

Chapter 31

Court Martial appeal

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Chapter 31

Court Martial appeal

Part 1 - Introduction

1. This chapter summarises the situations in which appeals may be made from the Court Martial (CM) to the Court Martial Appeal Court (CMAC), and outlines the powers of the CMAC on appeal. It also summarises the procedure to be followed when making an appeal and time limits for appeal, but it does not contain detailed guidance on the law relating to appeal. It is intended primarily for the use of those convicted and sentenced by the CM as a guide to their options for appeal, and for those facing CM proceedings to understand the effect on those proceedings of appeals by others (e.g. the prosecution). Appeal from the CM is a specialist area of law and in all cases legal advice should be sought before submitting an appeal.

2. The CMAC was established by the Courts-Martial (Appeals) Act 1951 for the purpose of hearing appeals from Naval, Army and RAF Courts Martial and is a superior court of record. The judges of the CMAC are normally two or three judges drawn from the Court of Appeal (Criminal Division) and they sit in the High Courts of Justice on The Strand in London. The circumstances in which appeals may be made to this court and the procedures to be followed are contained in the Courts-Martial (Appeals) Act 1968 (c.20) as amended, and the Court Martial (Appeal) Rules 2009. The procedural rules for appeal to the CMAC are contained in the Armed Forces (Court Martial) Rules 2009.

3. Part 1 of this chapter is the introduction. Part 2 deals with the situations in which an application for leave to appeal may be made and the powers of the CMAC in each circumstance, including references made by the Criminal Cases Review Commission and the Attorney General. Part 3 deals with the appeal procedure, bail, costs, legal aid and reporting restrictions relating to appeal. Part 4 deals with special references to the CMAC by a judge advocate. Finally, Part 5 explains the circumstances for appeal from the CMAC to the Supreme Court.

Part 2 - Rights of appeal

Appeal against conviction

4. **Leave to appeal and referral.** A person convicted by a CM may only appeal to the CMAC with the leave of the CMAC. The appeal may be against conviction and against any sentence (where the sentence is not fixed by law) passed on him for the offence for which he was convicted¹. This includes where the conviction or sentence arose as a result of an appeal from the Service Civilian Court². In addition the Criminal Cases Review Commission may refer a case to the CMAC³, see [Chapter 35](#) (The powers of the Criminal Cases Review Commission).

5. **Power to quash conviction.** If the CMAC gives an appellant leave to appeal, the appeal will be heard by the CMAC. At a hearing of the appeal, the CMAC must allow an appeal against conviction if it thinks that the finding of the CM in all the circumstances of the case is unsafe⁴. In all other cases the CMAC must dismiss the appeal.

6. **Power of the CMAC on quashing a conviction.** If the CMAC allows an appeal against a conviction it will quash the conviction and the appellant will be treated as if he had been acquitted by the CM unless there is a re-trial⁵. The CMAC has the power to authorise a re-trial, in which case it will be a matter for the Director of Service Prosecutions (DSP) to decide whether a re-trial is appropriate. The CMAC also has the power to direct a re-trial. If it does so it may direct a re-trial on a different charge(s) to that on which the appellant was originally convicted. Where the appellant was convicted of two or more charges and the CMAC quashes some convictions but not all, it may substitute any sentence(s) which the CM could have passed. However, the sentences for the remaining convictions, taken together, must not be more severe than those passed by the CM (including those passed in respect of convictions that are now quashed)⁶.

7. **Alternative finding.** Where the appellant has been found guilty of an offence to which he did not plead guilty, the CMAC has the power to substitute a finding of guilty to another offence on which the CM could have found the appellant guilty, provided the CM must have been satisfied of the facts which prove him guilty of that other offence. It may then award an appropriate sentence for that offence, but the court cannot pass a sentence of greater severity than the original sentence⁷.

8. **Insanity and unfitness to stand trial.** The CMAC has the power to make various findings on appeal in relation to insanity and unfitness to stand trial. Legal advice should be sought in all cases in which such matters arise⁸.

Appeal against sentence and commencement of sentence on appeal

9. As with appeal against conviction, appeal against sentence of the CM requires the leave of the CMAC. If the appeal is successful the CMAC may substitute any sentence the Court thinks is appropriate, but it must not be of greater severity than that for which the sentence is substituted. An appeal against a sentence passed on single occasion by the CM will be treated as an appeal in respect of sentences passed in relation to all of the sentences

¹ Courts-Martial (Appeals) Act 1968 (c.20) section 8.

