



changing lives
reducing crime

Military convictions and criminal records

January 2013

Introduction

Nacro is the largest crime reduction charity in England and Wales. We help over 70,000 people each year, reducing crime and the impact of crime in over 200 communities up and down the country.

Nacro's mission to reduce crime and change lives is predicated on the belief that we must reduce the devastating effects crime has on individual victims and on communities, using evidence-based practice to do what works to reduce crime and reoffending. Victims of crime have to live with the experience forever, whilst those who commit crime can find it hard to break the destructive cycle of offending. At Nacro our work focuses on:

- intervening early with people at risk of becoming involved in crime and antisocial behaviour to prevent crime happening in the first place
- working with people in prison or on a community sentence so they change their behaviour, take steps to repair the damage they have caused individual victims and communities, and move on from crime and offending
- resettling offenders after custody helping them to find a home, a job, develop new skills, rebuild relationships and reintegrate into their community.

Our Resettlement Advice Service offers the UK's only dedicated confidential helpline and online service providing free expert advice, support and advocacy to serving prisoners and ex-offenders who have put their offending behaviour behind them but face severe barriers to moving their lives on as a result of the stigma attached to their former behaviour. We work very closely with the Disclosure and Barring Service who put employers and members of the public in touch with us for advice on matters relating to standard and enhanced criminal record checks and risk assessments. We help thousands of people every year in this area and the helpline has handled over 250,000 enquiries since criminal record checks were first introduced. We also work with NHS trusts, local government, the police, the probation service, the private sector and educational institutions providing guidance on safer and fairer recruitment practices.

If you would like to discuss any aspect of this briefing further, please contact Dominic Headley on 020 7840 7235 or at dominic.headley@nacro.org.uk or Jackie Sinclair on 020 7840 7223 or at jackie.sinclair@nacro.org.uk.

Data sources

In carrying out the research in this report, Nacro contacted the following organisations by telephone, email or in person:

- The Metropolitan Police's PNC Policy and Planning Unit
- Disclosure Scotland
- The MoJ's Sentencing and Policies Unit
- The MoD's Service Police Crime Bureau
- Access Northern Ireland (AccessNI)
- Disclosure and Barring Service (formerly known as the Criminal Records Bureau)

Summary

The Armed Forces Act 2006 replaced the three separate systems of law for the armed forces with a single harmonised service justice system. The majority of the provisions of this Act are not new, but the Act extended the powers of commanding officers in the military to impose sentences through summary hearings.

The summary hearing system is an internal disciplinary proceeding which also handles minor criminal conduct offences that have equivalent offences in civilian law. Summary hearings handle the majority of minor service law offences. A serviceman's commanding officer has jurisdiction to deal with a person under his command who is subject to service law (i.e. not a civilian) if the accused is of, or below, the rank of Commander in the Navy, Lieutenant-Colonel in the army or Wing Commander in the RAF. A person charged with an offence which could be dealt with by a summary hearing before a commanding officer has the right to choose trial by court martial instead. If a commanding officer dealing with an offence summarily finds the accused guilty, he can impose punishments including loss of seniority (for an officer) or reduction in rank (for a warrant officer or non-commissioned officer). The commanding officer operates in the role of prosecutor, jury and judge.

Nacro accepts that the armed forces operate in a unique environment wherever they are serving in the world, and believes it is only right that there is a service justice system which recognises this. We understand that the system needs to uphold the highest standards of discipline, professionalism and must reflect UK civilian law.

However, research by Nacro's Resettlement Advice Service has found that there is an inconsistent approach between government departments regarding the application of disposals under the summary justice system, and their subsequent impact upon a person's civilian criminal record. This inconsistency has criminalised some servicemen without their knowledge and without receiving appropriate legal advice. Nacro is concerned that many servicemen will face barriers, including difficulty securing employment, when they leave the armed forces because they have accepted disposals under the summary justice system without being aware that this would lead to a criminal record. Ahead of the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, Nacro is calling on the government to review the Armed Forces Act 2006 and its impact on the Rehabilitation of Offenders Act 1974 (ROA) and to issue clear guidance to all departments on this issue.

