SUMMARY OF COURT MARTIAL APPEAL COURT CASES

Version 1

Issued by the Judge Advocate General

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LIST OF COURT MARTIAL APPEAL COURT AUTHORITIES FROM THE COMING INTO FORCE OF THE ARMED FORCES ACT 2006 ON 1 OCTOBER 2009 AND OTHER AUTHORITIES REFERRED TO IN THE SERVICE SENTENCING GUIDE VERSION 6.

AG's Ref 32 of 2015 R v Salisbury, CMAC	[2015] EWCA Crim 1110.
R v Armstrong MC CMAC	[2011] EWCA Crim 3248 and [2012] EWCA Crim 83.
R v Ashworth CMAC	[2015] EWCA Crim 1737.
R v Auld CMAC	[2012] EWCA Crim 2097.
R v Bagnall CMAC	[2019] EWCA Crim 2458.
R v Bailey CMAC	[2019] EWCA Crim 372.
R v Birch CMAC	[2011] EWCA Crim 46
Blackman Sub nom R v Marine A and ors, in re Guardian News and Media and ors, Marine A and ors v Judge Advocate General CMAC and QBD Divisional Court	[2013] EWCA Crim 2367.
R v Blackman, BBC, ITN, Times Newspapers Ltd British Sky Broadcasting, Guardian News and Media, Associated Newspapers Ltd and MoD CMAC	[2017] EWCA Crim 326.
R v Blackman v Secretary of State for Defence CMAC	[2014] EWCA Crim 1029.

R v Blackman CMAC	[2017] EWCA Crim 190
R v Blackman CMAC	[2017] EWCA Crim 325.
R v Bowler and Darbyshire, CMAC	[2013] EWCA Crim 2643.
R v Boyd ,Hastie, Spear and ors CMAC,	[2001] WL 14914 and on appeal to the House of Lords, sub nom R v Spear and ors [2002] UKHL 31.
R v Bradshaw CMAC	[2012] EWCA Crim 312.
R v Calverly CMAC	[2014] EWCA Crim 1738.
R v Capill CMAC	[2011] EWCA Crim 1472.
R v Cava CMAC	[2011] EWCA Crim 671.
R v Cheeseman CMAC	[2019] EWCA Crim 149.
R v Chin-Charles and Cullen, CA (Criminal Division)	[2019] EWCA Crim 1140.
R v Coleman CMAC	[2017] EWCA Crim 2346.
R v Cooney, Wood and Allam CMAC	[1999] 2 Cr App R 428.
Cooper v UK ECHR	[2003] ECHR 686, see, below, Grieves v UK, decided on the same day.
R v Cosgrove CMAC	[2011] EWCA Crim 764.
Cox v Army Council HL	[1963]AC 48.
R v Cross CMAC	[2010] EWCA Crim 3273.
R v Cruise- Taylor CMAC	[2019] EWCA Crim 1697.
R v Dickson CMAC	[2012] EWCA Crim 2020.

R v Dodman CMAC	[1998] 2 Cr App R 338.
R v Douglas CMAC	[2019] EWCA Crim 1087.
R v Downing CMAC	[2010] EWCA Crim 739.
Engel and ors v Netherlands	[1979-80] 1 EHRR 647.
R v Evans, CA (Criminal Division)	[2019] EWCA Crim 2358.
R v Farrell CMAC	[2017] EWCA Crim 1547.
Findlay v UK ECHR	[1997] 24 ECHR 22107/93.
R v Foley CMAC	[2012] EWCA Crim 71.
R v Garry CMAC	[2014] EWCA Crim 2534.
R v Glenton CMAC	[2010] EWCA Crim 930.
R v Gray CMAC	[2012] EWCA Crim 252.
Grieves v UK ECHR	[2003] ECHR 688. See Cooper decided on the same day.
Gunn v Service Prosecuting Authority CMAC	[2019] EWCA Crim 1470.
R v H CMAC	[2018] EWCA CRIM 1984.
R v H and J CMAC	[2019] EWCA Crim 1863.
R v Henderson CMAC	[2014] EWCA Crim 209.
R v Heslop CMAC	[2016] EWCA Crim 1951.
R v Jones and Miszczak, CA (Criminal Division)	[2019] EWCA Crim 1570.
R v Knock CMAC	[2014] EWCA Crim 1986.

R v Love CMAC	[1998] 1 Cr App R 458.
R v Limbu CMAC	[2012]EWCA Crim 816.
R v Lyons CMAC	[2011] EWCA Crim 3197.
	[2011] EWCA Crim 2808.
R v Martin CMAC	[2007] EWCA Crim 3377.
R v Mckendry CMAC	[2001] EWCA Crim 578.
R v Melia CMAC	[2018] EWCA Crim 602.
R v Moffat CMAC	[2014] EWCA Crim 332.
Morris v UK ECHR	[2002] ECHR 162.
R v Mulgrew and Richards CMAC	[2012] EWCA Crim 2008.
R v Ndi CMAC	[2019] EWCA Crim 79.
R v Nightingale CMAC appeal sentence	[2012] EWCA Crim 2734.
Guilty plea quashed as a nulity	[2013] EWCA Crim 405.
R v Owen CMAC	[2013] EWCA Crim 2385.
R v PS, Abdi Dahar and CF, CA (Criminal Division)	[2019] EWCA Crim 2286.
R v Price and Bell CMAC	[2014] EWCA Crim 229.
R v Rabouhi CMAC	[2014] EWCA Crim 1517.
R v Rea CMAC	[2019] EWCA Crim 1248.
R v Rheines CMAC	[2011] EWCA Crim 2397.
R v Robinson CMAC	[2014] EWCA Crim 1601.

R v SS, RL, JT and IT. Interlocutory Appeal CMAC	Unreported, CMAC references 2015 03632/ B3, 2015 03634 /B3, 2015 03635/ B3 and 2015 03636/B3
R v S CMAC	[2013] EWCA Crim 2579.
R v Sadole CMAC	[2019] EWCA Crim 915.
R v Sharratt CMAC	[2013] EWCA Crim 2002.
R v Simm and Tennet CMAC	[2016] EWCA Crim 1449.
R v Smart CMAC	[2011] EWCA 2738.
R v Stables CMAC	[2010] EWCA Crim 2405.
R v Summers CMAC	[2012] EWCA Crim 2073.
R v Townshend CMAC	[2018] EWCA Crim 430.
R v Twaite CMAC	[2010] EWCA Crim 2973.
R v Wetherall CMAC	[2011] EWCA Crim 990.
R v Wilby CMAC	[2013] EWCA Crim 1417.
R v Wright-Stainton CMAC	[2011] EWCA Crim 2131.

AG's Ref 32 of 2015. CMAC.	Date of judgment: 3 6 2015.	**Coram: Levison P, Parker J and Stewart J.**	**JA at first instance: Judge Peters**
Charges: Four charges of sexual activity with a child, s9(1) SOA 2003.	Sentence: 2 years imprisonment concurrent on each count, suspended for two years. Sexual Harm Prevention Order.	Facts: The Appellant was a 28- year-old dependent wife, of good character, employed as a bus monitor, who having had sexual intercourse with C's brother then 17, had unprotected sexual intercourse with C when he was 13 and 14, despite two warnings from the police. She blamed C for forcing himself on her.	**Judgment: the duty to follow/ have regard to the Sentencing Council Guidelines identical at CM and CC.** **This was a 1A case under the Sentencing Council guidelines as there was penile penetration which put the case in the highest category of harm and it was in the top bracket for culpability as alcohol was used to facilitate the offences, there was grooming, planning and a breach of trust. Mitigation: good character, two young children, G pleas and delay.** **Section 125 (1) Coroners and Justice Act 2009 provides that the civilian courts should "follow" the SG Guidelines unless it "would be contrary to the interests of justice to do so" and s259 of the Armed Forces Act 2006 provides that the court "should have regard" to the Guidelines. As service personnel and their families should be in no better or worse position than they would be before the civilian courts, the CM should be bound to follow the guidelines unless the interests of justice require otherwise.** **<u>Comment</u>: presumably under s259(2) where not following the guidelines can be justified by any features of service life or the service disciplinary system relevant to the case.** **The starting point should have been significantly higher than the five-year start-point in the Guidelines. Having regard to double jeopardy and the fact that the Appellant now has to face custody, then three years was the least possible sentence the court could impose.**

R v Armstrong MC. Charges: Four charges of conduct to the prejudice of good order and military discipline contrary to s 69 Army Act 1955 now re-enacted in materially similar but tri-service terms in s19 AFA 2006 for offences after 31 10 2009.	Judgment 8 12 2011. Prosecution Appeal.	**Coram: Thomas P, Griffith Williams and Coulson JJ.** Facts: Major Armstrong MC was subjected to an RMP search of his quarter. They recovered a Glock 9mm pistol which was damaged and could not be used but included serviceable parts, which he had retained as a trophy from Iraq, 56 rounds of 5.56 ammunition compatible with a service rifle, five rounds of 9mm ammunition in a service pistol magazine both of which had been handed in by soldiers, and 212 rounds of .22 ball ammunition which he had in his possessions since he was a Second Lieutenant, a service issue auto injector with a dose of	**JA at first instance Judge Hill.** **Prosecution Appeal against a terminating ruling. The Judge Advocate was of the view that civil offences should have been charged alleging offences under the Firearms Act 1968, the Misuse of Drugs Act 1971 and the Official Secrets Act 1986. A trial took place and at the close of the Crown case, the Judge Advocate ruled that there was no case to answer on any of the s69 counts.** **The defence did not support the judge's ruling and the Attorney- General appointed an amicus to support the judge's ruling that the matters could not be regarded as conduct to the prejudice when no-one in the military community knew of them. The court followed R v Dodman, where it was held that this offence was proved if there was deliberate or reckless conduct that viewed objectively was prejudicial, in that case, to RAF discipline, even if, as in Dodman, no one knew that he was committing the offence until well after it had been committed.** **The CMAC did support the judge's view that s69 was not appropriate if there were ordinary criminal offences that could have been charged save in "exceptional circumstances". CMAC did not enlarge on what was exceptional about this case. To use s69 where criminal offences were available "…would be outside the lawful exercise of the prosecutor's discretion". See R v Dodman in this guide.** **Comment: If a soldier has, for example, failed to hand in a small quantity of ammunition it is perhaps more appropriate to charge him with a conduct offence rather than an offence under the Firearms Act 1968, with the severe results that may entail, as his conduct could be said to be a breach of discipline rather than a serious criminal offence.**

		morphine in it, which a soldier had handed him in theatre, and his own computer with189 classified documents on it ranging up to Top Secret.	

R v Ashworth. Charge: Racially aggravated threatening, abusive or insulting words or behaviour, s31(1) (a) Crime and Disorder Act 1998.	Date of judgment: 18 6 2019. Sentence: 90 days' detention and reduced to the ranks.	**Coram: Holroyd LJ, Simler and Davies JJ**. Facts:The Appellant (A) joined the army at 16 and at the time of the offence was a Sergeant in 1st Bn The Rifles serving with the Army Training Unit, Kenya. A and another Sergeant were drinking in a bar which was out of bounds. At 23:15 a Kenyan black NCO told him to leave. At 03:30 when the patrol returned he was still there and the same NCO again told him to leave. A threatened to knock the NCO out, he then said he would go but then told the black NCO that he was a "fucking Kenyan", who should not be telling him what to do and he was only leaving because a white Sergeant was telling him to go.	**JA at first instance Judge Large.** **Held: The CMAC approved paragraph 3 .4.11 of Version 5 of "Guidance for Sentence in the Court Martial" in respect of the factors set out there which should be taken into account in deciding whether to suspend a sentence of detention. These are repeated unchanged in Version 6.** **CMAC concluded that the sentence was neither wrong in principle nor manifestly excessive as this was a disgraceful incident where, as the court put it at paragraph 27, "…a fellow soldier, doing his duty, had been publicly humiliated on the grounds of his race."** **The court, at paragraph 23, said that the Court Martial, "…. Is a specialist tribunal and particular respect must be given to its judgments as to the significance of the military context of an offence and as to the implications for the service, as well as the individual offender, of imposing particular sentences."** **On the specialist/expert status of the Court Martial see also: R v Love, R v Mckendry, R v Lyons, R v Rheines, R v Downing, R v Glenton, R v Capill, R v Cross, R v Foley, R v Calverly, R v Coleman, R v Simm and Tennet, R v Townshend, R v Ndi, R v Bagnell, R v Bailey and R v Cruise -Taylor, the citations of which are set out above and these authorities are summarised in this Guide.** **The cases of : R v Downing, R v Birch, R v Limbu, R v Price and Bell, R v Townshend, and R v Ndi, also deal with the specialist/ expert nature of the Court Martial when passing sentences of dismissal. All these authorities are summarized in this guide and their citations are listed above.**

		A first entered a NG plea but changed his plea after legal advice.	

R v Auld. Charges : The Defendant was acquitted of the first charge, battery, and convicted of assault occasioning actual bodily harm, contrary to s47 OAPA 1861, as was his Co-defendant on this charge.	Date of judgment: 19 9 2012. Sentence: 9 months' detention and compensation of £500 for personal injury to the complainant.	**Coram: Pitchford LJ, Bean and Underhill JJ**. Facts; The trial was conducted on the basis that the only kick during the assault had been delivered by the co-defendant and that the Appellant's liability for it arose out of the fact that the kick was inflicted as part of a joint enterprise. At the sentencing hearing, when one lay member was different, the Crown opened the case on the basis that both men had kicked the complainant. This was not corrected by the Appellant's solicitor, but was, in the end, dealt with correctly when the Judge Advocate summarized the facts in his sentencing remarks.	**The Appellant appealed his sentence which was nine months' detention against the co-defendant's eight months' detention on the basis that as the case had been incorrectly opened on this issue and the court had been under a misapprehension and thought the Appellant did the kicking himself.** **Held: It is clear there was no misapprehension as to what part each man played. The difference in sentence was justified by the fact that the Appellant had been before the court for affray and the co-defendant had no convictions for violence.**

R v Bagnall Charge: Assault occasioning actual bodily harm contrary to s47 OAPA 1861.	Date of judgment: 19 12 2019 Sentence: eight months' detention and reduction to the ranks (from lance-bombardier).	**Coram: Fulford VP, Picken and May JJ.** Facts:The appellant (B), aged 27, who had previous matters recorded against him and pleaded NG went to a party in barracks after a boxing match when visiting Larkhill. The complainant, a full Bombardier, asked him to leave as he was thought to be a nuisance. He did so but returned about an hour later and tried to force his way in punching the same Bombardier fracturing his eye socket. In interview under caution he said he acted in self-defence.	**JA at first instance Judge Camp.** **Grounds of Appeal:** **The sentence was too long.** **Insufficient weight was given to the mitigation.** **The sentence should have been suspended.** **Detention as well as reduction resulted in an excessive sentence.** **The court adopted the reasoning in R v Love [1998] 1 Cr R 458 , namely that the Court Martial "… was generally speaking, better placed than we [CMAC] are when it comes to assessing the seriousness of offending in the context of service life, and deciding upon what particular penalty is required to maintain the discipline and efficiency of the armed forces."** **They approved the passage in Version 5 of the "Guidance for Sentence in the Court Martial", which is identical in Version 6, and states at paragraph 5.9.1 that: "Personnel in the Armed Forces are trained to exercise controlled and lawful violence towards the enemy. Unlawful violence displays a lack of discipline and can corrode unit cohesiveness and operational effectiveness, particularly when directed against Service colleagues. Deterrent sentences are often necessary particularly when violence is associated with excess alcohol."** **This passage is repeated in the current Guidance. It was also approved in R v Henderson, below.** **The court also approved the guidance given about sentence for assault occasioning actual bodily harm at paragraph 5.9.4 namely: "Assault occasioning actual bodily harm is prevalent in the Armed Forces. Dismissal and reduction in rank should always be considered where the injuries caused to the complainant are serious or permanent, or where it would be incompatible for the defendant to continue to serve in a particular role (for example the Service Police). In all cases custody must be considered."**

			The court also approved the starting point and range for assault occasioning actual bodily harm which are higher than those in Sentencing Council Guidelines. These were at paragraph 5.9.5: **Category 1: 18 months' custody within a range of 1-3 years.** **Category 2: 9 months' custody within a range of 6-18 months.** **Category 3: 120 days' custody within a range of 90 to 180 days.** **CMAC held that the Court Martial were entitled to conclude that this offence fell between Categories 2 and 3 and start at six months before factoring in the aggravating circumstances. This is unchanged in the new Guidance in Version 6.** **Eight month's detention was not excessive in the circumstances.** **The mitigating circumstances should be fully identified in the sentencing remarks** **The CMAC adopted the guidance at paragraph 3.4.11 of Version 5 of "Guidance for Sentence in the Court Martial" on suspension which remains the same in Version 6. The Appellant had skills which were in short supply but CMAC held that the Court Martial was best placed to decide if this was sufficient to justify suspension. There was no error in principle in not suspending the sentence.** **Authorities on the specialist/expert status of the Court Martial: R v Love, R v Mckendry, R v Lyons, R v Rheines, R v Downing, R v Glenton, R v Capill, R v Cross, R v Foley, R v Calverly, R v Simm and Tennet, R v Townshend, R v Ndi, R v Bailey, R v Ashworth and R v Cruise-Taylor, which are all summarized in this guide.** **See also the following authorities which deal with the specialist/expert status of the Court Martial in the context, particularly, of imposing the sentence of dismissal: R v Downing, R v Birch, R v Limbu, R v Price and Bell, R v Townshend, R v Coleman, R v Ndi and R v Bailey.**

R v Bailey Charge: Theft s.1(1) Theft Act 1968.	Date of judgment: 26 2 2019 Sentence: Dismissed and fine of £500.	**Coram: Gross LJ Soole and Murray JJ.** Facts: The appellant, a well-regarded flight lieutenant of 43, of good character, pleaded guilty to a charge of theft. He had initially borrowed a ski jacket from the gymnasium, without permission, by using keys he had found. He tried to return it, but the lock had been changed and he decided to keep it.	**JA at first instance: Judge Hill.** **The court approved and applied the "Guidance on Sentencing in the Court Martial version 5" in respect of theft and relied on the reasoning in R v Glenton [2010] EWCA 930 where Lord Judge LCJ held that "…the Court Martial is a specialist criminal court…which is designed to deal with service issues."** **The Court observed that they struggled to see" … notwithstanding the sadness of the case, how the appellant could continue to exercise authority and serve as an officer in the light of this offence." They upheld the sentence.** **See also on the specialist status of the Court Martial:** **R v Love, R v Mckendry, R v Lyons, R v Rheines, R v Downing, R v Cross, R v Capill, R v Calverly, R v Coleman, R v Simm and Tennet, R v Townshend, R v Ndi, R v Bailey, R v Bagnall, R v Ashworth and R v Cruise-Taylor. In respect of dismissal and the status of the court see: R v Downing,R v Birch, R v Limbu, R v Price and Bell, R v Townshend, R v Coleman and R v Ndi.**

R v Birch Charges: Four charges of battery contrary to s39 CJA 1988.	Date of judgment: 20 1 2012. Sentence: dismissal , six months' detention and reduction to the ranks, from Corporal.	**Coram: Hughes VP, Slade and Sharp JJ.** Facts: The Appellant was an instructor training recruits at the Infantry Training Centre, Catterick. He got very drunk and at about 03:45 hrs he stormed into the lines, woke the recruits and threw a chair at one of them. He held another recruit down on his bed and punched him four times. He then head butted two other recruits. The first assault was a glancing blow but the second hurt the complainant.	**JA at first instance: Judge Peters.** **The Appellant appealed against the dismissal element of the sentence only.** **Held:"As a matter of principle a Court Martial is a specialist court. It has an ability to assess the likely effect on a service which depends on mutual confidence of a person's continued service which is difficult for the Court of Appeal to reproduce… The Court Martial is entitled to a level of deference from this court. That said this court exists to interfere with sentences when they are wrong."** **The court were not persuaded that Birch had really lost 15 years' income, as was argued on his behalf, by reason of his dismissal as it was almost certain that he would get another job, and a civilian who behaved as he had done would be likely to lose his job. This was a serious breach of trust by a training NCO. It was however an isolated incident and he had performed very well on operations and was otherwise highly regarded. The CMAC quashed the sentence of dismissal.** **The following authorities, which are all summarized in this Guide, deal with the specialist/expert nature of the Court Martial: R v Love, R v Mckendry, R v Lyons, R v Rheines, R v Downing, R v Glenton, R v Cross, R v Capill, R v Foley, R v Calverly, R v Coleman, R v Simm and Tennet, R v Townshend, R v Ndi, R v Bailey, R v Ashworth, R v Bagnall and R v Cruise-Taylor. The following authorities deal with the status of the Court Martial as an expert/specialist court in the context, particularly, of imposing sentences of dismissal: R v Downing, R v Limbu, R v Price and Bell, R v Townshend, R v Coleman, R v Ndi and R v Bailey.**

Blackman sub nom.R v Marine A and others in re Guardian News and Media and ors. **Marine A and Ors v Judge Advocate General.**	Date of judgment: 1712 13 Appeal re reporting restrictions.	**Coram: Judge CJ, and Tugenhat and Holroyde JJ.** Facts: In 2011 in Afghanistan an insurgent was fired on and wounded by an Apache helicopter. A marine patrol, led by Mne A, was sent out and the wounded man, who by then posed no threat, was shot and killed by Mne A. A video with sound, was recorded on a helmet camera by one of the patrol. Five of the patrol were charged with murder. The Crown did not proceed against two of the marines whom they had originally charged with murder.The two co-defendants were acquitted of murder, at the conclusion of the trial, but Mne A was found guilty of murder.	**JA: Judge Elsom.** **Orders made by the Court Martial.** **Interim Order prohibiting the naming of any Defendant.** This order was made under Rule 153 of the Armed Forces (Court Martial) Rules 2009, which provides that the Court Martial "…may give leave for any name or other matter given in evidence in the proceedings to be withheld from the public". On the return date having heard and read evidence about the threat level the judge concluded that there was a real and immediate threat to the Defendants' lives if their names were made public, whether from organized terrorists or a "loan wolf." **Order continued until verdict, when the matter would be reviewed.** **On the first morning of the trial, before Judge Blackett, Judge Advocate General, an order was made under s11, Contempt of Court Act 1981, in respect of the anonymity of the Defendants and this was extended to the pilots of the Apache helicopter which wounded the insurgent whom Mne A subsequently killed.** **In order to prove their case the Crown relied on a patrol members' head camera footage in order to prove that the Defendants had murdered the wounded insurgent. The media applied for this material to be released for publication.** **Having heard evidence from an official at the Office of Security and Counter-Terrorism, the Judge Advocate concluded that these clips would be likely to radicalize others or incite terrorist attacks and ordered that they should not be released to the media.** **The soundtrack was released, a step that was not resisted by MoD or any of the Defendants.**

			There were three categories of videos and still images: **Category 1.** **Stills of the insurgent as he lay wounded which the Judge ordered should not be released as these were likely to radicalize others and incite terrorist attacks just as the video footage from which they were taken would do.** **Category 2.** **These stills showed members of the patrol in some detail including one marine with a pistol, which it was common ground, he did not fire. It was ordered that four stills could be released, but that further evidence would be required from the official from the Office of Security and Counter-Terrorism in respect of the remaining images. No order was made in respect of these images in the event.** **Category 3.** **Images showing the terrain where the incident took place. No objection was taken to the release of these images and the Judge ordered their release** **Revisiting the orders.** **The media applied to the Judge to lift the order prohibiting the identification of any of the Defendants when the lay members retired to consider their finding in respect of A, B and C. The Prosecution supported this application and Mnes A, B and C opposed it. Mnes D and E, against whom the Crown had discontinued, indicated that they wished to be heard if there was any suggestion that the order in respect of their anonymity should be reviewed. The Judge heard further evidence from the defence security expert who had previously given evidence and the witness again stated that the Marines would be at a real and immediate risk if their identities were known.**

