

JUDGE ADVOCATE GENERAL'S PRACTICE MEMORANDUM 7

Costs Orders under the Armed Forces (Proceedings) (Costs) Regulations 2009

Forms of Costs Order

1.1 The Armed Forces Act 2001 [AFA01] ss 26 – 28 and the Armed Forces (Proceedings) (Costs) Regulations 2009 [AF(P)(C)R09] make provision for two separate forms of orders:
(i) AFA01 s 26 and AF(P)(C)R09 reg 3 governs orders where costs have been incurred by one party as a result of the unnecessary or improper act of another party.
(ii) AFA01 s 27 and AF(P)(C)R09 reg 4 governs orders against legal or other representatives (wasted costs orders).

Guidance

2.1 Applying Armed Forces (Court Martial) Rules 2009 r26 (Circumstances not provided for), the Service Courts should follow the guidance available to the civilian courts.

2.2 Guidance on the principles and procedure governing the exercise of jurisdiction to award costs under reg 3 of the 2009 Regulations can be found in para. 4.1 of the Practice Direction (Costs in Criminal Proceedings) (2015) (Arch. 2023, 6-55 et seq.) and r45.8 of the CPR 2020.

2.3 Guidance on the exercise of jurisdiction to award wasted costs under reg 4 can be found in para. 4.2 of the Practice Direction (Arch. 2023, 6-64 et seq.) and r45.9 CPR 2020.

Costs incurred by the Director of Service Prosecutions (DSP) are widely construed.

3.1 AF(P)(C)R09 reg 6 provides as follows:

"Where any of Her Majesty's forces incurs costs of any of the descriptions in the Schedule to these Regulations in respect of the exercise by the Director [of Service Prosecutions] of his functions as a party to proceedings before a court mentioned in section 27(1), such costs shall be taken for the purposes of any order under regulation 3 or 4 to have been incurred by the Director."

3.2. Schedule 1 to the AF(P)(C)R09 states that costs incurred by any of Her Majesty's Forces of any of the following description are to be taken as incurred by DSP for the purposes of any order under regs 3 or 4:

- Costs incurred in relation to the recovery and disclosure of information in the course of proceedings.
- Costs incurred in the preparation of case papers and reports
- Travelling and subsistence expenses of witnesses
- Travelling and subsistence expenses of prosecuting authority staff
- Fees and expenses of a prosecuting authority advocate
- Any other costs properly incurred in preparing for a trial or an appeal.

Duty of parties not to require witnesses to attend court unnecessarily

4.1 Service personnel can be located across the globe and unnecessary requirements for them to attend court cost money and can affect operational effectiveness. Judge advocates will be particularly alert to costs wasted in requiring witnesses to attend court when their attendance was not needed. This includes the situation where a witness was required to attend court at PTPH when the issues in the case were less clear, but subsequent events have shown that the witness was not required to attend court. Defence legal representatives remain under a duty to notify the court that a witness who was originally fully bound to attend court is no longer required. Failure to do so may lead to an order under Regulation 3 or 4 above.

Appeals

5.1 Any person against whom the court makes an order under regs 3 or 4 may appeal: (i) in the case of an order made by the Court Martial, to the Court Martial Appeal Court; and (ii) in the case of an order made by the Summary Appeal Court or the Service Civilian Court, to the High Court in England and Wales.