Background

The Resettlement Advice Service (RAS) received an enquiry in July 2012 from the wife of a former Foreign and Commonwealth (FCO) soldier who had recently left the army. Her husband, lance corporal (LCpl) Isimeli (Bale) Baleiwai originally from Fiji, was facing deportation from the UK after serving 13 years with the British Armed Forces.

He had an exemplary service record, a row of medals and had served in five operational tours including Northern Ireland, Bosnia, Afghanistan and two tours in Iraq. His wife is British and they have two young children who are also British born. LCpl Baleiwai voluntarily discharged from the armed forces on 15 June 2012 in order to spend more time with his family and provide them with more stability. He applied for British citizenship in March while still a serving soldier, as he was advised to by Ministry of Defence (MoD) personnel. His application was refused on 28 June 2012 by the UK Border Agency as he apparently failed the necessary 'good character' requirement by having an 'unspent' criminal conviction. This was because the UK Border Agency had changed

their policy in April 2011 to zero tolerance for unspent criminal convictions when processing applications for 'indefinite leave to remain' or citizenship.

At the time of his application, LCpl Baleiwai was not aware that he had an unspent criminal conviction. He had been fined in 2011 by his commanding officer for fighting with another soldier who instigated the fight. The matter was dealt with by way of an internal disciplinary proceeding known as a summary hearing. There had been no police involvement, no trial and no defence. Nor was the matter dealt with impartially. LCpl Baleiwai did not know he was being charged with a criminal conviction. He believed this was an in-house disciplinary offence only. He was not aware that he had received a criminal record as a result of the proceedings, and he believed it was only recorded on his military record as there had been no court martial.

As Nacro is aware, the ROA covers military convictions. As part of our work, we regularly provide guidance on the ROA, including information on the way military convictions are dealt with as part of the Act. Nacro's guidance on the [ROA](#) is widely used by many individuals and organisations, including professionals that work in the criminal justice sector. However, Nacro was not aware that a punishment issued in an internal military disciplinary proceeding could result in a serviceman receiving a criminal record; and Nacro had not previously received a similar enquiry. Consequently, Nacro initially believed that there must have been an error by the UK Border Agency. Nacro therefore advised the Baleiwai family to contact the Ministry of Justice's (MoJ) Sentencing and Policies Unit for clarification that a fine received as a result of a summary hearing would not result in the serviceman receiving a criminal conviction.

Nacro was subsequently informed by the MoJ that changes had been made to the ROA by the [Armed Forces Act 2006](#), and by the application of the ROA to punishments given by summary hearings in an armed forces court. The relevant changes are as follows:

Section 2 of the ROA (Rehabilitation of persons dealt with in service disciplinary proceedings)

(1) ... for the purposes of this Act any finding that a person is guilty of any offence in respect of any act or omission which was the subject of service disciplinary proceedings shall be treated as a conviction and any punishment awarded... shall be treated as a sentence...

(2-4) [Repealed by the Armed Forces Act 1996: this means that these provisions no longer apply]

(5) In this Act, 'service disciplinary proceedings' means any of the following:

(za) any proceedings (whether or not before a court) in respect of a service offence within the meaning of the Armed Forces Act 2006 (except proceedings before a civilian court within the meaning of that Act);

(6) Section 376(1) to (3) of the Armed Forces Act 2006 ("conviction" and "sentence" in relation to summary hearings and the Service Appeal Court) apply for the purposes of this Act as they apply for the purposes of that Act.

Section 376 of the Armed Forces Act 2006 ("Conviction", "sentence" etc in relation to summary hearings and the SAC)

(1) Where a charge against a person in respect of an offence is heard summarily by an officer, subsections (2) to (4) apply for the purposes of references in this Act to conviction, acquittal, sentence or passing sentence, or to any related expressions.

