

**EXPLANATORY MEMORANDUM TO  
THE RULES OF THE SUPREME COURT (NORTHERN IRELAND)  
(AMENDMENT No. 3) 2009**

**2009 No. 264**

1. 1.1 This explanatory memorandum has been prepared by the Ministry of Justice (Northern Ireland Court Service) and is laid before Parliament by Command of Her Majesty.

**2. Purpose of Instrument**

2.1 The Rules of the Supreme Court (Northern Ireland) 1980 (S.R. 1980 No. 346) (“the principal Rules”) govern the practice and procedure in the Supreme Court of Judicature in Northern Ireland.

2.2 This instrument -

- amends Order 116A of the principal Rules in respect of applications for control orders under the Prevention of Terrorism Act 2005 (“the 2005 Act”), to reflect amendments made to the 2005 Act by the Counter Terrorism Act 2008 (“the 2008 Act”);
- amends Order 116B of the principal Rules to prescribe the procedure to be followed when applying for a notification order under the 2008 Act; and
- amends the provisions in both Order 116A and 116B in respect of special advocates.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 The Rules which amend Order 116A (control orders) and the commencement provision shall come into operation on 10<sup>th</sup> August 2009. The primary provisions under the 2008 Act were commenced in February 2009. It is not considered that the delay between commencement of the relevant provisions of the primary legislation and the coming into operation of these Rules is problematic.

3.2 The Rules which amend Order 116B (notification orders) will come into operation at the same time the primary provisions relating to notification orders under the 2008 Act are commenced. We understand from the Home Office that this is expected to be 1<sup>st</sup> October 2009.

**4. Legislative Context**

4.1 The principal Rules are normally made and amended by the Northern Ireland Supreme Court Rules Committee. However, the initial exercise of the rule making power in respect of both Order 116A (control orders) and 116B (financial restrictions applications) was by the Lord Chancellor, subject to the affirmative resolution procedure. The power to make these Rules has now

reverted to the Supreme Court Rules Committee and is subject to the negative resolution procedure.

4.2 Control Orders

The 2005 Act allows the Secretary of State to make an application to the High Court for a control order to impose obligations on individual suspected of terrorist activity. Section 3 of the 2005 Act makes provision in relation to the supervision by the Court of the making of non-derogating control orders. In particular, it requires the Court to give an individual, subject to a control order, the opportunity to make representations to the Court about directions for a full hearing in relation to that order.

4.3 Section 80 of the 2008 Act amended section 3 of the 2005 Act to alter the time frame within which the controlled person may make representations to the Court. The amendment provides that, where a non-derogating control order is made, the court must hold a directions hearing to allow the individual to make representations, *within seven days from the date on which the order is served* on the individual.

4.4 The 2008 Act also makes amendments in relation to the anonymity provisions in respect of a controlled person in the 2005 Act. Section 81 of the 2008 Act made a technical amendment to paragraph 5 of the Schedule to the 2005 Act to insert new paragraph 5(4). New paragraph 5(4) allows the Secretary of State to make an application for an anonymity order to protect the identity of the controlled person at the stage where leave is sought to make the order.

4.5 Order 116A of the principal Rules prescribes the procedure to be followed when making an application to the High Court for a control order under the 2005 Act. The amendments which are made to Order 116A by these Rules reflect the amendments which have been made to the 2005 Act by the 2008 Act in respect of directions hearings and anonymity applications.

4.6 Notification Orders

Schedule 4 to the 2008 Act allows for an application to be made to the High Court by the Chief Constable of the Police Service of Northern Ireland for a notification order to be placed on an individual. A notification order under Schedule 4 may be sought in respect of a national in the UK who has been convicted of a foreign terrorist offence and who is deported to the UK on release from prison abroad. It may also be sought in respect of a foreign national with a terrorism conviction who is in or who is coming to the UK.

4.7 A person under a notification requirement, made under Schedule 4 to the 2008 Act, must provide certain personal information to the police (i.e. name, address, date of birth.) when they are not in custody or where that information changes.

4.8 Order 116B of the principal Rules sets out the procedure to be followed when making an application to the High Court for a financial restrictions order under the 2008 Act. As an application for a notification order will also be made

under the 2008 Act, these Rules amend Order 116B to take account of this new application under the 2008 Act.