			The official indicated that if any Defendant were sent to prison he could not be properly protected and his family would be a soft target. **Held by the Judge Advocate: This evidence was unconvincing because no reasons were given to support these conclusions and the opinion was not objectively well founded.** **It was ordered that the anonymity order in respect of the three Defendants on trial would be discontinued whether they were convicted or acquitted and the orders in respect of Mnes D and E, against whom the prosecution had not proceeded, would be discontinued.** **Mnes D and E had not been heard but the judge concluded that as any submissions that they might make would not cause him to take a different view it was not necessary to hear them.** **ALL FOUR MARINES APPEALED THE ORDER THAT THEIR NAMES COULD BE RELEASED FOR PUBLICATION AND THE PRESS AND MEDIA APPEALED THE ORDER OF THE COURT PREVENTING THE RELEASE AND PUBLICATION OF THE VIDEO FOOTAGE AND STILLS.** **Held by CMAC: The Marines could not appeal the order permitting the publication of their names to the CMAC because the order did not restrict publication and accordingly did not relate to "withholding" a name or other matter under Rule 152 Court Martial Rules 2009 as it in fact related to publishing it so the right of appeal in Rule 154(b) did not apply.** **As the order was made just before verdict it could not be said that the order was a ruling at preliminary proceedings and therefore appealable by virtue of Rule 27 of the Court Martial Appeal Rules 2009. Accordingly, the court would sit as a Divisional Court dealing with the matter as a judicial review.**

			The application by the press would be dealt with by the same Judges at the same time, but sitting as CMAC, because that order was caught by Rule154 (b) which gives a right of appeal against "an order or direction restricting" in this case the publication of the stills produced from the video camera on one of the patrol member's helmet. **RELEASING THE VIDEOS AND STILLS.** **HELD: On the material before him, the Judge was entitled to conclude that the Category 1 material showing the insurgent after he had been wounded by the helicopter, was likely to be widely distributed by terrorist organisations to incite terrorism such as the murder of Drummer Rigby and accordingly there was an immediate threat to the lives of members of the armed services if the material was released.** **In the more usual civilian context, it would be appropriate to balance the victim's rights, if he survived, and those of his family under Article 8 of ECHR, as publication might seriously interfere with their private life, against the public interest in open justice and the media's right to free expression under Article 10.** **Category 2 Images.** **The judge was right to hold that if the images of a marine with a pistol soon after the helicopter attack on the insurgent were released and published they would place his life under immediate threat.** **There was no appeal against the Judge Advocate's order that the four images, which did not show the insurgent or any act of violence by any marine, be released.**

			The CMAC ordered the release of the remaining stills where the Judge had indicated that further evidence was required in order to make a ruling as no party wished the matter to go back before the Judge for further evidence to be heard. **The Category 3 images were not the subject of any appeal.** **THE DECISION OF THE DIVISIONAL COURT IN RESPECT OF THE PUBLICATION OF THE MARINES' NAMES.** **Held: The Judge's findings that there was no real and immediate threat to life was plainly open to him once he had rejected the expert's conclusions.** **The Judge did not conduct a balancing exercise to decide whether there was a sufficient public interest in the publication of the Defendants' names, given the importance of open justice, set against the need to respect their and their families' rights under Article 8 - see Re S (a child) [2005] 1AC 593.** **The Joint Terrorism Analysis Centre provided further evidence before CMAC to the effect that the threat to all four marines would be increased if they were named.** **The CMAC held that it would require an overwhelming case for Mne A, who had been convicted of murder in an armed conflict, to remain anonymous, balancing the risk to him in prison and after his release given that proper steps would be taken by the authorities to protect him and his family. The balance came down firmly on the side of open justice and CMAC ordered that his name be made public.** **The court applied the same principle to Mnes B and C. The fact of their acquittal made no difference. They had returned to service and MoD and the civilian police had taken steps to protect them and their families. The risk to their Article 8 rights was not sufficient to outweigh the need for open justice.**

			In future if similar issues arose, they should be resolved, by calling evidence, if necessary, and hearing submissions at the start of the trial to enable the reporting of the trial as it took place, subject to any restrictions ordered by the Judge. **The cases of D and E were remitted to the judge as they had not had the opportunity to challenge evidence, call evidence or address the judge. Anonimity orders were made in respect of D and E, but on 1 March 2017 the order in respect of Mne E was lifted on his application.**

R v Blackman, BBC, ITN, Times Newspapers Ltd British Sky Broadcasting, Guardian News Media and Associated Newspapers Ltd and the Ministry of Defence.	Date of judgment: 28 3 2017	**Coram: The Lord Chief Justice, the President of the Queen's Bench Division and the Vice-President of the Court of Appeal.**	**JA at first instance: HH Judge Blackett, the Judge Advocate General.** **CMAC referred to the case of Marine A (set out above) and R (Guardian News and Media Limited) v City of Westminster Magistrates' Court [2012] EWCA Crim 420 where the basic approach to dealing with an application by the press or other media for the release of material referred to in court is set out.** **The media applied for the release of six video clips. Three of the six video clips were released by MoD. The CMAC refused to release the remaining three video clips taken by Mne B before and during the killing of the wounded insurgent by Blackman.** **The Head of Research in the Information and Communications Unit in the Office of Security and Counter-Terrorism at the Home Office said these three clips would "… be used as compelling evidence for supporters of violent Jihad to act and respond specifically and violently. They will use it as evidence to justify the claim that the West is at war with Islam and operates outside its own legal restraints; it will trigger a tipping point for many sympathisers who may have been on the verge of active response into immediate violent action. It will, in short, create a real and immediate risk to life".** **The CMAC received evidence from Mrs Blackman about the advice she had been given by the police and her fears for her safety.** **No counsel for the press or media wished to challenge this evidence, or the evidence from the Home Office official, in cross-examination.** **The court did not reach a decision as to whether this material would cause a risk of immediate danger to life. They struck a balance between the press and media's right to free expression under ECHR Article 10 and the Article 8 rights of others. The court concluded that the release of this material would significantly endanger a large number of people in the UK and elsewhere and accordingly the balance lay against disclosure.**

R v Blackman v Secretary of State for Defence. Charge: murder contrary to common law.	Date of judgment: 22 5 2014. Sentence: life imprisonment with a minimum term of 10 years, less time on remand, dismissal with disgrace from Her Majesty'service and reduction to the ranks.	**Coram: Lord Thomas CJ, the President of the Queen's Bench Division, and the Vice-President of the Court of Appeal (Criminal Division).** Facts: On 15 September 2011 Command Post (CP) Taalanda, a British CP in Helmand Province, Afghanistan came under small arms fire. An Apache helicopter located an insurgent and engaged him seriously wounding him. Blackman, identified only as Mne A at his trial, an Acting Colour Sergeant, was detailed to lead a patrol to assess what the results of the attack by the Apache had been. One of the patrol had a camera attached to his helmet which recorded sound and video images of what took place.	**JA at first instance: HH Judge Blackett, Judge Advocate General.** **APPEAL AGAINST CONVICTION.** **Ground of appeal:** **A civilian facing a serious charge has, since 1168, been entitled to trial by jury whose verdict, from at least 1367, had to be unanimous. Majority verdicts were introduced by s13 Criminal Justice Act 1967 and are now governed by s17 Juries Act 1974 which provides that a defendant could be convicted by a majority of ten if there were not less than eleven jurors and a majority of nine if there were ten jurors remaining by the time the jury reached a verdict. In the Court Martial s160(1) AFA 2006 allows for conviction by a simple majority which the appellant argued, adopting the passage at page 56 of Sir Patrick Devlin's "Trial by Jury", that, "If there were a dissenting minority of a third or a quarter that would of itself suggest to the popular mind the existence of a reasonable doubt and might impair public confidence in the criminal verdict". It was submitted that whilst the Court Martial was Article 6 compliant members of the armed services were being unlawfully discriminated against because they did not have the same level of protection as a civilian being tried in the Crown Court and their Article 14 rights were being breached because they were being discriminated against.** **Held: The CMAC followed the European Court of Human Rights decision in Engels and Ors v The Netherlands (Application No. 5100/71, decision 8 June 1976, [1979-80] 1 EHRR 647), where the court held that differences between the civilian and military systems of justice could be justified by differences between the conditions of civilian and military life, and in the present case there was no Article 14 discrimination because it was necessary to avoid the equivalent to a "hung jury" in the military system and CMAC were bound by R v Thwaite [2010] EWCA Crim 2973 where the CMAC held that findings of guilt by a simple majority did not deprive the Defendant of his right to an Article 6 fair trial.**

		In September 2012 the footage was found during an unrelated RMP investigation into alleged possession of IIoC.As a result Blackman, Watson and Hammond and Mnes D and E were charged with murder.The case against D and E was discontinued prior to arraignment, Hammond and Watson were acquitted and Blackman was convicted of murder.	**CMAC indicated that Parliament could legislate to align the extent of the majority required to convict at a trial by jury; an amendment to the Rules could "probably" allow the judge advocate presiding at the trial to enquire whether the verdict was unanimous or by a majority. Careful consideration should always be given to venue balancing the advantages of jury trial against the advantage of trial and sentence by a court whose lay members had military experience.** **APPEAL AGAINST SENTENCE.** **Held: The Court Martial were right to apply Schedule 21 of CJA 2003 and take a 15 year start point for the minimum term. CMAC approved the Court Martial's approach to balancing the aggravating and mitigating circumstances to arrive at a 10 year minimum save in two significant respects.**

			Firstly the appellant acted in a way that was entirely out of character whilst he was suffering from combat stress disorder. It was very unfortunate that the only medical evidence before the Court Martial and before CMAC was obtained over two years after the murder, particularly when the appellant was at a remote CP for five and a half months with limited contact with those commanding him, so that his mental welfare was not assessed by the chain of command, and there was evidence that he had become somewhat paranoid about the Taliban "gunning for him". **Secondly no additional term was required for deterrence, the proceedings received worldwide publicity and the life sentence imposed on him and the significant minimum term he will serve amounted to sufficient deterrence.** **The minimum term that must be served before he could be considered for release on licence was reduced to eight years.**

R v Blackman Charge: murder.	Date of judgment: 15 3 2017	**Coram: Lord Chief Justice, the President of the Queen's Bench Division, the Vice-President of the Court of Appeal (Criminal Division), Oppenshaw and Sweeney JJ.** Facts: The facts are set out above in the summary of R v Blackman v Secretary of State for Defence. A psychiatric report had been obtained for the sentencing hearing from Dr Orr who concluded that Blackman may have been suffering from undetected combat stress disorder. The contents of this report were part of the reason that the minimum term Blackman had to serve in respect of the life sentence imposed on him, before being	**JA at first instance: HH Judge Blackett, Judge Advocate General.** **Grounds on which the Criminal Cases Review Commission made their reference to CMAC on 15 12 2016:** Psychiatric evidence that had not been made available at the trial, and which the prosecution did not contest, showed that both at the time when Blackman killed the insurgent and at trial, Blackman was suffering from an adjustment disorder, a recognized medical condition that could provide a partial defence to murder namely diminished responsibility, resulting in the substitution of a manslaughter verdict or an order for a re-trial. The Judge Advocate had not left the manslaughter alternative for the members to consider. Possible incompetence by the Defence team, in particular, failing to secure psychiatric evidence and failing to properly investigate Blackman's mental health to establish if the partial defence of diminished responsibility was open to him. **At a directions hearing the court decided to dispose of the CCRC grounds first giving leave to add three further grounds. The appellant sought to add to the CCRC grounds if his appeal did not succeed on those points. Counsel having changed, these further grounds were abandoned.**

		considered for release on licence, was reduced from ten to eight years.On 15 December 2016, in the light of this and other material the Criminal Cases Review Commission referred the matter to CMAC.	**Held: The governing legal principle for the partial defence of diminished responsibility is set out in s.2 Homicide Act 1957, as amended by s.52(2) Coroners and Justice Act 2009, which provides that a person is not to be convicted of murder if at the time of the killing he was suffering from an abnormality of mental functioning, arising from a recognised mental condition, and which substantially impaired his ability to understand the nature of his conduct and/or form a rational judgment and/or exercise self-control and provides an explanation for his acts or omissions in doing or being a party to the killing, in the sense that the abnormality in mental function causes the person to do the acts or make the omissions to do or be a party to the killing, or the abnormality in mental function is a significant contributory factor in causing him to carry out that conduct.** **"Substantial" here means "important or weighty" as in "a substantial salary" or "a substantial meal", see R v Golds [2016] UKSC 61 per Lord Hughes in the Supreme Court.** **The CMAC had reports from:** **1. Professor Neil Greenberg, a former naval medical officer who became a member of the Royal College of Psychiatrists in 1999, and had held specialist registrar posts in psychiatry before becoming the uniformed lead for mental health research in the armed forces and co-director of the Academic Centre for Defence Mental Health. He had served with a RM Commando in Afghanistan and had been Professor of Defence Mental Health at King's College London, since 2013. The court found him to be a "very impressive witness."** **2. Dr Philip Joseph a consultant forensic psychiatrist since 1989 who CMAC said had "very great experience having assessed over 800 persons charged with homicide." These doctors gave evidence, the third psychiatrist, Dr Orr did not give evidence as he was ill at the time of the hearing but CMAC considered his report. The court accepted the view of all three psychiatrists that Blackman was suffering from an adjustment disorder of moderate severity, which is a recognized medical condition listed in the International Classification of Diseases 10th edition. Having examined the evidence they each concluded that this condition impaired Blackman's ability to make rational judgments and exercise self- control.**

			There was a proper reason for not putting this before the trial court as Blackman felt that there would be a stigma attached to relying on this evidence, it would be likely to end his career and he had limited understanding that he had a psychiatric condition, and the psychiatric evidence suggested that an adjustment disorder was often not apparent to the person suffering from it. **The court held that it was "particularly unfortunate" that the Prosecution had not sought a psychiatric report. This must be done "…in any case involving conduct which is entirely inconsistent with the prior character and conduct of the defendant.** **This is even more so in a case such as this where…there is a real responsibility placed upon the armed forces in respect of the mental health and welfare of the troops."** **Given the psychiatric evidence and the evidential background namely the following:** **Blackman had been an exemplary soldier before deployment.** **His father had died of Parkinson's just before Blackman deployed, he had returned from Afghanistan to scatter his ashes and the court held that this placed significant stress on him.** **The Court accepted the evidence in the Telemeter Report, prepared for the MoD, but challenged by the prosecution, in so far as it related to the conditions under which Blackman was serving on operations. In particular the report stated that Blackman did not receive the full pre-deployment training package, was not trained in Trauma Risk Management (TRiM), a peer support system which should have been in operation but was not, until three days before the killing, which Professor Greenburg thought "a significant factor".** **The multiple commander had been killed and there were no other officers or senior ranks at his location which was of material significance as a stressor.**

			It was too dangerous for the padre to visit the CP. Padres have an important role in maintaining morale and mental health by providing someone in whom servicemen could confide and lack of this was a further stressor. **The multiple was a close-knit sub-unit where members supported each other instead of seeking external help.** **The CP was isolated and austere and the marines faced daily acute danger and did not feel safe, particularly at night, and the company of which the multiple formed part had been the hardest hit in the Commando, were losing ground to the insurgents and by the end of the tour were combat weary.** **The CP was undermanned with 16 members whilst the previous multiple at that location had had a strength of 25.** **The multiple patrolled for between 5 and 10 hours each day, over broken ground, with a constant Improvised Explosive Device (IED) and ambush threat in a temperature normally over 50 degrees Celsius, carrying a minimum load of 100 lbs. There was an IED explosion, on average, every 16 hours. Because of the insufficient ORBAT, individuals sometimes had to patrol twice a day. All the marines were very tired and Blackman, in particular, was deprived of sleep, partly because he undertook extra patrols and took extra risks to safeguard members of his multiple,particularly those with children, and the court accepted that this may have affected his ability to make decisions.** **There was a constant threat from insurgents, many of whom gave the appearance of being friendly local people, and they had inflicted severe casualties on our forces hanging his comrades' bodies in trees.** **Blackman felt that he was easily identifiable and being targeted. About a month before the killing two grenades were thrown at him. They fell in a ditch and the blast was funneled upwards saving his life.** **It was common ground that it was Blackman's perception of the support he was receiving that counted in assessing his mental state. His assessment was:** **There was a lack of support from the CO and OC.** **The CP was not secure and could be easily overrun.** **These factors intensified the sense of isolation at the CP.**

			The CMAC accepted Professor Greenberg's evidence that it was key to the mental health of members of a unit that they felt supported and their safety was given real consideration so Blackman's perception of lack of leadership by the CO and OC were key stressors. **The OC had written an appraisal of Blackman five days before the incident which stated that he "… had probably reached his ceiling as he lacked the dynamism to go further in his career". This was in marked contrast to his earlier reports which suggested that he had changed significantly while on operations, and which supported Professor Greenberg's conclusion that Blackman was suffering from adjustment disorder.** **On the day of the killing a CP, manned by another multiple from Blackman's Company, had come under sustained attack, hence the need for him to lead a patrol to ascertain the effect of the contact with the Apache helicopter. The fact that only one insurgent had been accounted for heightened the threat of further attack, and this affected Blackman's cognitive functioning and decision making.** **The serious nature of Blackman's mental condition was evidenced by:** **The evidence of a, TRiM trained, WO2 who had seen him two months prior to the killing whilst on R&R and described Blackman as "a husk of his normal self" and being in a flat mood.** **In the same R&R period his wife noticed Blackman looking at the ground a lot on a walk which he said was because he had to be alert for IEDs.** **Members of the multiple gave evidence that Blackman had become withdrawn, isolated and increasingly irritable.** **His startled response in December 2011 when he heard a loud bang whilst at the theatre.**

			THE KEY ISSUE. **Was this a cold-blooded execution as the Court Martial concluded?** **Or** **Was it the result of a substantial impairment of Blackman's ability to form a rational judgment and/or exercise self control whilst he suffered from an adjustment disorder?** **Having regard to the facts and in the light of the psychiatric evidence, CMAC held that the adjustment disorder had put Blackman in a mind to kill, and the fact that he acted with apparent careful thought as to how to set about the killing, had to be seen against the overarching framework of the disorder which had substantially impaired his ability to form a rational judgment and also impaired his ability to exercise self-control.** **The conviction for murder was quashed and a verdict of manslaughter by reason of diminished responsibility substituted. Sentence adjourned-see R v Blackman [2017] EWCA Crim 325, summarised below.**

R v Blackman Sentence for manslaughter.	Date of judgment: 28 3 2017. Sentence: Dismissed and seven years imprisonment.	**Coram: The Lord Chief Justice, The President of the Queen's Bench Division, The Vice-President of the Court of Appeal(Criminal Division), Openshaw and Sweeney JJ.** Facts: see Blackman v Secretary of State for Defence and R v Blackman summarised above.	**JA at first instance: HH Judge Blackett, Judge Advocate General.** **As the original conviction was quashed the court proceeded to sentence for manslaughter by reason of diminished responsibility. The Sentencing Council Guidelines for this offence did not come into effect until 1 11 2018. The court followed the principles set out in R v Wood [2009] EWCA Crim 651, and considered the following matters:** **The relationship with a sentence for murder.** **Applying the Criminal Justice Act 2003, Schedule 21 the minimum term imposed by CMAC was 8 years equivalent, allowing for release on licence, to a 16 year determinate sentence.** **The reduction in the minimum term made by CMAC from ten years to eight years.** **The appellant (B) acted in a way that was entirely out of character when he was suffering from combat stress disorder. The court attached particular weight to the remoteness of the CP where B served for five and a half months with limited contact with commanders so that his mental health had not been assessed by the chain of command, in the usual way. B had become paranoid, believing that the Taliban were "gunning" for him.** **It was not necessary to add to the severity of the sentence to deter. There was sufficient deterrent by reason of a significant term of imprisonment and world-wide publicity.** **The harm caused by the offence.** **In a manslaughter, the harm is at the highest level as the victim was killed. His death cannot be measured by the short time he was likely to survive; this was the deliberate killing of a wounded man.**

			The appellant's culpability. **In quashing the murder conviction and substituting manslaughter the court had concluded that the adjustment disorder from which B suffered had led to an abnormality of mental functioning which had substantially impaired:** **His ability to form a rational judgement about the need to adhere to the values and standards of the armed forces.** **His ability to exercise self-control as he had acted impulsively and not controlled his emotions. He still retained responsibility for the killing but at a medium rather than high level.** **Aggravating Factors:** **The effect of the killing on the reputation of the British Armed Services and the International Security Force. The killing can be used by insurgents and others as evidence that our forces were in breach of the values they proclaimed;** **The vulnerability of the seriously wounded insurgent;** **Ensuring the killing was not witnessed by the helicopter and the subsequent cover-up;** **Collusive involvement of the patrol. The use of the weapon may not have been, in the circumstances, an aggravating feature.** **Mitigating Factors.** **B's outstanding service record and acts of conspicuous bravery;** **The effect of the conflict on B;** **B's assessment of the lack of support he received from the OC and CO;** **The fact there was a high risk of a further attack and B knew the surviving insurgent was armed with a grenade.**

			Mitigating Factors(continued). **Reduction for possible plea.** **If the psychiatric evidence had been available from the outset, as it should have been, the defence argued that the matter would have ended as a plea to manslaughter which would have been accepted.** **Held: Given that it was then B's case that he had shot a round into an already dead body, this submission was misconceived.** **The Dismissal Element of the Sentence.** **Held: In the light of B's outstanding service and the finding of diminished responsibility, there was no question of dismissal with disgrace but the CMAC was not persuaded that whether B should be allowed to serve on should be left to the service to resolve as an administrative matter. Dismissal was appropriate because B bore a substantial responsibility for the killing despite the psychiatric evidence and B's perception of lack of support from the OC and CO. B had damaged the reputation of the Royal Marines and the armed services, and in any event it was impracticable for him to serve on after so long an absence whilst he served his sentence.** **For the manslaughter of which B now stood convicted the CMAC imposed a sentence of 7 years imprisonment, time on remand to count. Dismissed.** **NOTE: The defendant had, or was very close to, having served this sentence.**

R v Bowler and Darbyshire Charges: s18 and s20 OAPA 1861.	Date of Judgment: 17 12 13. Sentence Bowler for s20 OAPA 1861: Eleven months' detention after a plea on a basis. Darbyshire, after a trial for s18 OAPA 1861: Six years' imprisonment.	**Coram Treacy LJ, Wilkie J and Andrews J**. Facts: An argument broke out over the complainant's bottle of gin. Appleby, not a Defendant, and the complainant fought, and Appleby sustained quite a serious wound. Anker, and Bowler pleaded to s20 on a basis. It was Bowler's case that she had helped disarm the complainant of a knife but had then continued to kick him on the ground when he was no longer a threat to her, including kicking, recklessly, to the head. The complainant sustained injuries to his liver and to his kidney that would require medical checks on his kidneys and blood pressure for the rest of his life. He was in hospital for a week and on bed rest for seven days after his discharge.	**J A at first instance: Judge Camp.** **Disparity cannot be relied on as between a Defendant who pleads to an offence under s20 OAPA 1861 on a basis and a Defendant found guilty of s18 OAPA 1861 after a trial.** **The CMAC observed in respect of Bowler, "In our judgment there can be absolutely no criticism of the length of the sentence or the fact, if viewed in isolation, that the sentence was not suspended" but they accepted the disparity point as between her and Anker as the only difference between them was that Anker was very highly regarded by the Battallion and had sustained PTSD on a recent operational tour.** **Bowler's sentence of 11 months detention should be suspended as Anker's sentence had been.** **For Darbyshire the appropriate start point was seven years not eight, " having regard to the conduct involved the harm done and the level of culpability", the Court Martial were right to deduct two years to reflect the long delay and the Defendant's service in Afghanistan and so the sentence was reduced from six years to five years.**

R v Boyd, Hastie and Spear and ors	Date of CMAC Judgment;15 January 2001. HL: 18 July 2002. There were 12 Appellants all charged with civilian offences all but two committed in the UK.	**Coram CMAC: Laws LJ, Goldring and Holman JJ. HL: Lord Bingham KG, Senior Lord of Appeal in Ordinary, and Lords Steyn, Hutton, Scott and Rogers.**	**JA in the trial of Boyd, Gavin Gore-Andrews a part time Judge Advocate.** **The ruling in respect of the appointment of Permanent Presidents is not set out as they ceased to be appointed after the ruling of Judge Pearson, AJAG, in R v McKendry on 6 March 2000.** **The Judicial Committee was of the opinion that a civilian offence committed in the United Kingdom could properly be tried by Court Martial which complied with Article 6(1) of the European Declaration of Human Rights as it was independent and impartial.** **A part time Deputy Judge Advocate was appointed in the case of Boyd by the Judge Advocate General who is an independent judge, not a member of the executive and his appointments are independent because he applies objective judicial standards when he makes them and the Deputy Judge Advocate was accordingly independent despite the fact that he lacked security of tenure.** **Lord Bingham, with whom the remainder of the law lords concurred, held that a judge advocate's role was essentially that of a criminal judge at a trial on indictment and the members were closely analogous to a jury.** **No attack was made by the Appellants' counsel on the independence and impartiality of full-time judge advocates.** **The House held that the lay members were independent and impartial because they were not in fact reported on by the chain of command for their performance on the court and to seek to interfere with their judicial function would amount to perverting or conduct to the prejudice and the members swore to try the case according to the evidence.** **As it was conceded by counsel for the Appellants that civil offences committed abroad, and military offences, could properly be tried by Court Martial because the court was independent and impartial for this purpose, then the House of Lords held, the Court Martial must also be independent and impartial in respect of civil offences committed in the UK.**

R v Bradshaw. Charges: convicted after trial of rape contrary to s1 SOA 2003, seven offences of sexual assault contrary to s3(1) of the 2003 Act, and one attempted sexual assault.	Date of judgment: 11 12 2012. Sentence: Rape- imprisonment for public protection with a minimum term of four years three months, with short concurrent sentences on the remaining counts.	**Coram: Rafferty LJ, Globe and Leggatt JJ.** Facts: The Appellant (B), over a period of months, committed six relatively minor sexual assaults in barracks after drinking sessions, four of them against the same complainant and the other two against two other complainants, all male soldiers in his Battalion. The complainant who had been sexually assaulted 4 times, reported the matter to an NCO, who warned B. Some two months later a soldier who had not previously been a victim, who had been on operations, and was suffering PTSD was drunk and vomiting in camp and B helped him to bed, returned and raped him causing intense pain to his anus.	**JA at first instance: Judge Large, Deputy Judge Advocate General (Assistant Judge Advocate General as he then was).** **Appeal against sentence on the basis that the defendant was not dangerous, and the minimum term was too long.** **The complainants on all the counts, save the rape, had been able to get on with their lives, but the complainant on the rape count had lost trust in his fellows and would probably leave the army and had needed psychiatric treatment. It had been traumatic for him.** **B had a number of relatively minor assaults recorded against him and had served 14 days detention for an assault on a superior officer.** **Held: The rape was part of a pattern of offending committed when B knew that a complaint had been made about his sexual offending, and he continued to offend after the rape. It was a course of conduct. He was not prepared to acknowledge his sexual preferences and had a problem he would not address. The CMAC "…had no doubt that statutory dangerousness was made out". There was nothing to impugn the start point the Court Martial had taken to arrive at the minimum term.**

		B then went on to commit two further, relatively less serious, sexual assaults against two other members of his Battalion.	