² Armed Forces Act 2006 (The Act) section 287(4).

³ Criminal Appeal Act 1995 section 9, and section 321 and Schedule 2 of the Act.

⁴ Courts-Martial (Appeals) Act 1968 (c.20) section 12.

⁵ Courts-Martial (Appeals) Act 1968 (c.20) section 19.

⁶ Courts-Martial (Appeals) Act 1968 (c.20) section 13.

⁷ Courts-Martial (Appeals) Act 1968 (c.20) section 14.

⁸ See Courts-Martial (Appeals) Act 1968 (c.20) sections 16, 21 and 22.

passed on that occasion. In this circumstance the CMAC may not substitute a sentence with one which, when taking the case as a whole, causes the appellant to be dealt with more severely on appeal than he was dealt with by the CM⁹.

10. Unless the CMAC orders otherwise, a sentence passed on appeal takes effect from the day on which the CM passed sentence. However, if the CMAC, on dismissing an application for leave to appeal, considers the application to have been frivolous or vexatious, it may direct that any sentence passed on the applicant by the CM shall begin to run again from the day on which the CMAC dismisses the application. This sanction acts as a disincentive to submitting hopeless appeals.

Appeals against restrictions on public access and reporting

11. Any aggrieved person may, with the leave of the CMAC, appeal against any order or direction restricting access or reporting¹⁰. Such appeals are usually made by the media, but potentially any person can appeal, including the prosecution where the result of the order or the direction is that it will be unable to present its case (eg. because of a risk to national security) or for any other appropriate reason. Where leave to appeal has been sought during preliminary proceedings those proceedings may continue pending the determination or abandonment of the appeal, but related proceedings cannot begin until that time¹¹. The effect of such an appeal is therefore that a CM trial cannot take place until the CMAC has determined the appeal. See the Court Martial Appeal Court Rules 2009 for the powers of the CMAC on an appeal against such an order or direction.

Prosecution appeals against rulings

12. The prosecution has the right of appeal to the CMAC where a judge advocate makes a ruling in relation to a trial by the CM¹². If the prosecution appeal against a ruling is unsuccessful, the defendant will be acquitted on the charge(s) to which the ruling relates. For this reason such an appeal is sometimes referred to as an appeal against a terminating ruling. The prosecution may request an adjournment to consider whether to appeal against a ruling made during a trial by CM. If the prosecution does appeal against a ruling, that ruling will have no effect while the appeal against it is pending. Proceedings may, however, be continued in respect of any other charge which is not the subject of the appeal whilst awaiting the appeal or the prosecution's decision whether to appeal. The CMAC may confirm, reverse or vary any ruling to which the appeal relates¹³.

Referral by the Criminal Cases Review Commission

13. The Criminal Cases Review Commission is an independent public body, set up in 1997 by the Criminal Appeal Act 1995. The Commission reviews possible miscarriages of justice in the criminal courts, including Courts Martial's of England, Wales and Northern Ireland and refers appropriate cases to the appeal courts¹⁴. A reference to the CMAC by the Criminal Cases Review Commission is treated as an appeal by the person under section 285 of the Armed Forces Act 2006 (the Act) against the conviction or sentence as appropriate. See also [Chapter 35](#) (The powers of the Criminal Cases Review Commission).

Unduly lenient sentences

⁹ Courts-Martial (Appeals) Act 1968 (c.20) section 16A.

¹⁰ Armed Forces (Court Martial) Rules 2009 rule 154.

¹¹ Armed Forces (Court Martial) Rules 2009 rule 50.

¹² The Court Martial (Prosecution Appeals) Order 2009, article 4.

¹³ The Court Martial (Prosecution Appeals) Order 2009, article 7.

¹⁴ Criminal Appeal Act 1995 section 9 and Schedule 11 article 1 of the Act.

14. If the Attorney General considers that a sentence or any other order made by a CM in dealing with an offender in respect of an AFA 06 s.42 offence (criminal conduct) is unduly lenient and either:

- a. The corresponding offence under the law of England and Wales, if committed by an adult, is triable only on indictment, or
- b. The case is of a description specified for the purposes of AFA 06 s.273 in an order made by the Secretary of State

he may, with leave of the CMAC, refer the case to the CMAC for it to review the sentencing of the offender¹⁵. However, this power does not extend to a sentence passed by the CM on appeal from Service Civilian Court. If the Attorney General makes such a reference to the CMAC, the CMAC may quash the sentence passed by the CM and substitute another sentence.