(2) If the officer records a finding that the charge has been proved, or the Summary Appeal Court substitutes a finding that a charge in respect of another offence has been proved, that shall be treated as a conviction.

(3) Any punishment awarded by the officer, or by the Summary Appeal Court, shall be treated as a sentence.

(4) If the officer dismisses the charge under section 131, or the Summary Appeal Court quashes a finding that the charge has been proved, that shall be treated as an acquittal.

(5) In this Act "in open court", in relation to a summary hearing by an officer, means in the presence of the offender.

The MoJ informed Nacro that these "changes made by the Armed Forces Act 2006 to the ROA (specifically section 2(5)(za) and section 2(6)) and section 376 of the Armed Forces Act 2006

make it clear that where a charge is heard summarily by an officer and is proved, it is treated as a conviction and the punishment is a sentence. It would therefore appear that the ROA does apply to punishments given by the army summary hearing, including the punishment of a fine.”

Current guidance on the ROA in relation to military convictions

MoJ

The MoJ makes it clear that they are not able to provide legal advice and can only give general advice on the operation of the ROA. They recommend that individuals should seek their own legal advice.

MoJ guidance states: “The Act applies equally to everyone convicted of a criminal offence, whether in civilian life or in the services. For cashiering, discharge with ignominy or dismissal with disgrace, the rehabilitation period is 10 years. For simple dismissal from the service it is seven years, and for detention five years. These periods are halved if the offender was under 18 at the time.”

The MoJ makes no reference in their guidance to changes to the ROA made by the Armed Forces Act 2006, they do not mention that summary hearings are covered by the Act, and they do not provide the rehabilitation periods for sentences received as a result of either a court martial or summary hearing other than those mentioned above.

Nacro

The Nacro guidance states that the Act also applies to convictions in the armed forces, including some service offences (see below). But if the service offence was of a kind which most people would not consider criminal (such as failing to salute an officer) the Act would only apply if the sentence was three months’ detention or more. The service offences to which the Act always applies are as follows:

| Army | Navy |
|--|--|
| Looting | Corresponding with, supplying or serving the enemy |
| Offences relating to property of members of Forces | Loss or waste of public and service Property |
| Miscellaneous offences relating to property | Offences relating to issues and Decorations |
| Making of false statements on enlistment | False statements on entry |
| Making of false documents | Falsification of documents |
| Scandalous conduct by an officer | Cruelty or scandalous conduct by an officer |
| Disgraceful conduct | Disgraceful conduct |

Other than those listed in the table above, the Act only applies to service offences if the punishment awarded was imprisonment, cashiering, discharge with ignominy, or dismissal with disgrace from HM Service, dismissal from HM Service, or detention for a term of three months or more. The rehabilitation periods for the various sentences are set out in the following table:

| Sentence | Rehabilitation period * |
|--|-------------------------|
| A sentence of cashiering, discharge with ignominy or dismissal with disgrace | 10 years |
| A sentence of dismissal | 7 years |

| | |
|--|---------|
| A custodial order under the relevant schedules and sections of the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 where the maximum period of detention is more than six months | 7 years |
| A sentence of detention in respect of conviction in service disciplinary proceedings | 5 years |
| A custodial order under the relevant schedules and sections of the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 where the maximum period of detention specified is six months or less | 3 years |

*These periods are halved if the offender was aged under 18 at the time

The Nacro guidance does not make any reference to changes to the ROA made by the Armed Forces Act 2006. It also does not mention that summary hearings are covered by the Act, nor does it provide the rehabilitation periods for sentences received as a result of either a court martial or summary hearing (service disciplinary proceedings) other than those listed in the table above.