R v Calverly. Charges: Two charges of absence without leave contrary to s9(1) AFA 2006.	Date of Judgment: 29 7 2014. Sentence: Charge 1- two months' detention; Charge 2- seven months' detention consecutive.	**Coram: Sir Brian Leveson P, Globe and Haddon-Cave JJ.** Facts; The Appellant (C) pleaded guilty to both charges. He went absent on the first occasion whilst subject to a service supervision and punishment order, also imposed for absence without leave. He remained absent for 105 days when, despite the fact that the unit had not sought a warrant, he was arrested by the civilian police. Then, despite the fact that the unit had been advised that C could be dealt with summarily by the commanding officer, for a seven week period nothing was done and C went absent again and, this time, was away from his unit for 674	**JA at first instance: Judge Elsom.** **Appeal sentence.** **Held; The CMAC approved the Guidelines then current, which suggested a sentence of six months factoring in a plea of guilty. This is essentially identical guidance to that offered in the current "Guidance on Sentence in the Court Martial", Version 6.** **The single judge had given leave on the basis that it was "just arguable" that, given the delay and C's injury, the sentence was too long. The court concluded that the sentence was not wrong in principle or manifestly excessive, "whatever sentence we might individually have imposed" and the appeal was dismissed.** **In considering the submissions made on behalf of C, the court bore in mind that "… the Court Martial is a specialist criminal court. This does not mean that we accept blindly the decision of the Court Martial, but we must attach due respect to a court which is designed to deal with service issues".** **In coming to this view the CMAC followed R v Love and R v Glenton, which are summarized in this Guide, as are the related authorities of: R v Mckendry, R v Lyons, R v Rheines, R v Downing, R v Cross, R v Capill, R v Foley, R v Simm and Tennet, R v Coleman, R v Townshend, R v Ndi, R v Bagnall, R v Bailey, R v Ashworth and R v Cruise-Taylor.** **R v Downing, R v Birch, R v Limb, R v Price and Bell, R v Townshend, R v Coleman, R v Ndi and R v Bailey deal with the specialist/expert status of the court particularly in passing sentences of dismissal.**

		days before he was again arrested. The unit intended to discharge C if the Court Martial did not dismiss him. C had three children by two different women, and he had what CMAC described as, “complex domestic problems”. He had become discouraged when he was medically downgraded because he had been injured playing rugby and he could not deploy with his unit as a result.	

R v Capill. Charge: plea of guilty to malingering contrary to s16 AFA 2006.	Date of judgment: 19 5 2011. Sentence: 120 days' detention.	**Coram: Hughes VP, Evans and Gloster JJ.** Facts: The Appellant (C), an able seaman, on return from operations in Afghanistan on R and R faced domestic difficulties and her partner's mother was dying. She gave thought to avoiding returning to Afghanistan and arranged for friends to break her arm. She wished to serve on and the navy wished to retain her.	**JA at first instance: Judge Large, Deputy Judge Advocate General (Assistant Judge Advocate General as he then was).** **Appeal against sentence.** **Held: The CMAC adopted the principle set out in R v Love and approved in R v Mckendry, R v Downing,R v Lyons, R v Rheines, R v Glenton, R v Cross, R v Foley, R v Calverly, R v Coleman, R v Townshend, R v Simm and Tennet, R v Ndi, R v Bailey, R v Bagnall, R v Ashworth and R v Cruise-Taylor all of which are summarized here, and held that the Court- Martial"…is a specialist body which is very much better placed than this Court can be when it comes to assessing the seriousness of offending in the context of service life".** **There was nothing wrong with the sentence and there was no basis on which the Court could possibly interfere with it. Just as with absence without leave an element of deterrence of others is an inevitable component in any sentence.** **See also R v Cross, in relation to malingering and R v Downing, R v Birch, R v Limbu,** **R v Price and Bell, R v Townshend, R v Coleman, R v Ndi and R v Bailey on the specialist/expert status of the Court Martial in passing, particularly, the sentence of dismissal, summarized in this guide.**

R v Cava. Charges: Two counts of assault by penetration contrary to s2(1) SOA 2003.	Date of judgment: 10 3 2011. Sentence: six years' imprisonment on each charge concurrent and dismissed from Her Majesty's service.	**Coram: Leveson LJ, Cox and Superstone JJ.** Facts: The appeal was solely on the constitution of the court. The Applicant (C) did not object to any member of the board. Had he done so the Judge Advocate would have heard the objection under Rule 32, Armed Forces (Court Martial) Rules 2009, rejected it or allow it and discharged the member and a waiting member would have taken his place. C was a pastor in the Fijian Church as was the member, a Major, and C had failed some eighteen months or three years prior to the trial (there is conflict in the evidence on the date) to organize accommodation for a group of Fijians on a	**JA at first instance Judge Hill.** **Appeal on the basis a member who had had contact with C should not have served on the board.** **Held: The officer should have declared his contact with C, but he must have considered that his contact with C was so slight that he was not concerned. C's reason for not objecting was that he did not feel that it was his place to do so. CMAC, by contrast, regarded this as strong evidence that C did not think that his contact with the member was such as to cause him to object to the officer sitting on the board on the grounds of partiality.** **The CMAC adopted the approach taken by Lord Phillips of Worth Maltravers CJ in R v Khan [2008] 2 Cr App R 13, at paragraph 10, namely:** **"Where an impartial juror is shown to have had reason to favour a particular witness, this will not necessarily result in the quashing of a conviction. [The Court of Appeal (Criminal Division) or in the Court Martial jurisdiction CMAC] will only do so if this has rendered the trial unfair or given an appearance of unfairness. To do this it is necessary to consider two questions: firstly "Would the fair-minded observer consider that partiality of the juror to the witness may have caused the jury to accept the evidence of that witness?" If so, "Would the fair minded observer consider that this may have affected the outcome of the trial?"** **If the answer to both these questions is in the affirmative, then the trial will not have the appearance of fairness. If the answer to the first or second question is in the negative, then the partiality of the juror to the witness will not have affected the safety of the verdict and there will be no reason to consider the trial unfair."**

		church visit to Fiji as he had agreed to do. The group included the Major who subsequently, by C's account, forgave him. It was argued that the member was bound to know that C was drinking too much, had not been going to church and had neglected his duty as a pastor as well as letting the group visiting Fiji, which included the member, down. On the direction of the Vice-President of the CMAC the member was asked a number of questions. He said he knew C," in passing" and that he knew C was a pastor but had only spoken to him once, apart from just exchanging greetings. He said that he did not know anything about C's reputation or his past.	**On the evidence CMAC rejected the submission that the officer was consciously biased. They then considered whether the insidious risk of unconscious bias existed. They concluded it did not, in part because C, who was represented by counsel and had an Assisting Officer, did not raise the matter at trial, which he would have done had he thought the officer was biased against him. Having reviewed the evidence about the member's knowledge of C, "…we have unhesitatingly come to the conclusion", that there was no risk of unconscious bias.** **At paragraph 23 of the judgment CMAC said that the guidance to potential lay members when they were directed to report to a particular Court was that they should notify the court service if they "knew"a Defendant, witness or counsel or solicitor in any of the cases they might be called on to try.** **CMAC suggested that this requirement should be re-cast to require the potential lay members to report whether they had "…contact outside the court setting" with any of those individuals, so as not to have to make a judgement as to what amounts to "knowing a person".** **In this case the member had not drawn his prior knowledge of C to the attention of the Military Court Service or the judge as he thought his contacts with him were insufficient to amount to "knowing" him.** **The judge advocate observed that it was counsel or a solicitor's duty to discuss the composition of the court with his client before the court is sworn. Comment: This must be the proper course.**

R v Cheeseman Charge: Attempted murder. Verdict: Not guilty but guilty of wounding with intent contrary to s18 OAPA 1861.	Date of judgment: 13 2 2019. The Appellant (C) had sought to rely on "the householder's defence" provided by s76 Criminal Justice and Immigration Act 2008 as amended by the Crime and Courts Act 2013 s43, which provides, inter alia, that in assessing the reasonableness of the force used the Defendant can rely on his mistaken belief about the circumstances, unless the force used was grossly disproportionate. Under s76(8A) the defence applies to "forces accommodation" .	**Coram: Burnet CJ, Cheema-Grubb and Spencer JJ.** Facts: The Appellant (C) and Complainant (L) had been drinking in C's room with C's consent. They were both drunk. C went for lunch and returned to find that L had locked himself in the room. He was trashing it. At some stage C demanded that L should leave. When L eventually opened the door C entered his room picked up a knife which was in the room and stabbed L repeatedly. C said in evidence that L was a very large man and would have "very likely killed" him if he had not done so.	**JA at first instance: HH Judge Blackett, Judge Advocate General.** **Appeal conviction on the basis that the householder's defence should not have been withdrawn from the Board by the judge. It was withdrawn on the basis that there was no evidence on which the lay members could properly reach the finding that L was in C's room without permission.** **Held: Given that C said that he had demanded that L should leave his room there was evidence on which the Board could conclude that C believed that L remained in his room without permission. The defence was not limited to cases where the complainant had been an intruder from the outset. Accordingly the householder's defence should have been left to the Board, but the conviction was safe as it was obvious from the sentencing remarks that the degree of force used was not an issue in the case, because the Board had concluded that C stabbed L because he had trashed his room and he was not acting in self-defence at all.**

R v Chin-Charles and R v Cullen	Date of judgment: 6 6 2019.	**Coram: Burnett CJ, Hallett and Rafferty LJJ.**	**Courts at first instance Woolwich and Liverpool Crown Court.** **Sentencing remarks should not be addressed to the Court of Appeal. They should be limited to findings of fact including on the issue of dangerousness, identifying where the case fell in the guidelines in respect of harm and culpability, with reasons as to why harm and culpability fell in the category they did, the starting point and range and the adjustments made to reflect the aggravating and mitigating factors and the credit given for any guilty plea. Victim personal statements may merit brief mention but reports only need to be referred to if "…essential to an understanding of the court's decision".** **The court set out the reasons they would have given in one a half pages rather than the eight pages of reasons at first instance.** **Contrast R v Beckett [2020] EWCA Crim 914, where the sentencing remarks were insufficiently detailed.**

R v Coleman Charge: Causing harassment alarm or distress contrary to s5 of the Public Order Act 1968. A charge of indecent exposure was ordered to lie on the file.	Date of judgment: 20 11 2017. Sentence: to be dismissed and reduced to the ranks.	**Coram: Macur LJ, Simler J and HH Judge Collier QC, Recorder of Leeds.** Facts: The complainant, a wife of a mess member went to a party in the Corporal's Mess. She went into the women's lavatory and locked herself in a cubicle. The Appellant (C), a male full Corporal, began to rattle the door and the complainant believed that the lock was giving way and pushed against the door. She managed to pull up her clothes. The complainant saw C with his penis and testicles exposed as she came out of the cubicle. In interview under caution C said he was drunk and he could not remember the incident or being confronted by the complainant's husband.	**JA at first instance: Judge Camp.** **Appeal against sentence.** **Held: Following R v Love CMAC recognized that the Court Martial was a specialist court but concluded that dismissal was manifestly excessive given the chronology. C had been told he would not be prosecuted, and the complainant had asked that the matter be reviewed. Only then had it been decided that C should be charged, and he faced sentence nearly eighteen months after the incident.** **Reduction to the ranks would involve an annual loss of £5,679.24 when the maximum fine for this offence was £1,000. That was disproportionate and this element of the sentence was quashed and replaced with reduction to Lance Corporal.** **On the specialist nature of the Court Martial see: R v Mckendry, R v Lyons, R v Rheines, R v Downing, R v Glenton, R v Capill, R v Cross, R v Foley, R v Calverly, R v Simm and Tennet, R v Townshend, R v Ndi, R v Bagnall, R v Bailey, R v Ashworth and R v Cruise-Taylor.** **R v Downing, R v Birch, Rv Limbu, R v Price and Bell, R v Townshend, R v Coleman, R v Ndi, and R v Bailey deal with thespecialist/ expert status of the Court Martial in respect, in particular, of the sentence of dismissal and all these authorities are summarized in this guide.**

		C was of good character highly regarded in the Battalion and the CO was keen to retain him.	

R v Cooney, Wood and Allam. Charges: These matters were tried separately in the Court Martial. C was found guilty of indecent assault, W was found guilty of false accounting and A pleaded guilty to causing death by dangerous driving.	Judgment: 31 3 1999. Sentence: C- six months' imprisonment and dismissal. W-fine £1,000 and dismissal. A-18 months' imprisonment and dismissal.	**Coram: Rose LJ, Ognall and Burton JJ.**	**The guidance given on sentence in this case, now over twenty years old, has in the main been overtaken by guidance in the Sentencing Council Guidelines and more recent authorities, however, it is submitted that the following guidance holds good in cases where dismissal is in the possible range of sentences the court is likely to need to consider:** **"It appears to us essential that there should be put before the Court Martial, prior to sentence, the likely financial consequences of dismissal".** **<u>Comment</u>: In cases where reduction in rank is possible information about the effect on the Defendant's employability, whether he is likely to regain his rank, and the effect on his pay and pension will be required.**

Cooper v UK. Charge: Theft contrary to s1 Theft Act 1968.	Date of judgment: 16 12 2003. Sentence: 56 days' imprisonment, reduced to the ranks and dismissed.	**Coram: Wildhaber, President, Sir Nicholas Bratza QC, subsequently President of the Court, and a UK judge of the Court, and fifteen other judges of the Grand Chamber of the European Court of Human Rights.** The facts are not set out as the Appeal turned on whether the Court Martial was an independent and impartial tribunal within the meaning of Article 6 of the European Convention of Human Rights.	**Appeal against conviction on the grounds that the Court Martial did not comply with Article 6 of ECHR because it was not an independent and impartial tribunal.** **By the time this case was heard at first instance, the Air Force Act 1955, and the other two service acts, had been recast by the tri-service Armed Forces Act 1996 (AFA 1996), which was designed to make good the deficiencies in the Court Martial system identified in Findlay v UK, sumarised below.** **Ground 1- a military court should not try criminal, as opposed to disciplinary offences.** **Held: Adopting, on this issue, Morris v UK, summarised below, the court could see no objection to a service court trying civil criminal offences, providing the service court was Article 6 compliant.** **Ground 2- the role of Higher Authority compromised the independence of the Court Martial.** **Held: The fact that charges are referred from the Commanding Officer to the Prosecuting Authority, via Higher Authority, that is to say the next link up in the chain of command from the Commanding Officer, did not prejudice the independence of the Court Martial because having referred the charges, it is then solely a matter for the Prosecuting Authority to decide which, if any, charges C would face at trial.** **The Higher Authority played no further part in the proceedings and was not equivalent to the convening officer under the pre-AFA 1996 system, who decided on which charges the Defendant should be tried.**

			Ground 3- the Prosecuting Authority was not truly independent. **The Applicant (C) argued that Higher Authority might well be senior to the Prosecuting Authority himself and the legal officers who served under him might feel under pressure to take decisions of which they believed the chain of command might approve as they would be likely to hold appointments in the future where they would again be subject to the chain of command and might feel that the decisions they took as prosecutors could affect their future career prospects, thus compromising their independence.** **The ECHR rejected this argument on the grounds that the Prosecuting Authority was answerable to the Attorney General and not the chain of command in respect of his prosecuting function, although he was subject to the authority of the chain of command in respect of his other functions as head of the RAF legal branch.** **The legal officers serving with the Prosecuting Authority only did prosecution work whilst serving in that posting, and apart from the service interest test, they applied the same standards in deciding what charges should be brought or what, if any, pleas should be accepted, as lawyers in the Crown Prosecution Service.** **There was no evidence that prosecutors had been put under pressure by the chain of command to deal with any particular case in any particular way. Accordingly, these arrangements did not undermine the independence of the Court Martial system.**

			<u>Comment</u> **On one view some observers might think that senior officers in the RAF who might have some influence on the career of the Prosecuting Authority/Head of RAF legal branch, might not distinguish between advice given or decisions made by that officer as Prosecuting Authority from advice given and decisions made by the same officer as head of his branch, and that their perception might affect his career if he applied to extend his period in post, for example, or that the Prosecuting Authority might believe that to be the case, and this might compromise his independence, or his appearance of independence, from the point of view of a rational fully informed observer, notwithstanding this decision of ECHR.** **Any such difficulty was resolved when the separate Prosecuting Authorities of the three services were amalgamated into a single tri-service Prosecuting Authority headed by a distinguished civilian practitioner appointed by the Queen from outside the services.** **The first appointment was of a former Treasury Silk, and he was succeeded by another Queen's Counsel who had held very senior appointments involving prosecuting war crimes and similar offences before various international courts. It is submitted that, in the light of these arrangements, it could not be reasonably argued that the current prosecuting authority, now called the Service Prosecuting Authority, is not fully independent.** **Ground 4- The Court Administration Officer (CAO) was appointed by the Defence Council (and still is now under s363(2) AFA 2006) and was not independent of the service and accordingly the officers it appoints to sit on the Court Martial were not independent and impartial.** **The CAO specified the lay members for the Court Martial at random, from a list of officers who had volunteered, ensuring that they did not come from the same station as the Defendant, were not under the same Higher Authority as him or her, were not padres or in the service police and did not know the Defendant, any witness or counsel or solicitors in the case.**

			If this source did not produce enough lay members the CAO would select RAF stations from an alphabetical list on a cab-rank basis and ask them to make officers available to be specified by CAO to sit on the board,which "little discretion" for CAO about which officers were going to sit. There was no reason to doubt CAO's independence, or that of the officers they specified to serve on the court. **The ECHR held that there was no reason for the members to have any legal training as they " would be careful to respect the legal directions of the judge advocate".** **The members also had Briefing Notes provided by CAO which "… fully instructed the ordinary members of the need to function independently". The Notes "…provided practical and precise indications of how this could be achieved". The ECHR held that the Briefing Notes provided "… a further safeguard of the independence of the ordinary members."** **Ground 5. The appointment of Permanent Presidents of the Court Martial (PPCMs) compromised the independence of the court because they would tend to have too much influence over the other members, they were reported on by the chain of command and might, for career reasons, feel under pressure to resolve cases in a particular way.** **ECHR accepted that although PPCMs were reported on, there were no reports on how they had approached any particular case.** **Because the PPCM system has been discontinued this part of the judgment is not fully set out here. However, the ECHR were of the view that PPCMs enhanced the independence of the Court Martial, because they had de facto security of tenure, and were not going to other RAF jobs as a PPCM was in his last appointment so they had nothing to gain by trying to ingratiate themselves with the chain of command.** **Ground 6. The fact that a lay authority, the reviewing authority, could alter judicial decisions was not consistent with judicial independence.**

			At that time every Court Martial was reviewed by an officer to whom the task was delegated by the Army Board and the equvalents for the other services. The Reviewing Authority was advised by the Judge Advocate General or a judge advocate to whom he delegated the task. The advising judge advocate, could not, of course be the trial judge advocate. **The conviction might be quashed, if there was an error of law or procedure, in which case the prosecuting authority could elect to have the matter re-tried, or the sentence could be reduced.** **ECHR expressed concern that a non-judicial authority could interfere with decisions made at a criminal trial, but went on to hold that such a procedure did not render the trial non-compliant with Article 6 as the procedure did not affect the trial itself.** **In a concurring judgement, Judge Costa said, "I still think [as he said in Morris, see below] that the intervention of the reviewing authority is anomalous, unfortunate and archaic, and it would be desirable to put an end to the practice".** **The UK Government plainly accepted the force of these observations because s16 AFA 1996 which made provision for review, was repealed by s38 AFA 2006 and Schedule 17 to the Act, which came into force on 31 10 2009.** **Judge Advocates.** **The ECHR noted that the judge advocate's role at a contested trial compared to that of a Crown Court judge on a trial on indictment. He sat alone to make binding rulings on the law and summed up the law and facts in the same way as a judge in the Crown Court.** **On sentence he advised the lay members, had a vote himself and if the votes were equal had the casting vote.** **The ECHR held that the judge advocate "…with such a pivotal role in the proceedings constitutes not only an important safeguard but one of the most significant guarantees of the independence of the Court Martial proceedings."** **The ECHR held unanimously that a Court Martial was an independent and impartial court within the meaning of Article 6 of the Convention.**

