is authorised under paragraph (3); or

(ii) the requirements of paragraph (5) are met.

(2) The requirements of this paragraph are met if—

(a) there has been no undue delay in applying for consent under article 4(2);

(b) that consent has not been refused; and

(c) taking into account the urgency of the situation, it is not reasonably practicable to obtain that consent before taking action.

(3) A service policeman of or above the rank of lieutenant-commander, major or squadron leader may authorise the action if—

(a) he is satisfied that new evidence has been obtained which would be relevant to an application under article 8(1) in respect of the qualifying offence to which the investigation relates; or

(b) he has reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation.

(4) An authorisation under paragraph (3) must—

(a) if reasonably practicable, be given in writing;

(b) otherwise, be recorded in writing by the service policeman giving it as soon as is reasonably practicable.

(5) The requirements of this paragraph are met if—

(a) there has been no undue delay in applying for authorisation under paragraph (3);

(b) that authorisation has not been refused; and

(c) taking into account the urgency of the situation, it is not reasonably practicable to obtain that authorisation before taking the action.

(6) Where the requirements of paragraph (5) are met, the action is nevertheless to be treated as having been unlawful unless, as soon as reasonably practicable after the action is taken, a service policeman of or above the rank of lieutenant-commander, major or squadron leader certifies in writing that he is satisfied that, when the action was taken—

(a) new evidence had been obtained which would be relevant to an application under article 8(1) in respect of the qualifying offence to which the investigation relates; or

(b) the service policeman who took the action had reasonable grounds for believing that such new evidence was likely to be obtained as a result of the investigation.

Arrest under warrant

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

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

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

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

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

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

(a) personally;

(b) by giving orders for the arrest of the acquitted person; or

(c) where that person is subject to service law, by ordering him into arrest.

(7) The following provisions apply in relation to an arrest under paragraph (5) as they apply in relation to an arrest under section 67 of the 2006 Act(**13**)—

(a) section 70 of that Act (search on arrest);

(b) section 90 of that Act (entry for purpose of arrest);

(c) sections 98 to 102 and 104(2) of that Act (custody without charge);

(d) regulations for the time being in force under section 104(1)(a) or (b) of that Act or (in so far as the regulations relate to compliance with any requirement of sections 98 to 102 or of regulations under paragraph 104(1)(b) of that Act) under section 104(1)(c) of that Act.

PART 4

Referral and Charge

Referral and charge

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

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

(a) request a senior service policeman to determine whether there is sufficient evidence to charge the acquitted person with the qualifying offence for which the acquitted person was arrested; and

(**13**) Section 67 was amended by paragraph 2 of Schedule 3 to the Armed Forces Act 2011 (c. 18).