Implementation of sentence whilst awaiting appeal

15. The initiation of an appeal does not affect the validity of the sentence of a CM. CM sentences take effect from the date of award unless the sentence is suspended, postponed or to be served consecutive to another sentence of imprisonment or detention.

¹⁵ Section 273 of the Act.

Part 3 - Appeal Procedure

Procedural rules

16. The rules for making an application for leave to appeal, time limits and the conduct of appeals to the CMAC are contained in the Court Martial Appeal Court Rules 2009.

Bail pending appeal

17. The CMAC may grant or revoke bail pending appeal and vary the conditions of bail¹⁶. A single judge may exercise the powers of the court in relation to bail but in the event that the single judge refuses an application by an appellant, the appellant¹⁷ is entitled to have the application reconsidered by a full CMAC. Application for bail to be granted, revoked or varied may be made by the appellant, the DSP or a surety or on reference to the court by the Registrar. Bail cannot be granted, except in exceptional circumstances, to appellants convicted of any of the offences listed in section 25(2) of the Criminal Justice and Public Order Act 1994 (c.33) or an offence under other legislation corresponding to such an offence, where the appellant has previously been convicted of such an offence¹⁸. The time during which an appellant is released on bail does not count as part of the term of detention or imprisonment.

Costs

18. Where the CMAC upholds the appeal, it may, if it thinks fit, direct the payment by the Secretary of State of such sums as appear to the Court reasonably sufficient to compensate the appellant for any expenses properly incurred by him in the pursuance of his appeal (including any proceedings preliminary or incidental thereto) and in carrying on his defence before the CM by which he was convicted. Similarly, where the CMAC dismisses an appeal or an application for leave to appeal, it may, if it thinks fit, order the appellant or applicant to pay the Secretary of State the whole or part of the costs of the appeal or application.

Legal aid

19. An appellant may apply to the CMAC for legal aid for an appeal. See JSP 838 (The Armed Forces Legal Aid Scheme).

Restrictions on reporting of appeals during CM proceedings

20. Reporting restrictions apply where the prosecution appeal or make an application for leave to appeal against a ruling unless either the judge advocate, the CMAC or the Supreme Court orders otherwise. The restrictions apply until the conclusion of the CM proceedings.

¹⁶ The Court Martial Appeal Court (Bail) Order 2009/992.

¹⁷ Using the Form at the Schedule to The Court Martial Appeal Court (Bail) Order 2009/992.

¹⁸ The Court Martial Appeal Court (Bail) Order 2009 SI 2009/992, article 4.

Part 4 - Special reference to the court

21. The Judge Advocate General may make a special reference¹⁹ to the CMAC if it appears to him that the finding of a CM involves a point of law of exceptional importance. The Secretary of State may also make a special reference to the CMAC if it appears to him, on consideration of matters appearing to him to have not been brought to the notice of the CM at the trial, to be expedient that the finding of the CM should be considered or reconsidered by the CMAC. A special reference to the CMAC in this manner is treated, except for costs, as an appeal by the person convicted against his conviction. The Secretary of State may refer the sentence passed on any person convicted by a CM to the CMAC and any such reference is treated, except for costs, as an appeal by the person convicted against sentence.

¹⁹ Courts-Martial (Appeals) Act 1968 section 34.

Part 5 - Appeal to the Supreme Court

22. Either the accused or the DSP may appeal to the Supreme Court against any decision of the CMAC²⁰. Leave to appeal to the Supreme Court may be granted by the CMAC or the Supreme Court but shall not be granted unless it is certified by the CMAC that a point of law of general public importance is involved in the decision and it appears to the Court or the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court.

23. An application for leave to appeal to the Supreme Court must be made to the CMAC in the first instance, generally within a period of 28 days beginning with the date of the decision which it is desired to appeal²¹. If the CMAC determines that the appeal is a point of law of general public importance but rules that it is not a point that ought to be considered by the Supreme Court, then application may be made to the Supreme Court within a period of 28 days from the date of the CMAC's refusal. If the CMAC determines that the appeal does not concern a point of law of general public importance, no further proceedings may be taken. The CMAC or the Supreme Court may grant an appellant an extension of time to make an application.

²⁰ Court-Martial (Appeals) Act 1968 (c.20) section 39.

²¹ The Courts-Martial (Appeals) Act 1968 section 40.