R v Cosgrove Charge: S18 OAPA 1861, wounding with intent- not guilty but guilty of s20 wounding.	Date of judgment: 9 3 2011. Sentence: six months' detention and to pay the complainant £5,000 compensation.	**Coram: Leveson LJ, Cox J and Sir Geoffrey Grigson.** Facts: The applicant, (C) and the complainant were friends. They went for a drink and then to a night- club. The complainant lent C his sun- glasses. He asked for them back. As C would not return them the complainant, at least twice, took hold of C by the front of his shirt asking for them back. The complainant then grabbed C by the throat and reached for the sunglasses. C struck out, he said in self defence, without, as the Court Martial found, realizing that he had the glass in his hand, causing a significant laceration to the complainant's face. C was 20, of good character and CMAC were told that his release date would mean that he would miss two weeks of his pre-deployment training.	**JA at first instance: Judge Large.** **Application for leave to appeal against sentence.** **Held: Leave granted. The Court Martial had identified a starting point of nine to twelve months' detention which they reduced to six months to reflect the 21 months delay in bringing the matter to trial. The CMAC further reduced the sentence to four and a half months to ensure that C did not miss any pre-deployment training to ensure he could deploy as the Court Martial intended.** **The compensation order made appropriate allowance for the complainant's part in this incident and would stand unchanged.**

Cox and the Army Council Charge: driving without due care and attention contrary to s3(1) Road Traffic Act 1960. The wording is the same in the current RTA 1988, also at s3. The offence now carries a maximum fine of £5,000. Under the 1960 Act the maximum was £40 equivalent, allowing for inflation, to about £650.	House of Lords: 15 3 1962. Sentence: severe reprimand.	**Coram: Lords Simmonds, Reid, Radcliffe, Morris of Borth-y-Gest, and Jenkins.** Facts: The Appellant, a Sergeant serving in Germany, was convicted at a District Court Martial of driving without due care and attention on the German public road.	**It was argued that this offence could only be committed in England. It was charged under s70 of the Army Act 1955, but the operative words are the same in the AFA 2006 s42, namely, if the act would, if done in England, have been punishable by the law of England it could be tried by Court Martial. In those circumstances, in the case of those subject to military law, driving without due care is punishable whether it happened, as Lord Simmons put it, in Sundern (in Germany) or Surbiton, even though the definition of a road in RTA 1960, where the s3 offence must take place, plainly comprehended only the Queen's Highway. Driving without due care and attention was still triable as that conduct would have been punishable if it had taken place in England.**

R v Cross Charge: Malingering contrary to s 16 AFA 2006.	Date of judgment: 21 12 2010. Sentence: Dismissal and detention.	**Coram:Thomas LJ, Sharp and Supperstone JJ.** Facts: The Appellant (C), who was only 19, returned from an operational tour in Afghanistan on R and R. Whilst on R and R two comrades in his company were killed and to avoid returning he got a friend to run over his leg.	**JA at first instance Judge Camp.** **There was a report by an army psychiatrist that suggested that C was not suffering from any psychiatric illness. The Judge had specifically invited the solicitor then appearing to consider obtaining a defence report. They declined to do so. At CMAC, C who was now represented by counsel who had obtained a report which showed that C had a general anxiety disorder and an adjustment disorder and MCTC had arranged for him to have psychiatric treatment.** **Held: "We would hope that that if in future, as this case indicated from its basic facts, that there is a psychiatric issue, that both the army prosecuting authority and the defence would each obtain reports". Had the report obtained on the advice of counsel been before the Court Martial, it is likely they would have arrived at a different sentence".** **Accordingly, dismissal stood but the sentence of detention was quashed, and a service community order for 12 months was substituted with a supervision order. The court could not include a condition of psychiatric care as that is the only requirement available to the Crown Court which is not available to the Court Martial, but the probation service who would supervise the order stated that they would arrange for him to receive psychiatric treatment.** **The Court approved R v Love, set out above, in respect of the specialist nature of the Court Martial.** **See also: R v Mckendry, R v Lyons, R v Rheines, R v Downing, R v Glenton, R v Capill, R v Foley, R v Calverly, R v Coleman, R v Townshend, R v Simm and Tennet, R v Ndi, R v Bailey, R v Bagnall, R v Ashworth and R v Cruise-Taylor. See R v Dowding, R v Birch, R v Limbu, R v Price and Bell, R v Townshend, R v Coleman, R v Ndi and R v Bailey in respect of the specialist/expert status of the court in passing sentences of dismissal.** **See R v Capill in respect of sentencing for malingering. These authorities are summarized in this guide.**

R v Cruise-Taylor Charges: Charges 1- ill treatment of a subordinate contrary to s 22(1) AFA 2006. Charge 2- conduct to the prejudice of good order and military discipline, contrary to s19(1) AFA 2006.	Date of judgment:3 10 2019. Sentence: Reduced from Lance Sergeant (the Guards equivalent of Corporal) to Lance Corporal and six months' detention.	**Coram: Davis LJ, Edis and Andrew Baker JJ.** Facts:The first charge representing a number of offences against seven different soldiers whilst the Applicant (C-T) was one of the directing staff at the Infantry Training Centre at Catterick, training recruits in Phase 2 training. He was in the habit of punching recruits hard for minor failings. None required medical treatment and some of the recruits did not want to pursue the matter. Charge 2 was a Specimen Charge relating to transactions with five recruits where, contrary to his written instructions, he had bought kit for soldiers without keeping a record or providing a receipt and on occasions failed to provide all the kit.	**JA at first instance: Judge Large, Deputy Judge Advocate General.** **Appeal sentence.** **CMAC approved the guidance in Version 5 of the Guidance on Sentence in the Court Martial, which is unchanged in Version 6, and states: "Harassment including bullying in any form gravely undermines morale and discipline in a service environment…."** **CMAC approved the list of aggravating and mitigating circumstances and noted that the following aggravating features were present:** **conduct over a protracted period,** **physical abuse,** **the victims were recruits in training.** **The CMAC noted that few of the mitigating factors listed were present.** **The submission made on behalf of the Appellant was that reduction in rank would have a disproportionate effect on his career and because of his good character, the glowing references and his mental health as well as the delay in bringing the case before the court, the sentence should be suspended.** **Held: "All relevant points were duly and carefully taken into account. It is well established that this court is always slow to interfere in the decision of an expert tribunal in a military context such as this. It is to be borne in mind that, taken overall, this is a very bad case of bullying. A number of young recruits were involved, all in training, and what happened occurred over a considerable period of time." The sentence was upheld.**

		One soldier, for example, had paid him £100 but only been given £70 worth of kit. It was emphasized by the Crown that C-T had not been dishonest, and had not unjustly enriched himself, but had failed to follow the rules.C-T was highly regarded in his Battalion, and was of good character, but the PSR suggested no real remorse . He had been bullied himself. He told the consultant psychiatrist who saw him that this had gone on for ten years and the psychiatrist said that this treatment had triggered a depressive illness and that custody would be a devastating blow. Fortunately, by the date of the appeal, he was no longer under psychiatric treatment.	**See also on the specialist/expert status of the Court Martial: Love, Mckendrick, Glenton, Lyons, Rheines, Downing, Capill, Cross, Coleman, Calverly, Foley,Simm and Tennet, Townsend, Ndi, Bagnall, Bailey, Ashworth and Cruise-Taylor all of which are set out in this guide.The following cases deal with the specialist status of the Court Martial in the context of dismissal: R v Downing, R v Birch, R v Limbu, R v Price and Bell, R v Townshend, R v Coleman, R v Ndi and R v Bailey.**

R v Dickson. Charges: Three charges of JPA travel claim fraud amounting to £2,412.20 contrary to ss1 and 2, Fraud Act 2006.	Date of Judgment: 12 9 2012. Sentence: six months' detention and reduced from Corporal RM to the ranks and compensation order for £2,865.30.	**Coram:Pitchford LJ, Simon and Underhill JJ**. Facts:Over a period from October 2008 to May 2011, the Appellant, a full Corporal in the Royal Marines, who had enlisted at 19 and was by the hearing 25, made false JPA travel claims. He had claimed almost double the mileage he was entitled to. After he had made the first two fraudulent claims he served in Afghanistan and was close to an IED which killed a close friend and wounded the Appellant in his arm and shoulder and caused loss of hearing in one ear. He also suffered severe PTSD.	**JA at first instance: Judge Mcgrigor**. **Held: The Court Martial paid careful attention to the offender and his circumstances and an immediate sentence was appropriate.** **The CMAC adopted the then guidelines for JPA fraud and in respect of suspension which are virtually identical in the current version, Version 6 of the "Guidance for Sentencing in the Court Martial."** **CMAC did not accept that a change from the medical team treating him at MCTC would be in the Appellant's interests and noted, as the Court Martial had done, that he had started to cheat the system before he went on operations and suffered PTSD.** **The Court Martial had been provided with incorrect figures for the loss to the Ministry of Defence and the CMAC corrected the compensation order.**

R v Dodman Charges: Three charges of conduct to the prejudice of good order and air force discipline contrary to s69 of the Air Force Act 1955. The Appellant was acquitted on the first charge and convicted on the second and third charges.	Date of judgment: 13 3 1998.	**Coram: Hobhouse LJ** Bracewell and Sachs JJ. Facts: The Appellant (D) took a full time job whilst still serving without permission in breach of the Queen's Regulations (Charge 2) and in order to be charged a lower rate signed into the Mess on the basis that he was on duty when he was working for a civilian firm (Charge 3).	**JA at first instance: Judge Seymour.** **To prove the s69 offence, and equally the s19 AFA 2006 offence, which save for being drawn so as to include all three services, is identical, the prosecution must prove that the act or omission alleged in the particulars of the charge were intentional or reckless and that act or omission was prejudicial to RAF discipline (under s19 service discipline). There is no need to prove any other intent unless some further mental element is required to prove the particulars, such as an allegation that a Defendant made a statement "knowing it to be false". The judge should consider any charge under s69 to decide if the particular matters pleaded in the charge include expressly or by necessary implication any additional mental element. It was a misdirection to introduce the concept that the behavior was "blameworthy". This mis-direction was more favourable to D than it should have been and the conviction was upheld.** **It was implicit in the third charge that by claiming he was on duty so as to be charged a lower rate for food and accomodation that it was being alleged that D's behavior was dishonest and accordingly a legal direction as to what amounted to dishonesty modelled on the direction which would be given for a civil offence of dishonesty needed to be included in the judge's summing up. This direction was not given, because the judge followed the law as it was then set out in the Manual of Military Law, but CMAC upheld the conviction because, on the evidence, it was "…an irresistible inference" that D was dishonest.** **Criminal conduct should not be charged as conduct to the prejudice of good order and (now) service discipline. This authority was followed in R v Armstrong MC, summarized above, where it was held that it was wrong for the judge advocate to direct an acquittal if conduct was charged instead of a substantive criminal offence, but for the prosecution to do so was "outside the lawful exercise of the prosecutor's discretion".**

			Comment. It seems that if the judge cannot stop the case at the close of the prosecution case and given that the defence are very unlikely to contend that it is an abuse to charge conduct instead of a criminal charge, because conduct is a less serious offence, in most cases than the criminal count that ought to be charged, all the judge advocate can realistically do is to direct that the matter be referred to the Director of Service Prosecutions for his personal consideration.

R v Douglas Charges: The Appellant pleaded guilty to Charges 1 to 3 alleging sexual assault on a child under 13, and three charges of possessing indecent photographs of a child contrary to s160 of the Criminal Justice Act 1988.	Date of judgment: 20 6 2019. Sentence: Charge1- custodial term of four years imprisonment with an extended licence period of five years, reflecting the whole incident with concurrent sentences on the other matters. Sexual Harm Prevention Order. Reduced to the ranks and dismissed.	**Coram: Holroyde LJ, Simler and Butcher JJ.** Facts: The Appellant and the complainant's father were serving in Cyprus. He was close to D the eight year old complainant and a trusted friend of the family. Charge 1 related to an incident at a pool party when he removed D's trunks, and carried him over his shoulder so that his penis must have touched the Appellant's back and shoulder. Later some of the adults, including the Appellant, discussed the kind of person they found sexually attractive and the Appellant pointed to D and said "Like him". When challenged he said "Like him but older". Charge 2 related to an incident when the Appellant got into bed with D, when he was fully clothed, and D was in pyjamas. The following morning Charge 3 took place. The Appellant put D on his knee and videoed it.	**JA at first instance: Judge Camp.** **Appeal sentence.** **Held: The Court Martial were entitled to find that there was a significant risk that the Appellant would commit further specified offences and cause serious harm. His sexual interest in D overcame all considerations of loyalty to the friends who trusted him. Determined grooming of a child, recording him on his computer whilst D sat on his lap, and having and using the mannequin, and the considered assessment of the PSR, were ample basis for that finding.** **However, the total sentence before credit for plea should have been five years, three years and four months when credit for plea is factored in. The sentence accordingly falls short of the four years necessary for the imposition of an extended sentence. The other elements of the sentence were upheld.**

		He pleaded guilty because he accepted that he behaved in this way because of his sexual interest in D. D told his parents about the incident reflected by Charge 2 shortly after the incident alleged in Charge 3. The police recovered a child mannequin dressed in the same kind of pyjamas that D often wore from under the Appellant's bed. It was stained with semen. The family felt this was a serious breach of trust. D had taken a long time to get back to the level of progress he had previously reached at school and his mother's health had suffered. The PSR concluded that there was a high risk that the Appellant would commit similar offences in the future doing serious harm to other children. The Appellant had volunteered to go on a course on understanding offending behavior and victim empathy. He was of good character and highly regarded in his unit.	

R v Downing Charge: Fraud contrary to s1 Fraud Act 2010.	Judgment date: 23 3 2010. Sentence: Dismissal and detention for 12 months.	**Coram: Judge CJ, Wilkie and Maddison JJ**. Facts: Over a period of nearly two years the Applicant(D) submitted 47 false travel and other claims amounting to £7,959.05. He only stopped making fraudulent claims when he was told his claims would be audited. He then admitted to an officer in the chain of command, and to the service police, what he had done. He had had financial difficulties. He was genuinely remorseful and his Chief Petty Officer said that he was one of the best Writers/ Logisticians she had come across, and he had much to offer the navy. He was 29 and of good character.	**JA at first instance: Judge Large, Deputy Judge Advocate General, then an Assistant Judge Advocate General.** **Appeal sentence limited to dismissal.** **Held: This was long term dishonesty that only came to an end when suspicion arose because of the number of claims. The dishonesty was substantial. "The impact of a crime committed by a civilian has a different impact to a similar or identical piece of criminal activity by a serviceman or woman in the course of their work. It may impact on operational efficiency as a whole and there may be a diminution in the ability of the applicant to perform his military responsibilities as part of a team.** **The question whether the criminal activities of a member of the military require dismissal from the service is pre-eminently, but not exclusively, a decision for the Court Martial. For this purpose, for the assessment of the impact of the Applicant's conviction on his ability to continue to serve in the relevant force, the Court Martial must be regarded as an expert tribunal, entitled to the same level of respect as any such tribunal is entitled when an appeal court is considering its decision. We do not treat the decision of the Court Martial as something we must rubber stamp. We have stood back from all the evidence before us. We have have noted the care with which the Assistant Judge Advocate General explained the reasons why in the end the court was unable to accept the submission advanced on the applicant's behalf that he should not be dismissed. We find the reasoning in those sentencing remarks entirely compelling."** **Other cases on the expert/specialist status of the Court Martial, which are all set out in this guide: R v Love, R v Mckendry, R v Lyons, R v Rheines, R v Glenton, R v Capill, R v Cross, R v Foley, R v Calverly, R v Coleman, R v Simm and Tennet, R v Townshend, R v Ndi, R v Bailey, R v Bagnall, R v Ashworth and R v Cruise-Taylor.** **R v Birch, R v Limbu, R v Price and Bell, R v Townshend, R v Coleman, R v Ndi and R v Bailey follow Downing on the expert/specialist nature of the court when imposing sentences of dismissal.**

Engel and ors v The Netherlands (No 1) Charges: Various disciplinary charges brought separately against five conscript Dutch army other ranks, contrary to the Dutch military code made under the Military Discipline Act 1903, the Regulations on Military Discipline 1922, the Military Penal Code 1903 and the Army and Air Force Code of Procedure 1964.	Date of judgment: 8 6 1967.	**Coram: European Court of Human Rights.**	**The Dutch system makes provision for military criminal law offences to be tried by Court Martial and for disciplinary offences to be heard by the CO. This appeal relates to this second category of offence.** **The applicants had been variously sentenced to light arrest under Article 8 of the Military Discipline Act 1903 when the soldier is confined to barracks or his home, or Article10, strict arrest, when a soldier would be in a cell during his off duty hours or could be sent to a disciplinary unit for three to six months.** **It was argued that as it was accepted on all sides that the CO was not a compliant court, and as these sentences involved deprivation of liberty, the sentences must be unlawful.** **Held: These applicants had all appealed to the Supreme Military Court and the CO had been upheld and the CO's decision had then become a court decision and the Applicants were then in lawful detention by order of a competent court within the meaning of Article 5(1) of ECHR.** **The provisional arrest imposed on Engels for two days was not to enforce an order by a competent court as it was to enforce the CO's order, nor was the arrest executed with a view to bringing Engels before a competent legal authority within the meaning of Article 5(1)(b) or (c) of ECHR and was unlawful.** **ARTICLE 14.** **The applicants argued that they were discriminated against because they were in detention in a cell whilst an officer would have been in his "dwelling, tent or quarters".** **Held: The hierarchical structure of the army justified differences according to rank, including in respect of discipline.** **It was further argued that there was discrimination between a soldier and a civilian, as a civilian could not be put in custody by his employer.** **Held: This did not amount to unlawful discrimination under ECHR because the difference was justied by the conditions and demands of military life.**

			ARTICLE 5(4). **Two of the applicants sought to argue that their committal to a disciplinary unit was in breach of Article 5(4) which provides that an individual "…shall be entitled to take proceedings by which the lawfulness of his detention shall be speedily decided by a court".** **Held: This provision was not engaged. The applicants had appealed to a competent court and were detained by virtue of an order by that court. This provision was designed to deal with custody imposed by an administrative body as opposed to a court.** **ARTICLE 6.** **All five applicants submitted that Article 6 applied to them. Article 6(1) guarantees "… a fair and public hearing within a reasonable time by an independent and impartial tribunal".** **Held: Although these offences were disciplinary rather than criminal for the three men who had been committed to a disciplinary unit for three to four months Article 6 applied because the severity of the sentence meant that Article 6 rights were appropriate.** **These three applicants advanced a further Ground of Appeal, namely, that given that they were entitled to an Article 6 compliant fair trial they had had insufficient time to properly prepare their defence, as guaranteed by Article 6(3)(b) of ECHR.** **Held: This argument was rejected on the basis that the facts advanced to support this contention were too vague for the Court to be able to reach such a conclusion.** **These applicants also argued that their Article 6(3)(d) rights had been breached. This provision guarantees the right to examine, or have examined, witnesses against the applicant and to call witnesses under the same conditions as the witnesses called against them.**

			The applicants argue that their legal representation had been insufficient to ensure that this Article was complied with as their representation had been limited to assistance by a fellow conscript, who was a lawyer in civilian life, as opposed to a lawyer who was in practice,and he had been limited to dealing with legal issues and had not been permitted to test the evidence called against the applicants. **Held: These limitations were not unjust where the facts were simple and the applicant could properly deal with them in person. It was also held that there was no breach of Article 6(3)(d) as the parties had had equality of arms in terms of the attendance and examination of witnesses.** **ARTICLES 6 AND 14 TAKEN TOGETHER.** **Although the military justice system had fewer guarantees to protect the defendant than the civilian criminal courts that could be justified by the necessary differences between civilian and military life.** **ARTICLES 10, 11, AND 14 TAKEN TOGETHER.** **Two of the applicants argued that the proceedings against them for their part in the production and publication of "Alarm"were in breach of Article 10 of ECHR, which guarantees a person's right to receive and impart information without interference from any public authority subject to any restrictions imposed by law, inter alia, "in the interests of national security."** **Held: The publication, "Alarm" was likely to undermine discipline and the army could properly take steps to prevent its publication and distribution as a necessary step to secure a properly functioning army.** **Article 14 was not engaged as any discrimination between the rights of a soldier and a civilian, in this context, was justified by the necessary differences between civilian and military life.** **Preventing these two applicants from publishing and producing "Alarm" did not, as a matter of fact, limit their freedom of association, guaranteed by Article 11 of ECHR because the proceedings did not relate to their associating, only to their attempt to use "Alarm" to undermine military discipline.**

R v Evans Count: death by careless driving RTA 1988, s2B.	Date of judgment: 17 12 19. Sentence: Seven months' imprisonment and disqualified for two years with a requirement for an extended re- test.	**Coram: Holroyd LJ, and Cavanagh J and HH Judge Picton.** Facts: It was dark but there was street lighting and the motor bicycle, ridden by W coming in the other direction had its headlight on and was not speeding. There was 400 yards straight road but the appellant, E, failed to notice W and he turned his tipper lorry right across the carriageway cutting a corner. He had failed to notice W who had no opportunity to avoid the collision in which he was killed with the tragic results set out in W's widow's personal statement.	**Judge at first instance Mr Recorder Waddington QC.** **The Court applied the Sentencing Council Guidelines for this offence. Although not all sentencers would have regarded this as a mid-level case and some would have put it in the lowest Category, the Recorder could not be said to be wrong to place the offence in the middle Category with a start point of 36 weeks custody and a range from a high level community order to two years' imprisonment because it was unsafe to cut the corner. E should have seen W approach as there was 400 yards clear visibility and carelessness in driving large vehicles was particularly serious as any accident would be harder to avoid and might be more serious. The issue was "should the sentence be suspended?" Applying the Definitive Guidelines for the Imposition of Community and Custodial Sentences the only factor capable of indicating that the sentence ought not be suspended was that the appropriate punishment could only be achieved by an immediate sentence.** **Balancing the driving and the terrible consequences of it against E's immediate deep remorse, early plea and good character and blameless driving record the sentence should be suspended. There would have been a suspended sentence order, but that was not appropriate as E had served 44 days in custody.** **The 2 year disqualification was appropriate but an extended re-test would not increase public safety and was quashed.** **<u>COMMENT</u>-IT IS SOMETIMES SAID THAT THE COURT MARTIAL SHOULD IMPOSE A MORE SEVERE SENTENCE WHEN A DISQUALIFICATION WOULD BE IMPOSED IN THE CIVIL COURTS WHICH THE CM HAS NO POWER TO IMPOSE. IT IS SUBMITTED THAT THIS APPROACH IS PROBABLY WRONG AS THE COURT APPROVED GEALE [2013] 2 CR APP R (S) WHERE IT WAS HELD THAT THE MAIN REASON TO DISQUALIFY IS NOT PUNISHMENT BUT TO PROTECT THE PUBLIC FROM RISK JUST AS THE REQUIREMENT FOR AN EXTENDED TEST IS.**

R v Farrell Charge: The Appellant pleaded not guilty to attempted murder and was convicted and pleaded guilty to two unrelated offences alleging possession of blank and ball ammunition.	Date of Judgment: 6 10 2017. Sentence: Attempted murder- six years' detention with four months' detention concurrent on the ammunition offences.	**Coram: Davis LJ, Lewis and Lavender JJ.** Facts: The Appellant (F) and the Complainant (H) were undergoing training at the Infantry Training Centre Catterick. In his barrack room F had been subjected to sustained "mickey taking" and had become upset. He left the room returning with a knife. According to a number of crown witnesses he struck out with the knife at H's head and neck area, whilst he lay on his bed, only missing because H rolled away. The knife penetrated the mattress and hit the bedframe underneath. It was F's case that he had been bullied repeatedly and he had eventually struck out intending to frighten H but not stab or kill him.	**JA at first instance: Judge Hunter, Vice Judge Advocate General.** **Appeal against conviction on the ground that the prosecutor had commented, in his final speech, in this way, "You may think that when [F] missed through the natural arc of his arm thrust he would swing it [the knife] back closer to his own body and impact further away from where [H] had been".** **The judge ruled that this was fair comment on the evidence which could properly be made without any expert evidence about the mechanics of the blow being called. The judge reminded the members, before they retired to consider their verdict, that how they interpreted the evidence was a matter for them and reminded them that they had no scientific or expert evidence on the issue of where the knife was aimed or whether the arc it would describe would bring it closer to F when it came in contact with the mattress.** **CMAC held that the prosecutor's submission was fair comment on the evidence which did not require the support of expert evidence. The members had the evidence of the witnesses at the scene, including F, and evidence about what F was alleged to have said afterwards at the scene as well as in interview under caution on which to decide if they were sure that the blow had been deliberately aimed at H; this was a jury point for the members to resolve.** **The court could see no error in the judge's ruling that the prosecutor's comment was fair, or in the way he summed the case up.**