## **5. Territorial Extent and Application**

5.1 This instrument applies to Northern Ireland.

## **6. European Convention on Human Rights**

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

6.2 The recent House of Lords judgment in the Secretary of State for the Home Department –v- AF and Others commented on control orders, specifically whether the level of disclosure made to a controlled person and the special advocate procedure would always be sufficient to ensure the Article 6 rights of the controlled person. These Rules make only minor technical amendments to the procedure for applying for a control order and do not touch upon the wider policy issues considered in the House of Lords judgment.

## **7. Policy Background**

### **7.1 Control Orders**

Under the 2005 Act, the Secretary of State may apply to the High Court for a control order in respect of an individual. A control order has the effect of imposing obligations on individuals suspected of involvement in terrorist activity. The Act draws a distinction between two types of control order – a “derogating control order” and a “non-derogating control order”. A derogating control order is an order which amounts to a deprivation of liberty but which is made in respect of a designated derogation from Article 5 of the European Convention on Human Rights. All other control orders are non-derogating control orders. The 2008 Act makes a number of amendments to the 2005 Act. Specifically, these Rules are concerned with the amendments made by section 80 and 81 of the 2008 Act.

7.2 Section 80 of the 2008 Act amended section 3 of the 2005 Act to provide that an individual, who is subject to a non-derogating control order, has seven days from the date on which the order is served to make representations to the Court. Previously under the 2005 Act, the seven day time period ran from the day the court gave leave to make the control order. Potentially, this meant that the individual would not yet have been served with the order when time started to run and such would not have been aware of the proceedings. The amendment to section 3 of the 2005 remedies that impracticality.

7.3 Section 81 of the 2008 Act amends paragraph 5 of the Schedule to the 2005 Act. This amendment means that a controlled person can now be anonymous throughout the judicial process, and not just from the point that the control order is made.

7.4 The amendments made to Order 116A of the principal Rules by these Rules reflect the amendments made to the 2005 Act by the 2008 Act.

7.5 Notification Orders

Schedule 4 to the 2008 Act makes provision in respect of a new type of application to the High Court for a notification order. Notification orders were included in the 2008 Act to ensure that those convicted of overseas terrorist offences would be subject to notification requirements in the UK. As there is currently no specific provision in the principal Rules to deal with applications to the Court for such an order, these Rules insert new Part V into Order 116B of the principal Rules to prescribe the procedure for making such an application.

7.6 Special Advocate Provisions

These Rules amend both Orders 116A and 116B to provide that special advocates may adduce evidence to the court. Home Office were of the view that it was already open in principle to special advocates to apply to the court to call expert witnesses. However, the Government stated during the passage of the 2008 Act through Parliament that it was minded to ask the relevant rules of court making bodies to amend the control order proceedings rules in due course to make it explicit, that with the permission of the court, special advocates can cross examine witnesses and adduce evidence. As the procedure in financial restrictions proceedings also involves the use of special advocates, it is appropriate that a similar amendment also be made to those Rules. This change clarifies the position, and brings this element of the rules into line with the special advocate provisions in the Special Immigration Appeals Commission rules.

## **8. Consultation outcome**

8.1 Due to the representative nature of the Supreme Court Rules Committee (which makes these Rules with the agreement of the Lord Chancellor) and the fact that these Rules are procedural in nature no formal consultation was considered necessary on this occasion.

## **9. Guidance**

9.1 These Rules will be published on the Northern Ireland Court Service website.

## **10. Impact**

10.1 An Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

## **12. Monitoring and review**

- 12.1 The Rules will form part of the Rules of the Supreme Court (Northern Ireland) 1980 which are kept under review by the Supreme Court Rules Committee. Any subsequent amendment to these Rules will be made by the Supreme Court Rules Committee with the agreement of the Lord Chancellor.

## **13. Contact**

- 13.1 Una Corrigan at the Northern Ireland Court Service (Criminal Policy Division) Tel: 028 9041 2289 or email [unacorrigan@courtsni.gsi.gov.uk](mailto:unacorrigan@courtsni.gsi.gov.uk) can answer any questions regarding this instrument.