Summary hearings

Most minor offences by members of the armed forces against service law are dealt with by the commanding officer through a summary hearing. It is an internal disciplinary proceeding which also handles minor criminal conduct offences that have equivalent offences in civilian law, as listed in the Armed Forces Act 2006. A serviceman's commanding officer has jurisdiction to deal with a person under his command who is subject to service law (i.e. not a civilian) if the accused is of or below the rank of Commander in the Navy, Lieutenant-Colonel in the army or Wing Commander in the RAF. A person charged with an offence which could be dealt with by a summary hearing before a commanding officer has the right to choose trial by court martial instead. If a commanding officer dealing with an offence summarily finds the accused guilty, he can impose punishments including loss of seniority (for an officer), or reduction in rank (for a warrant officer or non-commissioned officer). For lower ranks, he can impose a term of detention in a unit guardhouse, or at the Military Corrective Training Centre in Colchester of up to 28 days (or 90 days in serious cases) or a requirement to carry out extra work or drill or loss of entitlement to leave. Alternatively he can impose a fine of up to 28 days' pay, or another minor punishment.¹ The commanding officer operates in the role of prosecutor, jury and judge.

[The Manual of Service Law Volume 1](#) covers summary hearings in depth including the criteria for sentencing servicemen convicted at a summary hearing. The punishments available are:

- a) Service detention (only if the offender is of, or below, rate or rank of leading rate, lance corporal or lance bombardier or corporal in the RAF)
- b) Service supervision and punishment order (able rates, marines, soldiers or airmen only)
- c) Forfeiture of seniority (officers only)
- d) Reduction in rank or disrating (warrant officers or non-commissioned officers only)
- e) Fine
- f) Severe reprimand (officers, warrant officers and non-commissioned officers only)
- g) Reprimand (officers, warrant officers and non-commissioned officers only)
- h) Service compensation order

Additionally, the following minor punishments may be awarded:

¹ Summary hearing by a commanding officer
http://en.wikipedia.org/wiki/Military_Courts_of_the_United_Kingdom#Summary_hearing_by_Commanding_Officer

- 1) Stoppage of leave (those below the rank or rate of warrant officer only)
- 2) Restriction of privileges (able rates, marines, soldiers or airmen and army cadets only)
- 3) Admonition

Recording of summary hearing convictions on the Police National Computer

According to the Manual of Service Law, recordable offences are placed on the Police National Computer (PNC) by the Service Police Crime Bureau after receiving an upload from the Joint Personnel Administration of proven offences.

Recordable offences are considered those offences under section 42 of the Armed Forces Act 2006 for which the corresponding offences under the law of England and Wales are also recordable under regulation 3 of the National Police Records (Recordable Offences) Regulations 2000. In addition, there are a number of service offences that are recordable. These are:

- a) Section 11 (1) – Misconduct towards a superior officer
- b) Section 14 – Using force against a sentry etc
- c) Section 24(1) – Damage to, or loss of, public or service property
- d) Section 27 – Obstructing or failing to assist a service policeman
- e) Section 28 – Resistance to arrest etc(only in relation to a conviction under section 28(1) (b) or (c) – using violence or threatening behaviour)
- f) Section 29 – Offences in relation to service custody
- g) Section 30 – Allowing escape or unlawful release of prisoners, etc (but only where the conviction is under section 30(4)(a))
- h) Section 39 – Attempts to commit any offences specified above
- i) Section 40 – Encouraging or assisting the commission of any offence above (apart from an attempt)

Enquiries with the Metropolitan Police's PNC Policy and Planning Unit [SC026] confirm that the service offences listed above are now recorded on the PNC.

Findings

Based on the initial research, it appeared that convictions as a result of a summary hearing would be placed on the PNC and therefore disclosed on criminal record checks. However, the Nacro helpline had never previously received an enquiry in relation to the majority of the penalties that a serviceman can receive as a result of a summary hearing conviction. As the majority of minor service offences are dealt with by means of a summary hearing, Nacro would have expected there to be a large number of servicemen disciplined as a result of a summary hearing for criminal conduct and relevant service offences contacting our service, but neither Nacro or other organisations operating in this field which we contacted had previously come across this issue.