Findlay v UK It is not entirely clear from the report what the charges were. Possessing a firearm with intent to cause a person to believe that unlawful violence would be used against him, contrary to s16A Firearms Act 1968 or threats to kill contrary to s16 OAPA 1861 would be likely charges. However, as the case turns on whether the Court Martial is an Art 6 independent and impartial court it is submitted that the precise charge is immaterial. The Appellant (F) when on operations in Ulster and suffering from undiagnosed	Judgement date: 21 1 1997. Sentence: Two years' imprisonment, dismissed and reduced to the ranks.	**Coram: Judge Ryssdal President, Sir John Freeland KCMG, QC, UK Judge, and seven other Judges of the European Court of Human Rights.**	**This authority has largely been overtaken by events. It is of interest because it led to the modernization of the Court Martial and its emergence as a properly constituted Article 6 compliant court, involving various reforms, starting with the Armed Forces Act 1996.** **District Courts Martial were convened, usually, by the brigadier commanding the brigade in which the Defendant served. General Courts Martial were convened by the General commanding the division or district in which the Defendant was serving. The UK was divided into a number of districts which were administrative formations commanded, usually, by a major general, whose troops would, on operations, serve, in the main, under a different chain of command.** **The ECHR held that a Court Martial was not an Article 6 compliant court because the convening officer chose the officers who sat on it from the brigade, district or division which he commanded, he decided, on legal advice, what charges the defendant would face, and also whether any plea tendered was acceptable. He could, in theory, appoint the judge advocate, but that was seen as an emergency measure only and in this case, as in all cases under normal circumstances, the judge advocate was appointed by the judge advocate general, then HH Judge Rant CB, QC. The judge advocate did not preside, his rulings were not binding and he was not a member of the court.** **The verdict and sentence were announced as being "subject to confirmation"and did not take effect until the confirming officer, usually the officer who had convened the Court Martial, confirmed the finding and sentence. He was advised by a judge advocate other than the trial judge advocate, but did not have to accept that advice even on purely legal issues. The confirming officer could confirm the finding unchanged, quash it or substitute a lesser charge. If he quashed the conviction a re-trial could take place. He could confirm the sentence unchanged or reduce it but not increase it. In this case the same officer who had convened the Court Martial confirmed the finding and sentence. The defendant could petition the confirming officer in respect of conviction after a trial, or on the length or type of sentence. The judge advocate would also advise the confirming officer about the merits of the petition, but the defendant was not permitted to see the advice.**

PTSD used his loaded pistol to threaten his comrades, threatened to kill them and himself and discharged it into a television set, before surrendering the weapon.			**There were then two further reviews by lay officers both of whom were petitioned and both of whom having had the advice of, in each case, a different judge advocate, rejected these petitions. Again, the officers were not bound by the advice of the judge advocate which the defendant was not allowed to see. At no stage was the Defendant given reasons for the rejection of his petitions and the court did not give reasons when passing sentence.** **Those representing the UK government did not contest the submission that the Court Martial was not an independent and impartial tribunal and the ECHR unanimously ruled that it was not, because the convening officer decided what the charges would be and was therefore closely associated with the prosecution process. He then nominated the officers who were members of the court and under his command and dealt with confirmation. The officers on the court were not independent of the convening officer.**

R v Foley Charge: Absence without leave contrary to s9 AFA 2006.	Date of judgment: 24 1 2012. Sentence: 90 days' detention with a suspended sentence of 90 days' detention activated in full consecutively.	**Coram: Lord Judge CJ; Holman and Openshaw JJ** Facts:The Appellant (F) who had previously been absent received a suspended sentence of 90 days. The sentence was suspended because of his very difficult personal circumstances. He then went absent for 91 days and surrendered.	**JA at first instance: Judge Camp.** **The CMAC approved the Guidance for Sentence in the Court Martial, Version 3, on absence, which stated that, "Absence without leave seriously impacts on operational effectiveness….Sentencing should reflect this and provide an effective deterrent…."** **The entry point on a contested case is nine months' detention.** **No basis was made out for interfering with the sentence of " the specialist court."** **Other cases on the specialist nature of the Court Martial, which are summarized here: Love, Mckendry, Lyons, Rheines, Downing, Glenton, Capill, Foley, Cross, Calverly, Coleman, Simm and Tennet,Townshend, Ndi, Bailey, Bagnall, Ashworth and Cruise-Taylor.** **The following authorities deal with the specialist/expert status of the court in dealing with the sentence of dismissal: Downing, Birch, Limbu, Price and Bell, Townshend, Coleman, Ndi and Bailey.**

R v Garry Charge: The Appellant was charged with inflicting grievous bodily harm, contrary to s20 OAPA 1861 and was found not guilty but guilty of assault occasioning actual bodily harm, contrary to s47 of the 1861 Act.	Date of judgment: 11 11 2014. Sentence: 18 months' detention and reduced from Sergeant to Corporal.	**Coram: Rafferty LJ** **Simler J.** Facts: The Appellant (G) was 40 and well regarded in his Regiment. His wife was drinking heavily but G had got on top of his own drinking. He and his wife had a violent argument about whether they should apply for a posting to this country from Paderborn. He felled her with a punch and kicked her three or four strong kicks to her lower back. He had not assaulted her before. She did not see a doctor at the time. Their two year old child was present and very upset. A social worker saw Mrs G the next day. She was drunk. She made a complaint and showed her injuries.Later that day the hospital found bruising and 3 or 4 broken ribs.	**JA at first instance: Judge Large, Deputy Judge Advocate General, Assistant Judge Advocate General as he then was.** **G appealed his conviction on the basis that the judge advocate was wrong to allow the complainant to be treated as hostile and a conviction based on a statement that the complainant did not adopt was unsafe.** **Held: "The judge was best placed to assess Mrs Garry's demeanour, attitude and response to questions from whichever party. We struggle to see why it was an error to permit the Crown to treat her as hostile. That is an exercise of discretion and nothing before us suggests the exercise of it was flawed."** **The first statement was a detailed account of what the complainant said took place although she did not want G to be prosecuted, and the injuries were seen close to the incident by a social worker to whom a complaint was made the day after the alleged assault. She had never withdrawn her detailed statement or said it was untrue, only indicated that she had been drunk and could not remember what happened when she gave evidence in court. The conviction was not unsafe.** **Appeal sentence.** **Held: The Court Martial were right to regard this as a Category I offence as a shod foot was used as a weapon and the injuries were serious in the context of assault occasioning actual bodily harm. The CMAC went on to say: "In our judgment the court demonstrated clemency. It was astute to the difficulties endured not just by Mrs Garry but by a little girl still very young. The applicant, in our judgment, could not have complained had the loss of liberty been longer and there was never any question of its being capable of suspension, given the injuries inflicted."**

		At trial Mrs G said that she could not remember what had happened, as she was drunk, and was treated as hostile and two statements one made at the time, and the other made about four months later, were put to her but not adopted, as she said she was so drunk that she could not remember. She did not say her detailed account given very soon after the incident was untrue. The Appellant said his wife was so drunk the night before the incident that she urinated on her pants and on the day of the incident he said that she had defecated in bed, he had cleaned her up and she had wiped faeces on him. About an hour later he returned to check her and found that she was not breathing. He had opened her mouth to clear her airways and she bit him and then attacked him He had only defended himself.	

R v Glenton Charge; Absence without leave s38(a) Army Act 1955.	Date of Judgment: 21 4 2010. Sentence: 9 months' detention and reduced to the ranks, (from Lance Corporal).	**Coram: Judge CJ, Clarke and JonesJJ** Facts: The Appellant (G) was a highly regarded Lance Corporal who had performed very well on operations in Afghanistan. Under the Harmony Guidelines he ought not to have deployed on ops again for 18 months but because of manning difficulties he was on the ORBAT to deploy after nine month. He went absent on the last day of his pre-deployment leave and went to Australia where he had married. Two years and six days later he surrendered. A psychiatrist instructed by the defence concluded that G suffered from PTSD both when he went absent and when he was before the court.	**JA: Judge Peters.** **Appeal sentence.** **Held: "…a civilian who goes absent from his job does not commit a crime. Members of the forces who go absent without leave do. That is the crucial distinction which illustrates why the Court Martial must be treated as a specialist criminal court."** **CMAC approved and applied "Guidance on Sentence in the Court Martial", Version 2, in respect of sentence for absence without leave. The guidance remains unchanged in the current version, Version 6. The appeal was dismissed, and CMAC observed that but for the mental health difficulties from which G suffered the sentence would have been substantially longer.** **The following authorities on the specialist/expert status of the Court Martial are summarized in this guide: Love, Mckendry, Lyons, Rheines, Downing, Cross, Capill, Foley, Calverly, Coleman, Simm and Tennet, Townshend, Ndi, Bailey, Ashworth, Bagnall and Cruise-Taylor.** **The following authorities deal with the specialist/expert nature of the court in the context of the sentence of dismissal: Downing, Birch, Limbu, Price and Bell, Townshend, Coleman, Ndi and Bailey.**

		An army psychiatrist diagnosed adjustment disorder and substance abuse as the cause of G's problems. The PSR indicated that G had found it difficult to adjust from operations to life in camp and felt out of his depths as a newly promoted Lance Corporal. He felt he had been targeted and bullied and not supported by the chain of command. The PSR concluded that he was likely to go absent again. His wife was standing by him.	

R v Gray Charges: The Appellant faced 13 essentially identical counts in respect of termly claims for boarding school fees, phrases as fraudulent misrepresent-ation contrary to s3 of the Fraud Act 2006. He was convicted of nine counts running from July 2008 to March 2010 but acquitted of the first four counts between December 2007 and March 2008.	Judgment date; 2 2 2012. The sentence was not appealed and does not appear from the transcript.	**Coram: Hughes VP, Field, Beatson JJ.** Facts: The relevant facts related to whether a mixed verdict, when the sole issue was dishonesty, was inconsistent demonstrating a flawed approach or whether the board were entitled to reach different decisions on different counts. The facts are set out in the summary of CMAC's reasons for dismissing the appeal.	**JA at first instance: Judge Mcgrigor.** **Appeal against conviction on the basis that the verdicts were inconsistent on the sole issue of dishonesty.** **The Appellant (G) and his wife separated in July 2007. The Appellant could only continue to receive an allowance towards boarding school fees (Continuity of Education Allowance/ CEA) if he was living with his wife and children, or would have been but for his service commitments, or if as a single parent he maintained a home where his children normally lived and from which he travelled to duty, or would have done but for a posting, or if he is "the centre and prime mover in the life of the child", essentially the "primary carer."** **In an e-mail he asked an officer whose job it was to deal with allowances if he could continue to claim CEA after he separated in July 2007, and his e-mail went on to ask, "I can continue to claim CEA as long as I am financially responsible for the children…and maintain a family home?" He received a reply, "Sir, this is absolutely correct".** **In his sentencing remarks the Judge Advocate said, "The court concluded that although you wrongly thought you were entitled to the allowance from July 2007 until March 2008, you were not dishonest as you could reasonably have been expected to rely on that guidance, but by April 2008, when financial negotiations with your wife had broken down and you were paying CSA payments [the transcript says "CEA payments" but this must be an error] for your daughter, you knew full well that you should have applied for an exceptional authority to continue to claim CEA. Your failure to do so was dishonest…"** **The CMAC held that the CSA (Child Support Agency) payment was the watershed after which G must have known that his former wife was seen as the "person with care" and he was the "non-resident parent". The CMAC held that, "… the question is whether that was a legitimate basis on which the board could conclude that whatever doubt there might be about the dishonesty of the defendant until that point, [April 2008] it was sure he was guilty once he was making that [CSA] payment. We are quite sure the board was entitled to make that distinction."**

Grieves v UK Charge: wounding with intent contrary to s18 OAPA 1861.	Date of Judgment: 16 12 2003 on the same day as Cooper-see above. Sentence: Three years' imprisonment, dismissal from Her Majesty's Service, reduced to able seaman and ordered to pay £700 to the complainant as compensation for personal injury.	**Coram: Wildhaber, President, UK Judge- Sir Nicholas Bratza KCMG, QC, subsequently President of the Court, and 15 other Judges.** The facts are not set out as the Appeal related to whether a naval Court Martial complied with Article 6 of the Convention for the Protection of Human Rights and Fundimental Freedoms (ECHR).	**JA at first instance Commander Flannagan, Royal Navy.** **Held: At an army and air force Court Martial the Judge Advocate was an independent civilian judicial officer appointed by the Lord Chancellor whose pivotal role, similar to that of a Crown Court judge at a trial on indictment, "…constitutes not only an important safeguard but one of the most significant guarantees of the independence of the Court Martial proceedings." – see Cooper v UK, above, paragraph 117, which was decided on the same day as this case.** **At a naval Court Martial the Judge Advocate "… is a serving naval officer in a post which may or may not be a legal one and who although ticketed indefinitely, sits in Courts Martial only from time to time… the Judge Advocate of the Fleet (JAF) has no input into naval Court Martial proceedings, his principal role being to report to the Reviewing Authority [who could quash the conviction, in which case there might be a re-trial, or reduce the sentence]. Further, it is not JAF but the Chief Naval Judge Advocate (CNJA), a naval officer, who is responsible for the initial ticketing of a Judge Advocate (albeit with the agreement of the JAF)…The JAF could pass comments about a Judge Advocate's Court Martial performance to the CNJA. It may be that the CJNA had no control over promotions but the CNJA remained a senior service officer whose main functions included the appointment of legally trained service officers to legal posts in the service and who was answerable as regards those duties to the senior Admiral responsible for personnel policy. In addition, at the relevant time, the JAF's report on a judge advocate's could be sent to his service reporting officer.…For these reasons, the Court considers that even if the naval Judge Advocate appointed to the applicant's Court Martial could be considered to have been independent despite the reporting matters highlighted [above] the position of the naval Judge Advocate cannot be considered to constitute a strong guarantee of the independence of a naval Court Martial."**

			<u>Comment</u>: As a result of this judgment the Judge Advocate General took over providing judicial officers for naval Courts Martial. The Rules of Procedure were amended so that the Judge Advocate presided over the court as in the RAF and army Court Martial system, the appointment of CNJA was discontinued and the Judge Advocate General also became the Judge Advocate of the Fleet. Some of these changes were effected by The Naval Discipline Act 1957(Remedial) Order 2004 SI 2004 No. 66, under the procedure designed to amend legislation found by the European Court of Human Rights not to comply with ECHR, and provided for in the Human Rights Act 1987 s10(2), and Sch 2, paras (1)(1)(a), 2 and 3.

Gunn v Service Prosecuting Authority Charge: Battery contrary to s39 Criminal Justice Act 1988.	Judgment date: 3 9 2019. Sentence: Reduced from Sergeant to Corporal.	**Coram: Gross LJ, McGowan and Butcher JJ.** Facts: As the case relates to the constitution of the court the facts are not set out.	**JA at first instance: Judge Mcgrigor.** **The Appellant was offered the opportunity of being tried by a Court Martial composed of air force personnel but, to suit his then counsel's diary, agreed to be tried by an army court.** **AFA 2006 s154 provides that the Court Martial consists of a judge advocate and at least three, and in some cases up to seven, lay members, who must be officers or warrant officers. No limitation is made as to which service the lay members should be drawn from; they can come from "any of Her Majesty's Forces". However, the Queen's Regulations (QRs), a statutory instrument made under the act which set up the air force, the Air Force Constitution Act 1917, s2(1), provide that , " A service defendant will ordinarily be tried by lay members of wholly his own service".** **The Appellant argued that an Army Court Martial had no jurisdiction to try the Defendant in breach of subordinate legislation.** **Held: "Ordinarily" does not mean "invariably" and we are unable to construe this sentence as a mandatory rule which must be followed in all cases. Still less does [this] mean that a board not comprised from the same service as the defendant is invalidly constituted and lacks the jurisdiction to proceed…and there is no foundation for any such implication….In an appropriate case (where no specialist single service knowledge is required) the need for timely Court Martial proceedings may outweigh the desirability of following the ordinary same service practice …"** **The CMAC held that the case "…was one of the simplest fact - was a battery proved against the Appellant to the criminal standard? This issue required no specialist knowledge whatever, in stark contrast to a case where such knowledge might be required (eg, as to the technical details of aircraft or vessels) where the advantages of the usual practice are eminently apparent…" The court held that the Appellant sustained no prejudice at all by being tried by an army board.**

R v H Charges: Burglary of the camp shop, with intent to steal, s.9(1)(a) Theft Act 1968 and disobedience of a lawful command not to drink contrary to s12 AFA 2006.	Date of judgement: 30 7 2018. The prosecution appealed the Judge Advocate's ruling staying these proceeding as an abuse.	**Coram: Simon LJ, Picken and Knowles JJ.** Facts: The appellant (H) had been ordered not to drink but got drunk and broken into the camp shop where he had put some 600 cigarettes in a bag on a ledge by the window. The Force Commander gave him what the CMAC described as a "three part sanction" namely nine days' extra duties, confinement to camp and withdrawal of adventurous training, including white water rafting and a visit to a safari park. H gave evidence that he thought this was a punishment as the officer told him it was. He thought that sanction meant "punishment". The officer said these were steps to prevent him getting drunk or in trouble during the remainder of the exercise despite the fact that he would be under close supervision at the safari park for example.	**JA making the contested ruling: Judge Camp** **The measures were steps taken to control the defendant's conduct similar to bail conditions rather than being a punishment, and it was accordingly wrong to hold that the Defendant by being made subject to the three-part sanction, had been punished twice for the same conduct, despite the fact that the word "sanction" means, according to the Cambridge Dictionary, to punish someone for disobeying a law or rule and extra duties are normally seen as an informal punishment. Accordingly, the judge was wrong to stay the proceedings and the court reversed the order that the proceedings be stayed under the powers conferred by Articles 7 and 8 of the Court Martial (Prosecution Appeals) Order, 2009.**

R v H & J Charge: Conspiracy to fraudulently evade duty contrary to s1 Criminal Law Act 1977.	Date of judgment: 24 10 2019.	**Coram: Simmon LJ Davis and Jefford JJ.** The facts are not set out as this appeal concerns the power of the court to dismiss proceedings at the outset.	**JA at first instance: HH Judge Blackett, Judge Advocate General.** **This was an appeal against a preliminary ruling. The Court Martial Appeal Rules 2009, Rule 44, provides that CMAC may confirm, reverse or vary any order or ruling made at preliminary proceedings. This rule derives from s163(3) AFA 2006 which enables the Secretary of State to make rules, concerning, inter alia, appeals against orders or rulings made in preliminary proceedings.** **The Judge Advocate ruled that the power to dismiss under Sch 3, para 2 to the Crime and Disorder Act 1998, in the Crown Court, could not be imported into the Court Martial under Rule 26, of the Court Martial Rules 2009, which provides that subject to any other enactment and the Court Martial Rules the judge advocate "… shall ensure that that the proceedings are conducted in such a way as appears to him to most closely to resemble the way in which comparable proceedings in the Crown Court would be conducted in comparable circumstances, and if he is unable to determine how comparable proceedings would be conducted… in such a way as appears to him to be in the interests of justice."** **Held: Contrary to the judge advocate's ruling, Rule 25(3) of the Court Martial Rules 2009 did not provide a free standing power to terminate the proceedings, because the power must be looked at in its context in a rule dealing with essentially administrative issues, and where it is provided specifically that any such ruling is no bar to proceeding afresh. However, CMAC concluded that there was no reason why a service Defendant should be deprived of the right to make an application to dismiss the charge or charges against him when there is insufficient evidence and this should be done by importing a procedure comparable to that in the Crown Court, under the second limb of Rule 26.**

R v Henderson Charge: attempted grievous bodily harm with intent.	Judgment date: 29 01 2014. Sentence: Five years' imprisonment and dismissal from Her Majesty's Service.	**Coram: Hallett V-P, Silber and Lewis JJ**. Facts: The Appellant (H) was convicted after a trial. He was a man of good character who had served with courage in Afghanistan and was regarded by his CQMS as "head and shoulders above the other men in his platoon". Whilst drunk H had armed himself with an iron which he had heated for the purpose of attacking the complainant (W). H went to W's room where he was in bed with a girlfriend. H made a determined effort to get in and as W opened the door, he hit him in the face twice with the iron causing a very nasty burn. It took nearly two months to heal and left a permanent but not particularly noticeable scar.	**JA at first instance: Judge Camp.** **H appealed his sentence.** **Held: It was common ground that this was a Category two case under the Sentencing Council Guidelines with a start point of six years in a range of five to nine years. The issue was where the sentence fell in the scale.** **The aggravating factors were that H, in drink, had heated the iron to commit the assault, he hit W twice and as the court observed, W could have been killed or scarred for life. W was potentially vulnerable as he was in the sanctuary of his room in bed with a girlfriend. Given the seriousness of the injuries, H was fortunate not to be charged with the full offence.** **The mitigating features were that H was only 24, of good character and had glowing references. He was remorseful and he had been prepared to plead to ABH.** **Balancing this mitigation against the aggravating circumstances the sentence was one which was open to the Court Martial.** **<u>Comment</u>: This phrasing rather suggests that, whilst the sentence was not wrong in principle or manifestly excessive, the court would have themselves passed a lower sentence, and had some sympathy with the submission that more credit could properly have been given to the mitigation available to this brave soldier who would also lose his career to which he was devoted.** **The court approved the following passage in the then "Guidelines for Sentence in the Court Martial" which is repeated unchanged in the current version- the 6th edition, "Deterrent sentences are often necessary particularly when violence is associated with excess alcohol". On this principle, see also R v Bagnall above.**

		W found the pain almost unbearable. There was no explanation save that H found W irritating. H had apologized and they had been out for a drink together. H had had a drink problem since his return from Afghanistan.	

R v Heslop Charge: Convicted after a trial of assault by penetration contrary to s2 SOA 2003.	Date of judgment: 10 11 2016. Sentence: Seven years' imprisonment, dismissal with disgrace and reduction to the ranks.	**Coram: Hallett V-P, Holroyde and Whipple JJ.** Facts: The Appellant (H), a Lance Corporal of 24 with no relevant convictions came from a deprived and troubled background. She had served on three operational tours in Afghanistan and had volunteered to assist in the Ebola crisis when she put herself in grave danger. She had glowing references as a soldier and mentor to those junior to herself. The army had become her family and she was going to lose that. She kept her drinking measured and got the complainant (A), a private soldier, drunk. They went to A's room in barracks and H removed A's clothing below the waist, and penetrated her with four fingers, causing bleeding and pain, whilst she was asleep.	**JA at first instance: Judge Large, Deputy Judge Advocate General, Assistant Judge Advocate General as he then was.** **Appeal against sentence.** **Held: The Court Martial had correctly concluded that this was a Category 2 case under the Sentencing Council Guidelines because four fingers were a large object, she had gone into A's room, where A should have been safe, uninvited and A was so drunk that she was particularly vulnerable. In terms of culpability, the case fell into Category B because there were no Category A features. Accordingly, the start point was six years in a range of four to nine years. The Court Martial was right to increase the start point to seven years to reflect the seriousness of H's breach of trust and A's vulnerability, but was wrong to set the significant mitigation off against the fact that H had been drinking as this was factored in as part of the deliberate targeting of A by going on a drinking spree and in any event this could not outweigh the mitigation available to her. Accordingly, the mitigation should have reduced the sentence to six years. Reduction to the ranks and dismissal with disgrace stood unchanged.**

		A woke up and saw H between her legs with her hand and mouth covered with blood. The Board found that H had done this when A had not consented and was not capable of consenting.	

