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

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(**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, 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(**2**) are revoked.

Interpretation

2.—(1) In this Order—

"the 1968 Act" means the Court Martial Appeals Act 1968(**3**);

(**1**) 2006 c. 52.
(**2**) S.I. 2006/1788
(**3**) 1968 c. 20. The short title of this Act is amended by paragraph 53 of Schedule 8 to the 2006 Act.

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

"the 2006 Order" means the Courts-Martial (Prosecution Appeals) Order 2006(**4**);

"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(**5**);

"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(**6**);

"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.

(**4**) S.I. 2006/1786
(**5**) 1990 c. 42.
(**6**) S.I. 2009/988

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.