In addition, it was not clear what the rehabilitation periods are for the different penalties available. There is no mention at all in the Manual of Service Law of the ROA, or of when a sentence as a result of a summary hearing became 'spent' under the Act.

Nacro's understanding was that only sentences that had a recognised civilian equivalent, i.e. fines, were treated as criminal convictions by relevant government organisations. Therefore only some offences would be disclosed on criminal records checks and only a few sentences would constitute a criminal conviction for servicemen, depending on what information was recorded on the PNC and also the interpretation of these convictions by Disclosure Scotland, Access NI and the Disclosure and Barring Service (formerly the Criminal Records Bureau).

Once they have left the armed forces some servicemen who had been convicted as a result of summary hearing could face barriers when they rejoin civilian life such as difficulty securing employment, education, housing, insurance or with volunteering at their children's schools or clubs, as well as with travelling abroad, emigrating and, in the case of FCO servicemen, the right to remain in the UK.

Conversely, other servicemen would not be affected at all once they returned to civilian life as their military convictions would not be disclosed on criminal record checks.

Legislation

Nacro reviewed the original draft of the ROA and all subsequent amendments, and also reviewed the relevant schedules in the Armed Forces Act 2006.

Other than the rehabilitation periods previously mentioned, there is no mention in the legislation of the rehabilitation periods for the other penalties available as a result of a summary hearing conviction.

It appears from the Manual of Service Law that military convictions have different levels of severity, just as they do in civilian law. For example, a sentence of service detention (which has a rehabilitation period of five years) is considered a more serious penalty in military law than a sentence which results in a fine. A sentence which results in a forfeiture of seniority is considered a more serious penalty than an admonition, which is considered a very minor offence.

When compared to civilian law one would expect that military sentences would operate on a similar escalating scale of severity: a longer rehabilitation period for a harsher sentence. However, the only case that Nacro had come across involved a fine, which has a rehabilitation period of five years – the same as a period of service detention.

In addition, the original draft of the ROA states that any sentence not covered by Table A of the Act would carry a default rehabilitation period of five years.

Based on these findings, all the penalties available in a summary hearing would be disclosed for five years from the date of conviction. However, Nacro had not come across any of the other penalties being disclosed on criminal record checks.

In addition, there is no mention in the Legal Aid, Sentencing and Punishment of Offenders Act of military conviction penalties other than:

- 1) Removal from Her Majesty's Service – The end of the period of 12 months beginning with the date of the conviction in respect of which the sentence is imposed. If under 18, it is the end of the period of 6 months beginning with the date of the conviction in respect of which the sentence is imposed.
- 2) Service detention – The end of the period of 12 months beginning with the day on which the sentence is completed. If under 18, the end of the period of six months beginning with the day on which the sentence is completed.

Under the Legal Aid, Sentencing and Punishment of Offenders Act, a sentence not covered in the Act has no rehabilitation period attached.

Responses from relevant agencies

Nacro decided to seek clarification on the handling of the different disposals available from some of the relevant agencies including:

- the MoJ
- the MoD, Royal Military Police and Service Police Crime Bureau
- Access Northern Ireland
- Disclosure and Barring Service
- Disclosure Scotland

- UK Border Agency²

The MoJ

The MoJ consulted their lawyers who advised: “under current legislation where a disposal is not otherwise dealt within the ROA, then it falls to be considered under the last entry of Table A in section 5(2) which imposes a rehabilitation period of five years. Because the ROA does not define the disposals that you mention and because the terms originate in the relevant armed forces legislation, it is for that legislation to govern how these disposals are treated under the ROA. Where there is doubt over whether a particular disposal falls under a provision of the ROA then determination of this is a matter for the courts.” The MoJ recommended seeking legal advice.

The MoD, Royal Military Police and Service Police Crime Bureau

Enquiries were made directly with the Service Police Crime Bureau branch of the MoD. They were not able to provide us with a clear answer, but advised that they were looking into the same issue, and would contact us as soon as they had a clear answer.