R v Jones and Miszczak CA (Criminal Division) Charge: Violent disorder, s2 POA 1986.	Date of judgement: 30 9 19. Sentence: 4 years' detention.	**Coram; Coulson LJ, Cheema-Grubb and HH Judge Chambers QC.** The Appellant played the leading role in a group attack where two knives were used against party goers in a garden who did not retaliate.	**Court at first instance: Isleworth CC.** **Judgment: The Defendant was 17 at the time of the offence and just over 18 at the time he fell to be sentenced. Had he been sentenced as a 17-year-old the maximum sentence would have been a Detention and Training Order for 24 months. Applying the Sentencing Council Children and Young People Definitive Guideline, para 6.3, where it is stated that, "Where any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time of the offence should be imposed, however, a sentence at or close to the maximum may be appropriate", the court reduced the sentence to 24 months' detention in a Young Offender Institution."**

R v Knock Charges: Forgery x 5 contrary to s1 Forgery and Counterfeiting Act 1981 and using a false instrument x 5, contrary to s3 of the 1981 Act.	Date of judgment: 3 10 2014. Appeal against ruling that the appellant be refused leave to vacate her plea.	**Coram: Treacey LJ, Turner and Jay JJ.** Facts: The appellant, a TA Lieutenant Colonel, who was deployed to Afghanistan made false claims amounting to about £7,000 over a period of two years.	**JA at hearing: Judge Camp.** **Held: Because the Appellant was represented and the factual basis of plea had been fully explored in her presence, she could not now argue that she had not thought that the forged documents would be relied on by the authorities in processing her claim and the court "… could see no basis whatsoever for criticizing the decision made by the Judge."**

R v Limbu Charges: The Defendant pleaded to two charges of assault occasioning actual bodily harm and one charge of common assault on his wife.	Date of judgment: 3 4 2012. Sentence: six months' detention on each count of assault occasioning actual bodily harm, concurrent with one month for the common assault, also concurrent, and dismissed and reduced to the ranks.	**Coram: Rafferty LJ, Griffith Williams and Burnett JJ.** Facts: A corporal heard screaming and a child screaming "Mummy" from the Appellant (L's) quarter and looked through the window, and saw L punching his wife. The corporal banged on the door and said she had called the police, after about five minutes L opened the door and said, "Nothing wrong no problem". Mrs Limbu was cowering in a corner weeping and the corporal took her and the little girl home with her. L entered his plea on the basis that he had confronted his wife because he thought she was having an affair because she had a new ring on her wedding ring finger. He tried to pull it off she hit him on the chest and he hit her twice on the left shoulder with his daughter's toy guitar,	**Appeal against sentence.** **The appeal was directed against the dismissal element of the sentence which would cause L to lose some £170,000 in pension benefits.** **Held: The Court Martial was scrupulous to consider the financial consequences of the sentence and to correctly apply the Sentencing Council Guidelines and the Guidance for Sentencing in the Court Martial. The sentencing remarks were careful, full, applied themselves to appropriate authority and were squarely couched within the legal framework. The court reminded itself of the respect that should be paid to a Court Martial as a specialist criminal tribunal. "We are acutely conscious of the loyalty shown both by soldiers and by those who, at home support them. The military remains entitled to form its own view of whether, in that broader context, it wishes to retain a soldier."** **See the following authorities on the specialist/expert status of the Court Martial: Love, Mckendrick, Glenton, Lyons, Downing, Glenton, Capill, Cross, Coleman, Foley, Calverly, Simm and Tennet, Townshend, Ndi, Bagnall, Bailey, Ashworth, Price and Bell and Cruise Taylor. The following cases deal with the specialist/expert status of the Court Martial in the context of the sentence of dismissal: Downing, Birch, Limbu, Price and Bell, Townshend, Coleman, Ndi and Bailey.**

		and took her by the wrists and held her down.She sustained a bruise on her left shoulder and other relatively minor injuries. When Mrs Limbu saw the police about this matter she reported two earlier incidents, one two years or so previously when L hit her with an open hand, because he suspected her of being unfaithful, causing a heavy nose bleed and the other when the little girl was 2 or 3 and he slapped Mrs Limbu in front of her. L had been convicted, in the Magistrates' Court, since the Court Martial, of common assault on his wife and a restraining order had been made. Mrs Limbu and his daughter had left L and he had no contact with his wife or daughter. He had done very well whilst serving his sentence.	

R v Love Charges: Two charges of sending indecent or obscene material through the post contrary to s 11(2) Post Office Act 1953.	Date of judgment: 3 12 97. Sentence: This Staff Sergeant RMP was dismissed and reduced to the ranks.	**Coram:Simon Brown LJ, and Rougier and Astill JJ.**	**JA at first instance: Judge Pearson** **As the offence creating statute has been repealed and the matter would now be dealt with in a different way, this case is summarized in relation to the approach of the CMAC on sentence.** **This was one of the first cases when CMAC heard an appeal against sentence from the Court Martial.** **The CMAC held "…whilst free and intended by Parliament to correct any injustice which we perceive in a Court Martial sentence, we must be mindful that those imposing and confirming such sentences are, generally speaking, better placed than we are when when it comes to assessing the seriousness of offending in the context of service life, and deciding what particular penalty is required to maintain the discipline and efficiency of the armed forces."** **On the specialist/expert status of the Court Martial see also: R v Mckendry, R v Lyons, R v Glenton, R v Rheines, R v Dowding, R v Cross, R v Capill, R v Foley, R v Calverly, R v Coleman, R v Simm and Tennet, R v Townshend, R v Ndi, R v Bailey, R v Bagnall, R v Ashworth and R v Cruise-Taylor.** **On the specialist/ expert status of the court in respect of the sentence of dismissal see: R v Dowding, R v Birch, R v Limbu, R v Price and Bell, R v Townshend, R v Coleman, R v Ndi and R v Bailey. The citations for these authorities are set out at the head of this Guide and they are summarized here.**

R v Lyons Charge: Disobeying a lawful command in that he failed to draw his weapon from the armoury and undergo weapons training when ordered to do so, contrary to s12(1)(a) AFA 2006.	Date of reasons being given: 1 12 2011, the appeal having been dismissed on 3 10 2011. Sentence: to be dismissed, reduced in rate from Leading Medical Assistant to Able Seaman and to undergo detention for seven months.	**Coram: Toulson LJ, Openshaw and Hickinbottom JJ.** Facts: The Appellant (L) felt that having applied for discharge on conscientious grounds namely that it was morally wrong to serve in Afghanistan, his application having been refused by the Deputy Director Naval Personnel and his appeal to the Advisory Committee on Conscientious Objectors not having been disposed of, that he ought not to be required to undertake weapon training until his appeal had been determined. The appeal was subsequently resolved against him, the chairman being HH Judge King, formerly an Assistant Judge Advocate General. The Secretary of State accepted the committee's opinion.	**JA at first instance: Judge Mcgrigor.** **Comment : Unlike the war in Iraq which, some, including Lord Bingham, KG, PC formerly Master of the Rolls, Lord Chief Justice and Senior Lord of Appeal in Ordinary, considered unlawful, the British and American forces were in Afghanistan at the express invitation of the Afghani government and it is submitted that it is difficult to see how this deployment could be considered unlawful.** **The Judge Advocate withdrew the Appellant's defence from the lay members in these terms:** **"His application to be recognized as a conscientious objector had recently been rejected. Nevertheless, he saw himself as a conscientious objector. He was in the process of appealing this rejection. Further, he considered the order to undergo weapon training was a combat activity linked to his pending operational deployment which would detract from his application to be recognized as a conscientious objector and therefore he was entitled to refuse the order. As a matter of law I direct you that such a refusal on that basis by the Defendant is not a defence in law to a charge of disobedience to a lawful command."** **Grounds of Appeal.** **Ground 1.** **It was submitted that forcing L to continue to serve interfered with his rights under Article 9, European Convention on Human Rights, which guarantees "the right to freedom of thought, conscience and religion subject to necessary limitations for public safety, protecting public order, health or morals or the protection of the rights and freedoms of others."** **Held: In Bayatyan v Armenia (application no. 23459/03, 7 July 2001) it was held that although " … Article 9 does not explicitly refer to a right to conscientious objection but "… opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience, or his deeply and genuinely held religious or other beliefs… [can] attract the guarantees of Article 9."**

			CMAC held that the Crown were right to concede that Article 9 applied to a volunteer who changed his mind just as it did to a conscript with a conscientious objection from the start. However, L remained subject to the voluntary responsibilities he took on when he joined the navy whilst the issue of whether he could be discharged on conscientious grounds was resolved. **Ground 2.** **It was also argued that as a medical assistant, under the Geneva Conventions of 1949 and 1977, L was a protected person who could only carry and use a weapon to protect himself and the wounded and sick in his charge. This was permissive and to require a medic to undergo weapons training was unlawful.** **Held: Since medical personnel would need weapon training to protect themselves and their patients effectively and safely, if it became necessary, it was military policy that medical personnel should have such training. The need for the policy is obvious, but it is not for the court to judge unless there is an arguable basis for saying that this policy was unlawful, which, in this case, would be a "… proposition for which there is no basis."** **Ground 3.** **L did not have to obey an order which he believed to be unlawful.** **Held: There were no grounds for reading this requirement into the section. The services depend on lawful orders being obeyed. L was ordered to undergo skill at arms training on his personal weapon so he could use it effectively and safely to defend himself and/or the sick and wounded in his charge if his claim to be a conscientious objector was rejected and he served on operations in Afghanistan.** **Quite different issues might be raised if he had been ordered to do something he believed to be a war crime.**

			Appeal Sentence. **The then guidelines dealt with everyday comparatively minor breaches of discipline which usually attract a charge such as this. They have been revised, in version 6, to have regard to cases such as this which strike at the heart of military discipline. They then suggested an entry point of 60 to 90 days detention and reduction. It was submitted that a sentence of more than twice the suggested top of the range combined with dismissal, which was not envisaged by the guidelines, was wrong in principle or manifestly excessive. The court rejected that submission adopting the judge advocate's reasons for sentence and for concluding that the sentence must fall outside the usual range. They supported the sentence, adopting the reasons set out by the judge advocate. They are summarized here:** **Having considered the matter in advance the Defendant deliberately disobeyed an order;** **He did not reconsider this over a period of about four hours before he was ordered into arrest;** **L knew that he would not be able to deploy if he had not completed training on his personal weapon;** **He knew that another medical assistant would have to go in his place, possibly at short notice or in breach of the harmony guidelines. These provide that personnel should not normally deploy on operations without a significant gap between tours.** **Others would see him avoiding duty in a place of danger. "The service bond is all about the equal sharing of risk and danger so such behaviour has real potential to affect operational effectiveness";** **Service personnel cannot pick and choose what operations and orders they will carry out;** **L was a leading hand who should have set an example.**

			Little weight was placed by the Court Martial on the fact there was only one disobedience. Once he had refused to train on his weapon he had rendered himself undeployable and had achieved his aim not to serve on operations in Afghanistan. **Comment: He could not serve on operations anywhere without completing his weapon training.** **A deterrent sentence was necessary to discourage others from behaving in this way.** **The CMAC said the Court Martial "…clearly took a grave view of the offence for reasons it explained. It was entitled to take that view. In particular, the Board was in a far better position than this court to assess what it described as the corrosive effect on morale and the potential to affect operational effectiveness of the Appellant's conduct. It was entitled to take the view that the Guidance on Sentencing was inadequate in this case."** **Other cases on the specialist/expert status of the Court Martial, which are set out in this guide: R v Love, R v Mckendry, R v Downing, R v Glenton, R v Cross, R v Foley, R v Capill, R v Caverly, R v Coleman, R v Simm and Tennet, R v Townshend, R v Ndi, R v Bagnall, R v Bailey, R v Ashworth and R v Cruise-Taylor.** **R v Downing, R v Birch, R v Limbu, R v Price and Bell, R v Townshend, R v Coleman, R v Ndi and R v Bailey deal with the expert/specialist status of the Court Martial in the context of imposing the sentence of dismissal.**

R v Martin Charges: two charges of absence without leave contrary to s9 Armed Forces Act 2006.	Date of Judgment: 9 December,2007. Sentence: six months' detention.	**Coram: Hughes LJ, Wilkie J.** Facts: the appellant was 26 and re-enlisted for the second time in August 2006 as an infantry soldier and was still in Part 1 training. He went absent after Christmas leave. He was arrested after 6 months but then given leave to attend court for a hearing relating to contact with his children but did not return and was arrested having been absent for 230 days in all.	**Judgment: The sentence was upheld. The court relied on and approved the sentencing factors set out in the then "Guidance for Sentence in the Court Martial" for this offence which are effectively identical to those in the current Guidelines.**

R v Mckendry Charge: Absence without leave contrary to s.38 Army Act 1955.	Date of judgement: 20 2 2001 Sentence: Reduced to the ranks and 265 days detention.	**Coram: Judge LJ, and Cresswell and Ousley JJ.** Facts: At a time when the Appellant was having marital difficulties and facing allegations of theft which turned out to be unfounded, the Appellant met a nurse and went absent at the end of Christmas leave to be with her surrendering after one year, eight months and three weeks.	**Judge Advocate at first instance; Judge Pearson.** **The court rejected the sole ground of appeal, namely that the three services adopted a different approach to sentencing absentees holding that, "It would be entirely inappropriate for the Courts Martial Appeal Court to endeavour to impose some standard policy on all three branches of the armed services…" and, "We adopt rather the contrary approach. Unless it is plain that there is a real injustice or unfairness being caused, when, of course, this court would interfere, it would be appropriate for great weight to be attached to the differences that exist between the experience and needs of the different branches of the armed services."** **The Court adopted the dicta in R v Love [1998] 1 Cr App R 458, that those imposing sentences in the armed services "…are particularly well placed and indeed better placed than this court in assessing the seriousness of offending in the context of service life."** **On the specialist/expert status of the Court Martial see also: R v Lyons, R v Glenton, R v Capill, R v Cross, R v Foley, R v Calverly, R v Coleman, R v Townshend, R v Ndi, R v Simm and Tennet, R v Bailey, R v Bagnall, R v Ashworth and R v Cruise-Taylor. These authorities are summarized here and their citations are set out at the head of this Guide.** **For the specialist/expert nature of the Court Martial when imposing sentences of dismissal see R v Dowding, R v Birch, R v Price and Bell, R v Townshend, R v Coleman, R v Ndi and R v Bailey. The citations for these authorities are also at the head of this Guide and they are summarized here.**

R v Melia Charges: Plea of guilty to four charges of failing to prevent assaults taking place on different marines as part of an initiation ceremony, contrary to s15(1)(c) AFA 2006.	Date of judgment: 8 3 2018. Sentence: The Appellant, a Sergeant, was sentenced to four months' imprisonment suspended for one year, dismissal and reduction to the ranks.	**Coram: Hallett LJ, and Goss and Andrew Baker JJ**. Facts: The Appellant (M) was a highly regarded senior rank who had just been posted to the unit. He had gone to the company bar for a party and after the other senior ranks had left, he failed to prevent assaults on junior marines for the entertainment of the 30 odd marines left in the bar, by other junior marines "reefing" them that is to say striking their naked backsides with a two foot long wrist support causing bruising and some bleeding. M made some attempt to ensure that the complainants were genuinely consenting and offered to help one of them make a complaint. He had just returned from an operational tour and was genuinely remorseful.	**JA at first instance: Judge Hill.** **Appeal against sentence.** **Held: The court approved the then "Guidelines for Sentence in the Court Martial" in respect of this offence, which suggested loss of rank and detention not imprisonment for more serious offences. The current Guidelines (Version 6) are in similar terms. The court was of the view that given M's limited role, his mitigation and the fact that some Corporals were present and had not been charged, a sentence nearer the bottom of the range would be appropriate. Dismissal, reduction and the suspended sentence were quashed and a severe reprimand was imposed to reflect the delay, the fact that M had been out of the service for some time and this whole event had had a significant adverse effect on his life.** **<u>Comment</u>: A suspended sentence of detention has no teeth if a Defendant is being dismissed, he cannot be tried for any future offence by Court Martial and the civilian courts cannot bring a suspended sentence of military detention into effect.**

R v Moffat Charges: Having a firearm with intent to cause another to believe that violence would be used against himself or another contrary to s16A, Firearms Act 2006.	Date of judgement: 7 2 2014. Sentence: 3 years' imprisonment and dismissal.	**Coram: Pitchford LJ, Wilkie and Patterson JJ.** Facts: The appellant (M) was a leading seaman aged 45. Five years previously when M's wife had a very difficult labour he had not been with her because of the requirements of the navy. He had again been recalled to his ship at short notice when his wife was at an advanced state of pregnancy and he felt under pressure not to let the same problem arise again and no-one would assure him that he would be allowed leave. The day before the offence he went ashore and, whilst in a bar, in Lisbon, where the ship was alongside, he told an officer, whilst in an overwrought state, that if he could not get home, he would have to get a gun. The following day he drew a weapon and ammunition and went to see the second in command, Lieutenant Commander Williams,	**JA at first instance Judge Hill.** **Held: The analysis of this offence and this offender in the Judge Advocate's sentencing remarks were unimpeachable, but the court made insufficient allowance for the fleeting nature of M's loss of judgment against the background of his mental condition and his being away at the birth of his first child and concluded that there was no purpose in keeping M in custody longer than absolutely necessary so substituted a sentence of 14 months which would result in his almost immediate release. The sentence of dismissal stood.**

		and in an angry state said ”This is a loaded rifle, you know what that means; I want to talk to you.”The officer who, acting with what the court described as “striking calm and authority”, asking M that a woman officer be permitted to leave. She left, the officer told M to give the rifle to another rating, which he did. He then dissolved into tears and capitulated almost immediately. The weapon was not loaded and not pointed at anyone. The court found that M had no evil intent and was overwrought. A naval consultant psychiatrist found that M was suffering from an adjustment disorder and acted completely out of character and had no intention of using the rifle and posed a low risk to others. M was highly regarded. During 25 years’ service he was said to have been “…the epitome of steady reliability, honesty and commitment.”	

Morris v UK Charge: Absence without leave, 38(a) Army Act 1955.	Date of Judgement: 26 2 2002. Sentence: Dismissal from Her Majesty's Service and detention for nine months.	**Coram: Costa, President, UK Judge- Sir Nicholas Bratza, KCMG, QC and six other judges.** The facts are not set out as the case concerned whether the Court Martial was an independent and impartial court compliant with Article 6 ECHR.	**The ECHR held that the changes brought about by AFA 1996 since Findlay v UK, summarized above, "…have gone a long way to meeting its concerns". Now that the Court-Martial Administration Office, the forerunner of the Military Court Service, appointed the lay members of the court instead of a convening officer appointing officers from his command, "…the Court concludes that the manner in which the applicant's Court Martial was appointed does not in itself give rise to any lack of independence in that tribunal for the purposes of Article 6(1) of the Convention."** **However, there was insufficient protection for the two junior members from external army influence unlike with a jury in the Crown Court.** **<u>Comment</u>: It was not drawn to the ECHR's attention that to try to influence members of a court would amount to conduct to the prejudice, contrary to s69 Army Act 1955 or perverting the course of justice.** **As a result of this case fuller briefing notes were produced for the members emphasizing that the members must not discuss the case outside their number, the Queen's Regulations were re-drawn to forbid any report on an officer's decisions at a court and the Judge Advocate gave a direction about this at the start of each trial. In Cooper, summarized above, ECHR concluded that there were sufficient guarantees to ensure the independence and impartiality of the Court Martial.**

R v Mulgrew and Richards. Charges; The defendants faced joint charges of inflicting grievous bodily harm contrary to s18 OAPA 1861, with an alternative under s20 and a third joint charge under s47 alleging assault occasioning actual bodily harm.	Date of judgment: 4 10 12. Sentence was adjourned to allow an appeal.	**Coram: Rafferty LJ, Irwin and Nichola Davies JJ.**	**JA: Judge Large, Deputy Judge Advocate General, then an Assistant Judge Advocate General.** **The prosecution indicated that they would not invite a conviction unless the members were sure this was a joint enterprise revenge attack from the start unless in Mulgrew's case he had himself, with the requisite intent, stamped on the complainant's head (Charge 1 and the alternative in Charge 2).** **On charge 3 the prosecution invited an acquittal for Richards unless the lay members were sure that there was a joint enterprise revenge attack from the start, as otherwise it would not be possible to exclude self-defence. Accordingly, the judge advocate summed up on that basis in a way which CMAC said was "…clear, unimpugnable and unimpugned".** **It became apparent when the judge advocate retired with the members to consider sentence that the members had found the Defendants guilty on an entirely different basis namely that the complainants had been the initial aggressors and it was only then that the Defendants had engaged in a joint enterprise, and it was Richards not Mulgrew that did the stamping which would have required the members to be directed on self defence and the interaction between self defence and joint enterprise.** **Further, had the Defendants known the case they had to meet, their approach to the evidence in respect of blood stains would have been quite different.** **The CMAC Held that the convictions were not safe and were quashed.** **See also: R v Stables, summarized below, where the sentencing remarks were considered in deciding whether the conviction was safe. See also R v Twaite, below, where the Judge Advocate's discussions with the lay members about sentence brought to light difficulties in respect of the verdict.**

R v Ndi. Charge: Convicted after a trial of money laundering contrary to s328 Proceeds of Crime Act 2002.	Date of judgment: 24 1 2019. Sentence: dismissed and six months' detention.	**Coram: Davis LJ, Knowles and Yipp JJ.** Facts: The Applicant (N) had allowed his bank to be used for 25,000 euros to be fraudulently paid in, which he withdrew and gave to a man called Peter, who was the author of the fraud. N was of good character and his OC gave evidence that he had retained the trust of the chain of command and his skills were needed in the squadron.	**Appeal against dismissal only.** **The CMAC approved the "Guidance for Sentencing in the Court Martial", which said, as the current Guide does, that the start point for offences of dishonesty was dismissal. They adopted the dicta in Downing, summarized above that whether a serviceman could remain in the service was " …pre-eminently a matter for the Court Martial." N had not accepted responsibility for what he did and it was planned and there was no reason to depart from the start point in the Guide.** **On the specialist nature of the Court Martial see also: R v Love, R v Mckendry, R v Lyons, R v Rheines, R v Downing, R v Glenton, R v Capill, R v Cross, R v Foley, R v Calverly, R v Coleman, R v Simm and Tennet, R v Townshend, R v Bagnall, R v Bailey, R v Ashworth and R v Cruise-Taylor.** **R v Downing, R v Birch, R v Limbu, R v Price and Bell, R v Townshend, R v Coleman, and R v Bailey deal with the specialist/expert status of the Court Martial in the context of dismissal.** **These authorities are summarized here and their citations are set out at the head of this Guide.**

R v Nightingale Sentence appeal. Charge: Charge 1- Possession of a prohibited firearm under s5(1)(aba) Firearms Act 1968, possession of ammunition contrary to s5(1)(c) Firearms Act 1968.	Judgment date: 29 11 2012. Sentence: Charge 1- 18 months' detention, Charge 2- 6 months' detention concurrent.	**Coram:Lord Judge CJ, Fulford and Bean JJ**. Facts: Whilst he was serving in Afghanistan N's accommodation was searched in 2011 and a Clock pistol with compatible ammunition was recovered together with other ammunition lawfully acquired, but which should have been handed in. The pistol had been given to N by the Iraqi special forces as a mark of respect in 2007. He intended to have it de-activated but had not got round to doing so.	**JA at first instance Judge Mcgrigor.** **Held: The CMAC agreed with the Court Martial's decision not to impose the minimum 5 year sentence as there were exceptional circumstances. The firearm and ammunition came lawfully into his possession. The urgency of dealing with this, in his mind, reduced with time and in 2009 he suffered a significant brain injury which made the need to deal with the weapon and ammunition seem less immediately urgent. These offences were committed in exceptional circumstances by an exemplary soldier. The sentence was reduced to 12 months and suspended for 12 months to allow for the Appellant's immediate release.**