The Royal Military Police provided us with information via the Disclosure and Barring Service. They confirmed they add all the disposals mentioned to the PNC under the following descriptions:

- a) Forfeiture of seniority – described as ‘Otherwise dealt with’
- b) Fine – described as ‘Fine’
- c) Severe reprimand – described as ‘Severe reprimand’
- d) Reprimand – described as ‘Reprimand’
- e) Admonition – described as ‘Admonished’
- f) Service compensation order – described as ‘Compensation’
- g) Reduction in rank/disrating – described as ‘Reduced to the ranks’ (with possible annotation)
- h) Stoppage of leave – described as ‘Otherwise dealt with’
- i) Detention – described as ‘Detention’
- j) Service supervision and punishment order – described as ‘Otherwise dealt with’
- k) Restriction of privileges – described as ‘Otherwise dealt with’

It is not clear why some of these disposals are described as “otherwise dealt with”, particularly forfeiture of seniority which is one of the harsher disposals but only available to officers. This disposal would not only involve a reduction in rank, but also a loss of pay, so it is not clear why it has the same description as the penalties considered minor by the MoD.

The Royal Military Police was unable to provide any details about the rehabilitation periods for these offences under the ROA. They suggested that the MoJ would be able to provide the necessary information about rehabilitation periods for the offences as “they are responsible for the ROA legislation”.

Access Northern Ireland

Access Northern Ireland (AccessNI) carries out basic disclosures which will reveal unspent convictions on the PNC. They confirmed: “Access NI’s enhanced disclosure certificates disclose information on all convictions recorded on the PNC or Criminal Records Viewer (this contains Northern Ireland records only), including any convictions notified by the MoD. Where the application is for a basic disclosure, AccessNI will apply the rehabilitation periods set out within the Rehabilitation of Offenders (NI) Order 1978 to any convictions belonging to the applicant identified in these records. Therefore for periods of detention, fines etc AccessNI applies the same rehabilitation period as we would for convictions in a criminal court.”

AccessNI undertakes a relatively small number of basic disclosure checks and at the time of asking they could not recall a case which included convictions imposed by any branch of the

² We were unable to contact the UK Border Agency’s criminality policy team when conducting our research.

armed forces. They stated: "If such a case did arise and there was any doubt about whether the disposal awarded should be disclosed or not, AccessNI would seek legal advice."

The Disclosure and Barring Service

In addition to the information provided on behalf of the Royal Military Police regarding disposals, the Disclosure and Barring Service advised:

"The process appears to be that when any military service personnel are charged with something outside of court martial, an annex 40K (administration form) is completed. This is then sent to the Criminal Justice Office who then update the PNC.

Certain offences can be dealt with by local courts that have the same authority as a court martial up to a certain point (i.e. minor offences). Anything with an ACPO recordable offence is put on the PNC so if the offence is dealt with outside of court martial, the annex 40K is the route to get it added to the PNC."

The Disclosure and Barring Service were not able to be specific as to which of the disposals could appear on a standard or enhanced criminal record check as a conviction. They believed that some of the penalties could appear and "it would more likely be those that are deemed to be more serious like severe reprimands/reprimands or fines whilst a stoppage of leave or privilege restriction is unlikely to be revealed". However, they felt that although "some of the penalties could appear but most of them are unlikely to, this is essentially governed by how the Criminal Justice Office record the penalty and what route is taken: court martial/local court."

Disclosure Scotland

At present, Disclosure Scotland issues basic disclosure criminal record checks which reveal only unspent criminal convictions on behalf of individuals and companies in England and Wales as the Disclosure and Barring Service does not currently have the capability to provide this service. However, there are some differences in their handling of some disposals in England and Wales. For example, in England and Wales, a compensation order is considered 'spent' once paid in full; however Disclosure Scotland will disclose a compensation order for five years from the date of conviction. In addition, an admonition in Scottish civilian law is considered to be a similar disposal to an absolute discharge order in England and Wales which both have a rehabilitation period of six months from the date of conviction.