Appeal re status of plea.	Judgment date: 13 3 2013	In 2009, after running 220 kilometres in the Amazon basin, for a soldiers' charity,the Appellant (N) collapsed and sustained a significant brain injury which the medical report indicated would have made a significant contribution to his failure to deal properly with the weapon and amunition. N was a very highly regarded SAS soldier.	**Held: N's guilty plea should be vacated as it was a nullity because the CMAC interpreted the exchange between counsel and the judge, in circumstances where no indication as to sentence had been sought by the Defence, as follows (at para 7 of the judgment):** **"As we see it, what was being conveyed [by the judge] was that the defendant would be looking at, or close, to the minimum statutory term [5 year] if he fought, and certainly no longer than two years (and probably shorter) if he pleaded guilty; and if he pleaded guilty he would have the advantage of serving his sentence in military detention rather than a civilian prison, with the possibility (no more) that his military career could continue".** **CMAC concluded that this exchange improperly narrowed the Appellant's freedom of choice and his plea was a nullity and it was set aside.**

R v Owen. Charge: Three charges of absence without leave contrary to s9(1) AFA 2006.	Date of judgment: 20 11 13. Sentence: Charge 1- 2 months' detention, Charge 2- 3 months' detention and Charge 3- 4 months' detention all consecutive, 9 months' detention in all.	**Coram: Pitchford LJ, Holroyde and Nicola Davies JJ.** Facts: The Appellant (O) enlisted at 16 and at the time of his appeal was 21. He had significant problems himself and a relative had been the victim of serious sexual abuse. He felt that he had had little support from his unit. He went absent for about six months and was arrested. Arrangements were made for him to return to his unit in Germany but he did not report for the flight and was absent for about a month and was subsequently placed in custody until a Judge Advocate released him on his undertaking to catch the flight to return to his unit in Germany. He went absent again and was again arrested 26 days later.	**JA: Judge Large, Deputy Judge Advocate General then an Assistant Judge Advocate General.** **Appeal sentence on the totality principle.** **Held: Given that O had twice been trusted to catch a flight back to his unit, despite his distressing personal circumstances each period of absence added to the seriousness of O's position, it was not as had been submitted, equivalent to one period of absence, and there were no grounds to challenge the Court Martial's order that consecutive sentences were appropriate, but the Court Martial gave insufficient weight to the personal mitigation. Accordingly, CMAC ordered that the sentences on charges 1 and 2 should be served concurrently but the sentence on Charge 3 should remain consecutive, seven months in all.**

R v PS, Abdi, Dahar and CF. These cases were listed together so the court could give guidance on sentence where the Defendant had mental health problems	Date of judgment: 11 12 2019.	**Coram: Burnett CJ, Fulford and Holroyde LJJ.**	**General Observations by the Court.** **Mental health conditions and disorders could be relevant on the following issues:** **Culpability and harm: see s143(1) CJA 2003 which requires the sentencing court to consider these issues and whether the harm was intended or might have been foreseen. Mental issues may affect the defendant's ability to make judgements, make rational choices, understand the consequences of his acts or cause him to behave in a disinhibited way.** **The defendant's mental health may effect the type or length of sentence and whether, if it is custodial, it should be suspended.** **The defendant's mental health may affect whether he is dangerous: see CJA 2003, s226A.** **A defendant's mental health may prevent him understanding or complying with the requirements of the sentence.**

R v PS. Charges: Joint enterprise murder, wounding with intent and attempted wounding with intent.	Sentence: Murder: to be detained at Her Majesty's pleasure with a minimum term of fourteen years, less the period spent on remand, with no separate penalty on the other two counts.	Facts: PS was 14 and 4 months at the time of these offences and had a conviction for robbery which had attracted a referral and parenting order for 12 months. These convictions placed him in breach. Despite this matter hanging over his head and difficult family circumstances he was doing very well at school and was due to sit his GCSEs twelve months early. PS was sentenced on the basis that he intended to kill not just cause grievous bodily harm. This was a gang related incident where PS had travelled with four others to mount a revenge attack. The group were armed with knives but PS did not have a knife himself. He acted as look- out and to prevent the taxi they came in leaving without them.	**PS appealed his sentence.** **Held: There was no evidence on which the judge could properly have concluded that PS intended to kill rather than cause grievous bodily harm.** **After the trial a consultant neuropsychologist diagnosed Autism Spectrum Disorder and Attention Deficit Disorder which "…substantially contributes to his acting out when he feels threatened and his inability to resist poor leadership from others. His logical reasoning skills are too weak to process consequential pathways when he believes he is under threat. He acts out emotionally and impulsively at such times."** **The Court quashed the 14 year minimum term and substituted a minimum term of ten years, because of PS's mental condition and because M who inflicted the fatal wounds, had received a 16 year minimum term and PS should receive significantly less as he had not intended their victim to be killed.**

		PS's co-defendant M, aged 14, stabbed one victim who died and another victim was stabbed in the stomach and arm, and a third person's clothes were pierced but he was uninjured.	

R v Abdi Dahir. Sentenced for one count of wounding with intent contrary to s18 OAPA 1861.	Sentence: 14 years imprisonment. Facts: The Appellant (AD) had 37 offences recorded against him, for violence, public order offending and criminal damage and he had served a number of short custodial terms. AD's parents had been killed in the Somalian civil war and he had been brought up by relations one of whom abused him. He had been repeatedly raped and seen dead bodies during the war. He had sustained a brain injury causing cognitive defects. He suffered further trauma when he saw deaths at Grenfell Tower. See next column.	A psychologist and psychiatrist diagnosed complex PTSD which caused a lack of emotional control. He had sleep disorder and psychotic and cognitive disorder as well as mood disorder with cycling mood states. He had a long standing drink problem. AD had made repeated attempts to get help, including seeking admission to a psychiatric hospital. He had been to hospital trying to get help the day before the offence was committed, but these conditions had not previously been fully diagnosed so he had not had proper treatment for them. The complainant was a friend. AD had told him he was "on a list" and that he would kill him. AD waited until other people who had been with them had left and then repeatedly cut the complainant's face with a broken bottle leaving permanent scars. It was not clear from the evidence at what stage in the incident the bottle was broken.	**Appeal sentence.** **Held: This was a Category 1 case under the Sentencing Guidelines for s18, OAPA, 1861.There was higher culpability because a weapon was used and greater harm because the wounds were extensive and would leave permanent scars.** **The mitigation available to AD together with his mental difficulties should have resulted in a significant downward adjustment to between Categories 1 and 2. The fourteen year sentence was quashed and a ten year sentence substituted.**

The appeal of CF. The appellant faced seven counts: Counts 1 and 2 alleged causing a child under 13 to engage in sexual activity, contrary to s8 SOA 2003. Counts 3,4 and 5, alleged offences contrary to s13 SOA 2003, and involved two offences of sexual activity with a child and one of sexual activity in the presence of a child. Counts 6 and 7 were two offences of sexual assault on a child contrary to s7 SOA 2003.	Sentence: 5 years concurrent on Counts 1 and 2, under the provisions of s91 Powers of Criminal Courts (Sentencing) Act 2000 with 6 months concurrent on each of the remaining counts.	Facts: The Appellant, CF, was a boy of 15 and 16 at the time of these offences. Count 1 was a specimen count relating to four offences when the complainant, R, was 5 and 6 when he sucked R's penis. Count 2 was a single occasion when R's father came into his son's bedroom and found CF with R's penis in his mouth. As a result of this R had become clingy with his father, had harmed himself at school three times and was frightened if he saw a member of CF's family. Count 4 involved CF asking the 13 year old complainant, H, to "suck him off". The appellant put his penis in the H's mouth but stopped when the complainant asked him to. He did not ejaculate. Count 5 alleged that the appellant again put his penis in H's mouth.	**The Court referred to the Sentencing Guidelines for "Sentencing Children and Young People" and indicated that sentencers should have particular regard to rehabilitation and the appellant's welfare.** **A psychologist's report suggested that, CF had Autism Spectrum Disorder and functioned as a 7 year old. He was the most vulnerable of the 48 YPs undergoing their sentence in a unit for the vulnerable at Young Offender Institution.** **The court concluded that these offences were inappropriate experimentation by a vulnerable immature child.** **Paragraphs 6.46 and 6.47 of the above Guidelines indicate that for a person of CF's age, 16, the court MAY take the view that a sentence of half or two thirds of what an adult would serve was appropriate, but that the emotional and developmental age and maturity of the Defendant was "…of at least equal importance" to his chronological age and that individual factors relating to the child or young person are of the greatest importance and may present a good reason to sentence outside this range…"** **The Guidelines for sexual offences of this kind are drafted on the basis that the Defendant is an adult. These offences were committed by someone who was himself a child and had a functioning age of 7, which is important in arriving at the proper sentence. The court must be careful not to treat a young offender as though he is simply a reduced size adult committing similar offences.** **The judge was wrong to conclude that the complainant's age on counts 1 and 2 amounted to "extreme youth" given that the start point for the victim was 13 so the case fell in Category 2 not Category 1. The start point was three years detention and applying the discount for plea the total sentence should be 2 ½ years detention.**

		Facts continued: As a result of this offending H had become scarred of people, including older children and panicked if he saw rowdy behaviour. L was a girl of 8. The appellant touched her vulva over her clothes (Count 6) and her bottom also over her clothes (Count 7). As a result, L's mother had developed eating difficulties and L was frightened to go to her aunt where the offences happened and started to shake when she chanced to see CF. All these offences were committed against children who were CF's friends when he was playing at their homes or they were playing at his house.	**The sentence of five years on Count 1 and 2 was quashed and a sentence of two years and six months' substituted. The six month concurrent sentences on the remaining counts remained unaltered and applying the discount for plea the total sentence should be 2 ½ years detention.**

R v Price and Bell Charges: Bell pleaded guilty to Charge 1, namely, negligently handling a general purpose machine gun (GPMG) so as to cause the negligent discharge of a round killing another soldier, contrary to s15(2) AFA 2006. Price pleaded not guilty to Charge 2 which alleged that he negligently performed his duty as safety supervisor when the GMPG was under the control of Bell and the two machine gunners, by failing to ensure the safe handling of the weapon, not properly supervising the	Date of judgment: 21 2 2014. Sentence: Price 21 months' detention, reduced to the ranks and dismissed, Bell 14 months' detention, reduced to the ranks and dismissed.	**Coram: Pitchford LJ, Wilkie and PattersonJJ**. Facts: Price was a staff sergeant financial systems administrator in a cavalry regiment. He had very little experience of small arms and none of the General Purpose Machine Gun. On arrival in Kenya he was told that he would be a safety supervisor on a live-firing exercise for 2Bn Royal Regiment of Fusiliers for their work-up training for deployment on an operational tour of Afghanistan. He told the chain of command thay he was concerned about his inexperience. He had never fired a GPMG and had not been on a range management course. There was supposed to be training in Kenya, on the GPMG, prior to the start of the live firing exercise. It was due	**JA at first instance: Judge Elsom.** **Bell appealed sentence.** **Price appealed finding and sentence.** **Ground 1.** **The Judge's direction on negligence was incorrect in that whether the Appellant (P) was negligent should be measured against the standards of the reasonable safety supervisor with P's skills, training knowledge and experience, and therefore with P's weaknesses.** **The essence of the summing up was put in this way, "… if you are sure that that the accused behaved as no reasonable man with the same skills, professional training, knowledge and experience would have done in the circumstances, then he is guilty."** **Held: "We agree with the judge advocate that the standard of care required…is to be measured against the standard to be expected of the reasonable serviceman having similar training, knowledge and experience as the accused…the test is objective…In our judgement, a subjective consideration of the defendant's "skills" or "weaknesses" has no place in the objective judgment whether the defendant reached the appropriate standard of care."** **Ground 2.** **The judge was wrong to direct the lay members that P's lack of experience and training was immaterial to their judgement on the issue of whether P had been negligent. A Lieutenant Colonel in the Land Accident Investigation Team, which investigated the accident, had given evidence that the decision to use P as a safety supervisor was, having regard to his lack of experience, unsafe and P's counsel submitted that this should have been considered by the lay members in deciding the standard of care reasonably to have been expected of P.**

immediate action drills on a stoppage, and not determining the nature of the stoppage and the safety state of the weapon, and not prevent the weapon being moved from the firing-point and failing to alert Bell to the fact that the GPMG was pointing in an unsafe direction whilst Bell was seeking to clear the weapon, contrary to s15(2) AFA 2006. He was convicted. Charges 4 and 5, drawn under the same provision, alleged that the two gunners had told Bell that the GPMG had been made safe and was pointing in an unsafe direction whilst Bell tried to clear it. They were found not guilty on the Judge		to be given by the by the co-defendant, Corporal Bell, who was regarded as the local expert. It was cancelled. Subsequently he went on dry training on the GPMG and he passed the handling test but he had never fired the weapon. The week-end before the live firing Price was briefed on the Range Actions and Safety Plan which contained this paragraph, in respect of a hard extraction problem, i.e. where the cocking handle cannot be fully drawn to the rear so as to cock the weapon, "If the weapon still fails to cock troops are to inform the nearest safety supervisor who will request an armourer." On the live firing exercise a machine gun developed a stoppage. Corporal Bell was in immediate command of the two soldiers operating the gun. He entered his plea of guilty on the basis that the machine gunners had told him that the	**The judge advocate summed up in this way, on this issue, "Do not allow any doubts you may have about the wisdom of assigning a man of his military experience to the task of safety supervisor. You have to look at him, as I say, as he was on [the day of the accident] and the training and briefing he had had immediately prior to that day as well as his previous experience or lack of it."** **Held: The judge advocate was entitled to deal with the matter in this way. He was not directing the lay members to ignore the evidence from the Lieutenant Colonel but was warning them not to acquit just because P should not have been allowed to be a safely supervisor but to look at the accumulated training and experience he had had by the day of the accident and decide if P had acted as a reasonable man would have done with the same level of training, skill and experience.** **Ground 3.** **The judge advocate wrongly directed the board that if they were sure about any one of the particulars set out in the charge they could find P guilty without more, without directing them that they must also find that the particulars they found proved amounted to negligence.** **Held: The judge made clear that the members must be sure about at least one of the particulars of negligence and should then consider if they were sure that P had thereby failed to meet the required standard of care.** **Ground 4.** **The judge advocate wrongly directed the board that if they accepted expert evidence that P had acted or made omissions that he should not have that that would be sufficient to prove negligence without more.**

Advocate's direction at the close of the Crown case, because it was accepted on all sides that they had told Bell that this was a "hard cock" otherwise a "hard extraction" which means that the cocking handle cannot be pulled fully to the rear and it is not possible to see whether there is a round in the chamber. In telling Bell that it was a "hard cock" they had, in effect, told him that there might be a round in the chamber. There was no evidence that either gunner knew that the weapon was pointing at the victim.		the weapon was safe. If he had considered the situation, as an experienced machine gunner, he would have known that the weapon might not be safe and that the machine gunners could not know if it was safe or not as they were faced with a hard cock where by definition it was not possible to tell whether there was a round in the chamber or not as the cocking handle could not be fully pulled to the rear so that if the top cover was lifted it was not possible to see into the chamber. Indeed, as the weapon had just been firing the probability was that as the recoil moved the working parts to the rear, if there was still a round or rounds in the belt, a round would have been picked up and fed into the chamber. At a time when the GPMG was pointing in the direction of a soldier, Bell unscrewed the barrel, causing the GPMG to discharge	**Held: "It does not seem to us that there was any danger that the board would consider that a mere statement by an expert as to what was safe and what was not would constitute sufficient grounds for a finding of negligence. The Judge Advocate's directions were calculated to require of the board a judgment, not just whether in hindsight what the appellant did was safe or unsafe but whether in all the circumstances, including the limits of his training and experience, he did what a reasonable soldier in his position would have done."** **Ground 5.** **At the close of the Crown's case the judge ruled that there was a prima facie case on paragraph (4) of the particulars which alleged that P had failed to tell Bell that the weapon was pointing in an unsafe direction. The remaining particulars should have been withdrawn from the members as they had not been made out at the close of the prosecution case.** **Held: P had failed to order "stop" and prevent further firing so an armourer could take over dealing with the stoppage as set out in the "actions on" in the exercise orders or had failed to ensured that the GPMG was pointing in a safe direction or had failed to move it forward of any other soldiers on the range. There was no sound basis on which to doubt the findings of the board.** **<u>Comment</u>: CMAC cannot surely be saying that the issue of negligence is at large and not limited to the particulars of negligence set out in the charge?**

		killing one of the detail on the range. The board found Price guilty on the basis that he had, when safety supervisor, failed to ascertain whether the GPMG was safe and did not prevent it being moved to an unsafe position.	**Sentence:** **The Fusilier who was killed had been married for a short time and his wife was pregnant. Bell (B) had, in the heat of the moment, made a mistake he thought about every day. He was of good character, highly regarded and his Battalion wanted to keep him. The CO said he was a man of "genuine integrity, moral courage and professionalism" and on operations in Afghanistan "…he was physically courageous, loyal and highly effective…Following the tragic death of Fus Wilkinson, Corporal Bell has always done the right thing. Devastated by the loss of a comrade he has sought to engage with the subsequent inquiry seeking only the truth be told".** **He was also described as the best machine gunner in 2RRF and was about to take over as the machine gun platoon second in command.** **P, who was a clerk, now serving as a financial systems administrator in a cavalry regiment, with very little small arms experience, had deferred to B's experience. B was the local small arms expert and had been due to be P's instructor on the GPMG, before the live firing exercise, P had never fired a GPMG and he had had no training as to how to deal with this kind of stoppage. P was thought of very highly and was likely to be promoted to warrant officer.** **The range accident investigation team Lieutenant Colonel thought it unsafe to appoint him as a safety supervisor. As the adjutant put it, in evidence, "he should never have been put in that position… and in my belief the chain of command failed him and as a result failed Fus Wilkinson".** **The court found as a fact that that this species of stoppages rendered the weapon unsafe. "However, it was P's duty to stop the exercise when he knew the weapon was hard cocked." What the orders said was, "If the weapon still fails to cock troops are to inform the nearest safety supervisor who will request an armourer".**

			The CMAC referred to R v Blaymire [2005] EWCA Crim 3019 where the court had dismissed a TA soldier for failing to check that a weapon was clear, leading to a fatal accident. The Judge Advocate General advised the Army Board, when that body had power to reduce sentences, that the sentence was manifestly excessive and the NCO should be permitted to soldier on. The Army Board rejected this advice, perhaps because there were repeated failings over a period because having failed to check the weapon was clear or check the safety catch was on when he was handed it, he then failed to check that it was clear and the safety catch was applied when entering a command post, which was SOP, and he allowed the weapon to be pointing at someone when his finger was on the trigger and somehow the trigger was pulled. **The CMAC referred to the case of "Dowding". The report of the authority suggests the citation should be "Downing", which otherwise has the same EWCA citation, where it was held that the Court Martial is "an expert tribunal", see also Love, Mckendry, Glenton, Lyons, Capill, Cross, Coleman, Calverly, Foley, Simm and Tennet, Townshend, Ndi,Bagnall, Bailey, Ashworth and Cruise-Taylor. See also in respect of the specialist/expert nature of the Court Martial in cases were the sentence of dismissal is imposed: Downing, Birch, Limbu, Townshend, Coleman, Ndi and Bailey summarized in this guide.** **They said they were "…acutely conscious" of this guidance but as the Court Martial gave no reasons for dismissal and in the light of Blaymire and Sherratt set out above they quashed the dismissal element of the sentence for both Appellants.** **The CMAC did not view the culpability of these two soldiers as at the top of the range. The result of the accident was extremely serious and tragic but, "…theirs was not a reckless disregard for safety but a failure under the pressure of circumstances to recognize a danger which in other circumstances would be clear to them."** **P's sentence was reduced to 15 months detention.**

			CMAC held that the culpability of the two Appellants was not equal, as the Court Martial had concluded, because P, although a safety supervisor and senior in rank was so inexperienced and B was regarded as the local expert, including on the GPMG, so the start point for him should be 18 months' detention before factoring in his discount for plea, arriving at a sentence of 12 months' detention. **<u>Comment:</u> Sentences of 12 months' detention and above normally attract administrative discharge.** **<u>Comment</u>: One other issue that might attract some sympathy for Price is that the orders for the exercise did not make it plain that he had to give the order to stop firing as soon as this kind of stoppage arose. The orders, summarized above, could have meant that the armourer could be called in slower time and the Court Martial concluded that Price did not appreciate the inherent risk in this kind of stoppage about which he had no training, so it could be argued that he would not recognize the need to give the immediate order "stop". By contrast Bell the "best machine gunner in 2 RRF" , according to his Battalion chain of command, should have known that the overwhelming probability was that there was a round in the chamber, because the working parts in moving to the rear would have fed a round into the chamber unless the belt loaded on the weapon had been expended.**

R v Rabouhi. Charge: Unfitness or misconduct through alcohol or drugs contrary to s20 AFA 2006.	Date of judgment: 25 6 2014. Sentence: Reprimand and £1,000 fine.	**Coram: Rafferty LJ, Davis and Laing JJ.** Facts: The Appellant (R), who had been drinking in a hotel in Nebraska in a break in an exercise, had pushed an officer who by his own account "behaved like an obnoxious twat". R was acquitted of the charge relating to this part of the incident. He subsequently punched a sergeant who had intervened as a peace maker and was verbally aggressive to another officer.	**JA at first instance: Judge Mcgrigor.** **Held: The court adopted the approach set out in "Guidance on Sentence in the Court Martial" in respect of offences under s20 AFA 2006, which suggested a fine of up to fourteen days' pay and a reprimand or severe reprimand for a minor offence, but said, "No-one reading this judgment should conclude that it addresses a matter of principle".** **<u>Comment:</u> The Guidelines now suggest, "Minor offence: fine of 10 days' pay, within a range of seven to fourteen days' pay and (severe) reprimand if of appropriate rank." Reprimands and severe reprimands can be given to all ranks and rates except private soldiers and their equivalents. Because of the change in the Guidelines and the fact that this case was restricted to its own facts, it is now of limited value as sentencing guidance.**

R v Rea Charges: Convicted of two counts of common assault after a trial.	Date of judgment: 5 7 2019. Sentence: Ninety days' detention and reduced to the rank of Corporal.	**Coram: Davis LJ, Lewis and Knowles JJ**. Facts: The Appellant (R) who was then a Corporal but was acting as platoon sergeant when he went to the St Georges Day party held in the company lines. There was a disturbance and R told everyone to leave. He then punched the first complainant (K) leaving numerous bruises on his face. He then attacked another soldier (S) punching him numerous times leaving him, by S's account "a bloody mess". It was R's case that he never punched either man and he had only held S by the shoulders and pushed him back when S was about to attack him.	**JA at first instance: Judge Mcgrigor.** **Appeal conviction on the basis that the judge fell into error by directing the Board that the incidents were cross-admissible. His direction on recent complainant was said to be incorrect.** **R applied to call three witnesses who had not been called at the trial.** **Held: The judge did not direct the members in terms of cross-admissibility; on the contrary he directed them to consider the counts separately. His direction on recent complaint was an "entirely proper direction" in conventional terms.** **As to the witnesses, one was entirely hearsay and counsel "was wholly unable to explain, by reference to the statutory provisions on hearsay contained in the CJA 2003, how there was any proper basis for allowing evidence of this kind to be adduced." Accordingly, as the evidence would not have been admissible at trial it could not go before CMAC, see s28(2)(c) of the Courts Martial (Appeal) Act 1968.** **Another proposed witness was an expert who said her evidence was neutral as it did not support one party or the other. Accordingly, it would not advance the case for the Appellant and could not therefor be admitted under the terms of s28(2)(b) of the 1968 Act.** **Amongst other difficulties confronting the Appellant the final witness R applied to call had been available at trial and R's counsel had had his statement as unused material prior to the trial and so the witness could not be called at CMAC as there was no explanation as to why the evidence was not called at trial in accordance with s28(2)(d) of the 1968 Act.**