Disclosure Scotland was initially unable to provide us with a clear answer on which summary hearing disposals would be included on a basic disclosure, and how long these disposals would be disclosed. Eventually, they provided us with the following rehabilitation periods:

- a) Forfeiture of seniority – Not disclosed
- b) Fine – Disclosed until five years have elapsed from the date of conviction
- c) Severe reprimand – Not disclosed
- d) Reprimand – Not disclosed
- e) Admonition³ – Disclosed until six months have elapsed from the date of conviction
- f) Service compensation order⁴ – Disclosed until five years have elapsed from the date of the Order was made
- g) Reduction in rank/disrating – Not disclosed
- h) Stoppage of leave – Not disclosed
- i) Detention – Disclosed until five years have elapsed from the date of conviction
- j) Service supervision and punishment order – Not disclosed
- k) Restriction of privileges – Not disclosed

³ Admonition is disclosed for six months from the date of conviction, as it has an equivalent disposal in Scotland. In military law, a reprimand or severe reprimand is considered much harsher penalties than an admonition, yet they are not disclosed at all.

⁴ A service compensation order is disclosed for five years from the date of conviction rather than from when paid in full, in line with the equivalent disposal in England and Wales.

It should be noted that notwithstanding the provisions contained in the list above, Nacro has encountered a couple of cases recently which highlight the inconsistent handling of disposals by government departments.

A former serviceman who received a stoppage of pay order to the value of £40 as a result of a summary hearing had the sentence disclosed on a basic disclosure as a compensation order for five years from the date of conviction. This conviction was disclosed in 2007 prior to the changes to the ROA made by the Armed Forces Act 2006 being implemented in 2009.

In addition, an FCO serviceman was recently turned down for citizenship by the UK Border Agency for failing the necessary 'good character' requirement by having an unspent criminal conviction received in a civilian court. The serviceman had received an admonition which is spent six months from the date of conviction. At the time of his application, he had received a clear basic disclosure from Disclosure Scotland, but the UK Border Agency believes that an admonition is considered 'spent' five years from the date of conviction. As a result of receiving this conviction in a civilian court, the serviceman was disciplined by the MoD at a summary hearing. The serviceman received a reduction in rank sentence, which was not disclosed on a basic disclosure.

The UK Border Agency has their own access to the PNC and make their decisions based on their interpretation of the ROA.

Other developments

Outcome of the Baleiwai case

After Nacro received a response from the MoJ about their interpretation of the rehabilitation periods applicable to the disposals, the following question (and answer) was raised in Parliament by Margaret Moon MP in relation to the Baleiwai case:

Mrs Moon: To ask the Secretary of State for Justice what definition his department uses for (a) reprimand, (b) severe reprimand and (c) demotion under the ROA where these are handed down as punishments following a military summary hearing; and if he will make a statement.

Mrs Grant: The ROA does not define the terms 'reprimand', 'severe reprimand' and 'demotion'. These terms originate in the relevant armed forces legislation. The Armed Forces Act 2006 governs how these disposals are treated under the ROA. Where there is doubt over whether a particular disposal falls under a provision of the ROA then determination of this is a matter for the courts. Under current legislation where a disposal is not otherwise dealt within the ROA, then it falls to be considered under the last entry of Table A in section 5(2) which imposes a rehabilitation period of five years.

LCpl Isimeli Baleiwai appealed his summary hearing conviction and his conviction was overturned at a court martial hearing on Tuesday 20 November 2012. He was subsequently granted UK citizenship on 4 December 2012.