R v Rheines Charges: Breach of British Forces Germany standing orders by driving without insurance, driving a vehicle that had not been BFG registered and so had not passed its roadworthiness test and failing to stop at a stop sign.	Judgment; 26 10 2011. Sentence: Reduced to Corporal, from Sergeant.	**Coram:Hooper LJ, Holroyde and Supperstone JJ.** Facts: The Appellant had a minor accident in barracks in Germany. It was then discovered that he had no insurance and that his car was not BFG registered. He originally lied to the police saying he had been driving a friend's car. He entered pleas of not guilty, but before the trial date changed his plea to guilty. He had a previous conviction for driving with excess alcohol about six years previously. He had less than two years left to serve.	**JA at first instance: Judge Large, Deputy Judge Advocate General.** **Appeal sentence.** **Held: The passage in the then "Guidance on Sentence in the Court Martial was approved where it is suggested that, "The important question when the Court Martial is considering [reduction] is whether the offender by committing the offence has demonstrated that he is unfit to hold his present rank. Whether he is reduced to the ranks or allowed to retain some lesser rank than his present one will depend on how seriously the court views his conduct, and the mitigating factors."** **These remarks are unchanged in the current 6th edition of the Guidance.** **The court approved and adopted the approach taken in R v Love and R v Glenton, where the CMAC held that the Court Martial is "…generally speaking, better placed than we are when it comes to assessing the seriousness of offending in the context of service life, and deciding what particular penalty is required to maintain the discipline and efficiency of the armed forces."** **In respect of the specialist/expert status of the Court Martial see also: R v Mckendry, R v Lyons, R v Downing, R v Cross, R v Capill, R v Foley, R v Calverly, R v Coleman, R v Simm and Tennet, R v Townshend, R v Ndi, R v Bailey, R v Ashworth and R v Cruise-Taylor.** **The following cases deal with the specialist/expert status of the court in the context of sentencing servicemen to dismissal: Downton, Birch, Limbu, Price and Bell, Townshend, Coleman, Ndi, and Bailey.** **Summaries of these cases and their citations are set out in this Guide.** **The CMAC also held that the Court Martial was entitled to have regard to the fact that R who, as a senior rank, should support discipline, had put forward a dishonest account and involved two civilians in his attempt to avoid justice. His reaction to the police and the subsequent prosecution "… bore directly on the issue of whether the Appellant had shown himself unfit to hold his rank."** **"We do of course recognize that the consequences for the Appellant are heavy; but the unfortunate reality is that he has brought those consequences on himself. This appeal is accordingly dismissed."**

R v Robinson Charge: The Appellant was found guilty of battery contrary to s39 CJA 1988.	Date of judgment: 3 July 2014. Sentence: Dismissed.	**Coram: Rafferty LJ, Carr and Davis JJ.** Facts: The Appellant (R), a Corporal in the RMP, travelled back to camp in a taxi when there was a row with the driver about the fare. The driver agreed that he had taken a willing and active part in the disturbance but said that R bit him but he needed no medical treatment and did not want to make a complaint. R was, in effect, of good character, was well regarded in the RMP, and had five children.	**JA: Judge Mcgrigor, Assistant Judge Advocate General.** **Appeal against sentence.** **Held: The damage R did was at the bottom of the scale and the complainant did not wish to complain. R was, in effect, of good character, had given loyal service for 14 years and was well regarded by his CO who came to court to give evidence for him. He would lose his immediate pension and he had five children to support.** **The court had no difficulty in concluding that the sentence was manifestly excessive, quashed it and substituted a severe reprimand and a fine of ten days' pay.**

R v SS, RL, JT and IT Charges: Ill-treatment of a subordinate contrary to s 22(1) AFA 2006.	Date of judgment: 24 9 15.	**Coram: Davis LJ, Spencer J and Lindblom J.** Facts: The Defendants were alleged to have engaged in an initiation ceremony lasting some one and a half hours involving, inter alia, making the complainant eat unpleasant substances, run round the barracks naked, enter a paddling pool full of water, urine and vomit and hitting him with a belt on his naked backside making him bleed.	**JA at preliminary proceedings: Judge Hill.** **Judgment: An ill-treatment charge contrary to s22(1) AFA 2006 on a single day at the same location over a period of about one and a half hours with particulars setting out the 14 specific allegations involved is appropriate and not bad for duplicity as this is a continuing offence and such a charge is not unfair to the Defendant.**

R v Sadole Charge: assault occasioning actual bodily harm and two charges of battery.	Date of Judgement: 8 5 2019. Sentence: Assault occasioning actual bodily harm three months, first battery two months, second battery one month, all consecutive. Six months' detention in all. Compensation £3,000.	**Coram: Hallett LJ Simler and Andrew Baker JJ.** Facts: The Appellant (S) who was 33, of good character, and in training committed two minor assaults against a fellow trainee and then committed the ABH offence, against the same trainee, causing a cut that required 14 sutures, leaving a small but permanent scar above his lip. The victim had been worried about the effect of reporting and had to repeat part of the course. S had stopped drinking, was remorseful and had won the best trainee prize and was an asset to the navy.	**JA: Judge Hunter, Vice-Judge Advocate General.** **Held: This was a Category two assault occasioning actual bodily harm because there were repeated assaults on the same victim. Because of the seriousness of the injury and the offences taking place in training, these offences merited immediate detention which did not carry the same stigma as prison.**

R v S Charges: s20 OAPA 1861, and four charges of common assault.	Date of judgement: 12 12 2013	**Coram: Treacy LJ. Royce J and Andrews J.**	**JA at first instance: Judge Large** **Judgment: It was wrong to stay proceedings for a summary offence where proceedings were commenced outside the six-month time limit for laying an information for a summary only offence in the Magistrates' Court.** It was held that the Defence submission that the common assaults could not have been tried in the civilian courts when proceedings were commenced more than six months after the commission of the offences was incorrect because in the Crown Court if these common assaults were joined in an indictment containing an indictable offence, as here, and they were part of a series of offences of the same or similar character, as they were in this case, they could have been tried even if proceedings had commenced outside the six months' time limit for laying an information in the Magistrates' Court. In any event, the six-month time limit for laying an information deriving from s127 MCA 1980 did not apply to the Court Martial and it was wrong to conclude that the delay of over six months amounted to an abuse of process, as a fair trial was still possible. There was no misconduct or manipulation of the prosecution process, and no bad faith by the prosecution, and one of these factors had to be present before proceedings could be stayed.

R v Sharratt Charges: Plea of guilty to two charges of battery.	Date of judgment; 22 10 13. Sentence: Charge 1, 120 days' detention, Charge 2, 60 days' detention concurrent. Compensation of £300 to the complainant on Charge 1 and £100 to the complainant on Charge 2.	**Coram: Pitchford LJ, Henriques and Cox JJ.** Facts: Whilst out for a drink in Portsmouth the Applicant (S), a trainee musician, threw a bottle at the complainant striking him just above his eye causing a ½ centimetre long cut which was closed with steri-strips and surgical glue. Another musician stepped in as a peacemaker and S hit him causing him to sustained a small cut to his lip.	**JA: Judge Hunter, Vice-Judge Advocate General.** **Appeal sentence on the basis that a six month maximum start point was too high for a person of 21, with a caution for assault on the police, but no convictions.** **Held: S was fortunate not to have been charged with assault occasioning actual bodily harm. A consecutive sentence might have been appropriate but the court martial "… took the sensible view that the overall seriousness of the incident could be reflected by the sentence on charge 1 with a concurrent term on charge 2". The sentence was stern but "… it should not be thought that a sentence of military detention equates with a sentence of imprisonment."**

R v Simm and Tennet. Charges: Lance Corporal Simm pleaded guilty to one charge of ill-treating a subordinate and Lance Corporal Tennet pleaded not guilty but was convicted after a trial on the same joint charge under s22(1) AFA 2006.	Date of judgment; 28 7 2016. Sentence- Simm: eight months' detention; Tennet: 11 months and two weeks' detention.	**Coram: Treacy LJ, Nicol and Supperstone JJ**. Facts: Some two years earlier these Defendants and others put about 25 newly joined commandos through what the judge advocate considered, a view the CMAC endorsed, "40 minutes of depravity and naked humiliation" in front of 18 established members of the unit, including NCOs senior to the appellants.	**JA at first instance: Judge Hill.** **The court rejected Simm's submission that the sentence was wrong in principle because the court had not sentenced him on the basis on which his plea was entered. This submission was rejected by the CMAC because, although he had challenged some of the allegations in the particulars, it had been accepted that he was responsible for the totality of what took place on a joint enterprise basis. It was further submitted that the court was influenced by what Logan, a co-defendant, had done. He was, unlike these two appellants, dismissed and a service community order was imposed for a separate charge alleging waterboarding and "reefing". The authority does not indicate what that is, but it is submitted that it is beating on the naked buttocks, a Royal Marines practice that comes before the court from time to time. This ground was rejected as the Judge specifically indicated that that allegation did not form part of the facts on which the Simm was sentenced and was not included in the particulars of the charge.** **It was submitted on behalf of the Appellants that the starting point for these men should not have been 12 months, the top of the sentencing range set out in the "Guidance for Sentence in the Court Martial" for this offence as only three of the nine potentially aggravating factors were present. CMAC held that if there had been more aggravating factors it might have been necessary to sentence above the range.** **Tennet's submission that a sentence at the top of the range was too severe for a man of 20 of good character was rejected. The incident merited the sentence and his mitigation and the delay had been recognised by the fact that he had not been dismissed.** **The court followed the dicta in R v Love [1998] 1 Cr App R 458 and R v Glenton [2010] EWCA Crim 930 on the specialist nature of the Court Martial.** **See also: R v Mckendry, R v Lyons, R v Rheines, R v Downing, R v Cross, R v Capill, R v Foley, R v Calverly, R v Coleman, R v Townshend, R v Ndi, R v Bailey, R v Bagnall, R v Ashworth and R v Cruise-Taylor.** **See also: R v Birch, R v Limbu, R v Price and Bell, R v Townshend, R v Coleman, R v Ndi, R v Bailey on the specialist nature of the court in the context of sentences of dismissal. These authorities are summarized in this Guide and the citations are set out above.**

R v Smart Charge: Theft, convicted of handling after a trial.	Date of judgment: 3 11 2011. Sentence: Dismissed and reduced to the ranks from Corporal. It may be that the Services Legal aid Scheme recovered £4,650 from Smart, but contrary to the preamble to the judgment, the Court Martial has no power to make any such order.	**Coram: Pitchford LJ, Andrew Smith and Popplewell JJ.** Facts:The Appellant (S) was close to the theft and a NCO and storeman who should have been safeguarding military property on charge to the QM's department where he was serving. The property was a £400 TV which he helped load into a car outside the MT Platoon from where it was stolen. S had 21 years service behind him and was of good character. By reason of the sentence of dismissal S would lose some £170,000 in pension payments and £19,000 of his lump sum, neither of which he would receive until he was 60, instead of immediately on discharge at the end of his service. He had four children, one still in full time education.	**JA: Judge Camp** **Appeal sentence.** **The CMAC approved the Guidance for Sentence in the Court Martial, Version 2, where it was said, inter alia, that the financial effect of dismissal can involve "the loss of a huge sum" but that the entry point for offences of dishonesty was dismissal. Version 6 is in similar terms.** **Held:"Without questioning that those in the armed services who commit offences of comparable dishonesty will, and generally should, be dismissed, we are driven to conclude that in this particular case the policy was applied too rigidly and proper weight was not given to the appellant's service record and general character and the financial loss implicit in the sentence."**

R v Stables Charge: Assault by penetration s2 SOA 2003.	Judgment date: 22 9 2010. Sentence: 12 months' detention.	**Coram: Hooper LJ, Owens and Evans JJ**. Facts: The Appellant (S) was 20 and the complainant (T) was 19. They were both medical assistants and had been in training together in Aldershot and they were good friends. They had travelled together to Portsmouth where they were serving. Five days before the offence T had started kissing S and no less than 24 hours before the offence T had gone to S's cabin and at T's instigation they engaged in mutually consensual sexual touching. S touched her vagina and she held his penis.The following night they went out with others and T had nine Malibus, a rum based drink, and S had about nine pints before they returned to T's cabin where they got into bed. T fell asleep.	**JA: Judge Large, Deputy Judge Advocate General then an Assistant Judge Advocate General.** **Appeal conviction.** **Held: Give the findings of fact made by the lay members when considering their verdict, which came to light during the judge advocate's deliberation on sentence with the lay members, which are set out at the foot of column 3, no reasonable board could have concluded that S's belief in consent was unreasonable.** **If S may have believed that T was consenting it follows that he cannot have realized that T was asleep. The prosecution could not explain how, given the factual background, the Board could have come to the conclusion that S's belief that T was consenting was unreasonable, and CMAC held that, "In those circumstances we have no doubt that the decision which the Board reached was one which they could not properly have reached."** **The CMAC rejected the submission that the sentencing reasons could not be used to attack the conviction. See also R v Mulgrew and Richards [2012] EWCA Crim 2008, summarized above and R v Twaite [2010] EWCA Crim 2973.**

		FINDINGS OF FACT. The members found that they were not sure that S did not believe that T was consenting when he penetrated her vagina with his fingers, but any such belief was unreasonable. There was brief penetration, T woke up and pushed S off and he left, and later apologized. The lay members were not sure that T had ever said “no,” as she alleged, when they were on the bed at the outset.	

R v Townshend Charge: Having been acquitted on other matters the Appellant (T) was sentenced on a single charge of negligently performing a duty contrary to s15(2) AFA 2006, to which he had pleaded guilty. The particulars of negligence alleged that whilst flying his aircraft T had placed his camera, or caused it to be placed, or caused his camera to be adjacent to his seat armrest /control side stick and he had moved his seat forward causing his camera to come in contact with and/or be jammed by the control stick moving the sidestick forward	FACTS: When the autopilot was disengaged the aircraft, with nearly 200 people in it, fell about 4,400 feet in half a minute before T regained control, injuring the co-pilot severely so that he had to undergo two spinal operations and 32 others suffered minor injuries and others suffered psychological harm. While the cause of the accident were being investigated aircraft of this type had to be grounded causing difficulties with operational troop movements and replacement aircraft had to be hired. Together with repairs the costs ran into	**Coram: Holroyde LJ Andrews and Green JJ.** Date of judgment: 28 2 2018. Sentence: 4 months' imprisonment suspended for one year and dismissal.	**JA at first instance: Judge Large.** **The court adopted the approach to sentencing in negligence cases set out in "Guidance on Sentencing in Courts Martial. Version 5 " which is identical in the current 6th Version. They held that whilst the Guide did not have statutory authority it was a "…substantial and detailed document" and "…represented sensible guidance to assist the Court Martial in sentencing."** **The Court followed R v Love [1998] l Cr App R 458 where it was held that "[the Court Martial]… is generally speaking better placed than we are when it comes to assessing the seriousness of offending in the context of service life, and deciding what particular penalty is required to maintain discipline and efficiency in the armed services."** **It was conceded by T's counsel that this was a case of high culpability and not a momentary loss of attention causing the lives of nearly 200 people to be put in peril.** **The Court Martial did not indicate explicitly why dismissal was appropriate for an unintended error and this element of the sentence was quashed, as CMAC were of the view that a suspended prison sentence on its own, balancing the aggravating and mitigating factors set out in the Guidance was sufficient to mark the seriousness of the offence.** **On the specialist nature of the court see also: R v Mckendry [2001] EWCA Crim 578, R v Lyons [2011] EWCA Crim 2808, R v Downing [2010] EWCA Crim 739 , R v Price and Bell [2014] EWCA Crim 229, R v Glenton [2010] EWCA Crim 930, R v Cross [2010] EWCA Crim 3273, R v Capill [2011] EWCA Crim 1472, R v Foley [2012] EWCA Crim 71, R v Calverly [2014] EWCA Crim 1738, R v Coleman [2017] EWCA Crim 1140, R v Simm and Tennet [2018] EWCA Crim 1449, R v Ndi [2019] EWCA Crim 79, R v Bailey [2019] EWCA Crim 372, R v Bagnall [2019] EWCA Crim 2458, R v Ashworth [2019] EWCA Crim 1737 and R v Cruise-Taylor [2019] EWCA Crim 1697.**

and disengaging the autopilot causing the aircraft to descend.	millions of pounds.T was of good character highly regarded and still had an RAF career open to him despite this incident. To encourage open reporting the RAF did not usually prosecute for unintended errors.		**The following cases deal with the specialist/expert status of the Court Martial in the context of dismissal: R v Downing (citation above), R v Birch [2011] EWCA Crim 46, R v Limbu [2012] EWCA Crim 816, R v Price and Bell (see citation above) R v Townshend [2018] EWCA Crim 430 and, for the following three authorities see citation above, R v Coleman, R v Ndi, R v Bailey. All these authorities are summarized in this guide.** **COMMENT: The Judge Advocate set out very fully why a sentence of imprisonment was merited and it was very plain from the context that the court considered that these same issues merited dismissal. This was a serious piece of negligence putting a large number of individuals at serious risk and causing a loss running into some millions of pounds. It is difficult to see how CMAC came to the view that an incident serious enough to pass the threshhold for imprisonment does not indicate that an officer should not continue to serve.**

R v Twaite Charge: Fraud by false representation s2 Fraud Act 2006.	Judgment date: 7 12 2010. No sentence was passed because of the difficulties set out in the summary of the judgment.	**Coram; The Lord Chief Justice, Griffith-Williams and Sharp JJ.** Facts: The charge alleged that the Appellant (T) had dishonestly applied for a married quarter saying he was due to be married on 29 August 2008, when he in fact intended to marry on the same day and month but in 2009, which would not have enabled him to be issued with a quarter.	**JA at first instance: Judge Peters.** **It became apparent to the judge, when the lay members of the Court Martial retired with her to consider sentence, that the members had concluded that T was only guilty of fraud after he moved in at his quarter, an allegation which the prosecution declined to adopt at the start of the trial when the Judge invited them to consider a charge under s3 Fraud Act 2006, alleging failure to disclose information after he was issued with his quarter namely that the marriage was not going to take place until August 2009, information he was under a legal duty to disclose.** **Held: The judge was in an impossible position. She could move to sentence, setting out why the conviction was flawed or she could adjourn sentence so the matter could be appealed.** **See R v Stables and R v Mulgrew and Richards where not dissimilar problems arose. The conviction was quashed as the Board had convicted on a basis that was not open to them. A retrial was refused as the prosecution had declined the opportunity of adding the s3 charge when the Judge Advocate had drawn this difficulty to their attention.** **Following the then Practice Direction the Judge Advocate invited the President of the Board to state what the majority was by which they had convicted, importing the equivalent provisions in the Crown Court in respect of juries when they reach a guilty verdict by a majority, under Rule 26 of the Armed Forces (Court Martial) Rules 2009, which provides that the judge advocate shall ensure that the proceedings are conducted in such a way as most closely resembles the way in which comparable proceedings would be conducted in the Crown Court, or if the Judge Advocate cannot determine what that would be, in such a way as appears to him to be in the interests of justice.** **The CMAC held that as the arrangements for taking a majority verdict were different in the Court Martial from the Crown Court, and because of the need to maintain confidentiality in respect of the Board's deliberations that no enquiry should be made as to whether the verdict was unanimous or by a majority.**

			A majority verdict did not render the verdict non-compliant with Article 6, ECHR any more than a Magistrates' Court was non-compliant where verdicts were also by a simple majority. The fact that the magistrates were trying summary cases and had limited powers of punishment, whilst a Court Martial could and did try very grave offences did not alter this proposition.

R v Wetherall. Charges: Four charges of fraud s1 Fraud Act 2006.	Judgment Date: 5 4 2011. Sentence: Reduced from Sergeant to Corporal and ordered to pay compensation of £750.	**Coram: Leveson LJ, Tugendhat and Blair JJ.** Facts: When regimental accountant W had falsified his accounts to show that a sum of just over £1,500 had been paid into the bank. He pleaded guilty on the basis that he had done this because he was running four jobs in the rear party, he did not have sufficient experience or training and he was trying to buy time to sort out the account and had put money in from his own resources. There was no suggestion that he stole the money. W was 42 and highly regarded and of good character.	**JA at first instance: Judge Peters.** **Appeal sentence. The army were taking steps to discharge W because he had lost his security clearance because of this conviction and could not continue in his appointment as a combat and resources specialist. It was argued that as the court had decided not to dismiss they would have dealt with the case more leniently had they known that it was likely that the case would cause W to leave the army by an administrative route.** **Held: The Court approved the Guidance for Sentencing in the Court Martial, which stated then, as it does in the current version, Version 6, that the decision of a Court Martial not to dismiss does not prevent the services administratively discharging the defendant. In this case there was no suggestion that it was wrong to withdraw his security clearance which in turn made it impossible to do his current work and CMAC accepted that he was unlikely to get a post elsewhere in the army so his discharge was more or less inevitable, but that did not mean that his reduction in rank was anything but sensible and appropriate. W lost his security status and his appointment because of his convictions for dishonesty not because of the sentence of the court.**

R v Wilby. Charges: Disgraceful conduct of a cruel kind contrary to s23 AFA 2006.	Judgment date: 31 7 13. Sentence; 9 months' detention.	**Coram Leveson LJ** **Sharp and Spencer JJ.** Facts: The complainant was woken up and subjected to some very unpleasant humiliating bullying behaviour. This defendant however only took photographs which he deleted and did not actually take part in these events beyond encouraging what went on by being one of the pack.	**JA; Judge Hunter, Vice Judge Advocate General.** **Held: The sentence should be reduced to six months. It was a disgraceful incident but this Appellant's part in it was lower in the scale than his co-defendants.**

R v Wright-Stainton. Charges: The Appellant faced 12 charges of fraud contrary to s1, Fraud Act 2006. On the second day of his trial the prosecution accepted pleas to four counts.	Date of judgment: 6 9 2011. Sentence: Four months imprisonment for two years and a suspended sentence order requiring him to perform 60 hours unpaid work. He was dismissed from Her Majesty's Service, reduced to the ranks and ordered to pay compensation of £1,365.85.	**Coram: Pitchford LJ, Wilkie and Holroyde JJ.** Facts: The Appellant (W-S) was a staff-sergeant with some 23 years' service. He was of good character and had been highly regarded. His marriage was breaking down, he was under considerable pressure in terms of his duties, he had financial difficulties and an army psychiatrist was of the opinion that he was severely depressed, because of these proceedings, the delay in bringing the matter to court and his marital and financial difficulties. The author of the PSR judged him unlikely to re-offend.	**JA at first instance: Judge Hill.** **Appeal against dismissal only.** **Held: The CMAC approved Version 2 of the Guidance for Sentence in the Court Martial, which is, on this issue, unchanged in the current edition, Version 6, where it is said that if dismissal will prevent the individual drawing an immediate pension it is no different in principle from losing future earnings and, "It is therefore a flawed argument to suggest that someone who has committed an offence meriting dismissal should be retained in the service solely on the basis that he otherwise would lose the opportunity to qualify for an immediate pension, nevertheless, any potential loss is one of the factors which is relevant when considering dismissal."** **CMAC went on to hold that, "We accept that ordinarily such a gross breach of trust will result in dismissal, whether the financial consequences to the serviceman are serious or not. We recognize that this case is exceptional by reason of the contemporaneous psychiatric condition established by the medical evidence, to which the court did not, in our respectful view, give sufficient attention."** **Dismissal quashed. The remainder of the sentence was unaltered.**