Separately, the UK Border Agency announced plans to change their rules to ensure FCO soldiers with only minor disciplinary convictions would be able to stay on in Britain after they leave the services.⁵

Citizenship applications

On 13 December, the UK Border Agency issued new guidance on how they assess good character in [citizenship applications](#). The main changes deal with criminality and how it is assessed in terms of the good character requirement in citizenship applications. Some of the main amendments are summarised below:

⁵ 'Border Agency U-turn on deportation of FCO soldiers' available at: <http://www.channel4.com/news/border-agency-u-turn-on-deportation-of-fco-soldiers>

- Applications made on or after 13 December 2012 which feature a criminal conviction will no longer be assessed against the ROA. Instead they will be measured against a new set of sentencing limits.
- Where an application features a sentence of four years or more in prison this can never fall outside a sentencing threshold. Such an application for citizenship is likely to be refused.
- Police cautions will be looked at in determining whether someone meets the good character requirement.
- There will be greater scope to discount some disciplinary military offences when deciding nationality applications from serving and former members of the forces.

The new UK Border Agency guidance on military offences is contained in [section 2b of chapter 15 \(Armed Forces\) of the Immigration Directorate instructions and the modernised guidance document on military offences and sentences](#). The guidance states that:

- A criminal conviction imposed under service law should be considered in the same way as one imposed by a civilian court.
- A non-criminal conviction should not be considered in the same way, but may be taken into account in wider considerations of character and conduct.

The UK Border Agency guidance advises that single criminal conduct offences which have attracted the following sentences should be disregarded as a conviction for immigration and nationality purposes:

- Restriction of privileges
- Stoppage of leave
- Admonition⁶

Summary of findings

- The changes made to the ROA by the Legal Aid, Sentencing and Punishment of Offenders Act could help resolve the issues relating to some summary hearing disposals as the majority are not listed in the Act. It is also possible that disposals such as fines, compensation orders and admonitions will still be disclosed under the Legal Aid, Sentencing and Punishment of Offenders Act as there are equivalent titles in civilian disposals.
- There is an inconsistent approach between government departments regarding the application of the different disposals that can be received at a summary hearing.
- In practice, whether or not a serviceman is likely to be criminalised depends solely on the type of disposal he received at a summary hearing. A serviceman could receive a more serious military sentence (i.e. forfeiture of seniority, reduction in rank, severe reprimand) and this would not appear on a criminal record. Conversely, a serviceman could receive a less serious military sentence (i.e. admonition) which would appear on a criminal record.

⁶ The general UK Border Agency guidance on criminality states that when considering applications on or before 12 December 2012 and when admonition is not referred to in the ROA, it falls under s.5 of the Act – “any other sentence” – and carries a five year rehabilitation period (two and a half years for under 18s).

- There could potentially be legal challenges by servicemen who have been affected by the inconsistent approach to sentences received as a result of summary hearings
- FCO soldiers appear to be at a greater disadvantage as a result of receiving summary hearing convictions, because of the implications these could have on applications for right to remain in the UK.

Recommendations

As previously stated, Nacro accepts that the armed forces operate in a unique environment wherever they are serving in the world, and believes it is only right that there is a service justice system which recognises this. However, the above research demonstrates an inconsistent approach between government departments regarding the application of disposals under the summary justice system, and their subsequent impact upon a person's civilian criminal record. Ahead of the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, Nacro is calling on the government to address this problem through the following recommendations:

- 1) The changes made to the ROA by the Armed Forces Act should be reviewed by the government prior to the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act to ensure that servicemen do not come up against barriers to successful resettlement, including gaining employment, when they leave the armed forces. It should be clarified in legislation whether the disposals have a rehabilitation period attached to them.
- 2) Any disposal that does have a rehabilitation period attached under the Legal Aid, Sentencing and Punishment of Offenders Act should be comparable to rehabilitation periods in civilian law, i.e. a fine will be considered spent after one year, a period of service detention will be considered spent 12 months after completion of the sentence. Therefore a service compensation order should not have the potential to be disclosed for a longer period than the more serious military penalties.
- 3) Clear guidance should be issued to all the relevant government agencies highlighting the issues raised in this report and raising awareness of the impact that summary hearing convictions can have on a serviceman's life.