

2008 No. 401

COURT OF SESSION

**Act of Sederunt (Rules of the Court of Session Amendment
No. 6) (Counter-Terrorism Act 2008) 2008**

Made - - - - *2nd December 2008*

Coming into force - - *4th December 2008*

The Lords of Council and Session, under and by virtue of the powers conferred upon them by section 5 of the Court of Session Act 1988(a) and sections 66 and 67 of the Counter-Terrorism Act 2008(b) and of all other powers enabling them in that behalf, do hereby enact and declare:

Citation and commencement

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Counter-Terrorism Act 2008) 2008 and shall come into force on 4th December 2008.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

Amendment of the Rules of the Court of Session: Counter-Terrorism Act 2008

2. After Chapter 95(c) of the Rules of the Court of Session 1994(d) insert—

“CHAPTER 96

**COUNTER-TERRORISM ACT 2008 – FINANCIAL RESTRICTIONS
PROCEEDINGS**

Interpretation and application of this Chapter

96.1.—(1) In this Chapter—

“the 2008 Act” means the Counter-Terrorism Act 2008;

“financial restrictions decision” means a decision mentioned in section 63(1) of the 2008 Act;

“financial restrictions proceedings” means proceedings in the Court of Session on an application under section 63(2) of the 2008 Act or on a claim arising from any matter to which such an application relates;

(a) 1988 c.36; section 5 was amended by the Civil Evidence (Scotland) Act 1988 c.32, section 2(3), the Children (Scotland) Act 1995 c.36, Schedule 4, paragraph 45 and the Vulnerable Witnesses (Scotland) Act 2004 (asp 3), section 14(1).

(b) 2008 c.28.

(c) Chapter 95 was inserted by S.S.I. 2008/123.

(d) S.I. 1994/1443, last amended by S.S.I. 2008/349.

“special advocate” means, in relation to financial restrictions proceedings, a person who is appointed under section 68 of the 2008 Act to represent the interests of a party to those proceedings.

(2) In this Chapter—

- (a) references to a party to the proceedings do not include the Treasury;
- (b) references to a party’s legal representative do not include a person appointed as a special advocate.

(3) This Chapter applies to a reclaiming motion in financial restrictions proceedings as well as to financial restrictions proceedings at first instance.

Application to set aside a financial restrictions decision

96.2.—(1) An application under section 63(2) of the 2008 Act to set aside a financial restrictions decision shall be made by lodging a petition with the Deputy Principal Clerk.

(2) The petition shall include, in numbered paragraphs, statements of reasons setting out—

- (a) the details of the financial restrictions decision; and
- (b) the grounds on which the petitioner seeks to set aside that decision.

(3) There shall be lodged with the petition—

- (a) a copy of the financial restrictions decision;
- (b) all relevant documents in the petitioner’s possession and within the petitioner’s control.

Lodging of process

96.3. A process lodged under rule 4.3 in financial restrictions proceedings shall be lodged with the Deputy Principal Clerk.

Disclosure

96.4.—(1) Subject to rule 96.5, the Treasury shall disclose to every other party in financial restrictions proceedings—

- (a) material on which they rely;
- (b) material which adversely affects their case; and
- (c) material which supports the case of a party to the proceedings.

(2) The Treasury shall disclose the material on being served with a petition or summons in financial restrictions proceedings or, when the material comes to the Treasury’s notice after such service, as soon as practicable after that.

Applications for permission not to disclose material

96.5.—(1) This rule applies to an application by the Treasury in financial restrictions proceedings for permission not to disclose material otherwise than to the court and any special advocate.

(2) The following shall not apply to the application:—

- rule 4.5(1)(b) (copy inventory of productions to be sent to other parties),
- rule 4.6 (intimation of steps of process),
- rule 4.11 (documents not to be borrowed),
- Chapter 23 (motions).

(3) The application shall be made by motion to the Deputy Principal Clerk.

(4) The motion shall be intimated to any special advocate.

(5) The Treasury shall not rely upon any material which the court has granted permission not to be disclosed on an application unless a special advocate has been appointed under section 68 of the 2008 Act.

(6) At the same time as making the application the Treasury shall—

- (a) lodge with the Deputy Principal Clerk; and
- (b) serve on any special advocate,

the documents mentioned in paragraph (7) but such documents shall not be intimated to the petitioner or pursuer or any other party to the proceedings.

(7) Those documents are—

- (a) the material;
- (b) a statement of the reasons for the application for permission not to disclose the material; and
- (c) a draft summary of the material.

(8) The draft summary mentioned in paragraph (7)(c) shall be prepared with rule 96.7 in mind.

(9) Where the special advocate intends to oppose an application he shall lodge notice of opposition within 14 days of the date of service by the Treasury under paragraph (6).

(10) Where the special advocate does not intend to oppose an application he shall give notice to the court within 14 days of the date of service by the Treasury under paragraph (6).

(11) Documents lodged in relation to an application shall be kept separately from the process by the Deputy Principal Clerk.

(12) Documents lodged in relation to an application shall not be borrowed or inspected by any party other than by a legal representative of the Treasury or by any special advocate.

Hearing on applications for permission not to disclose material

96.6.—(1) On the making of an application under rule 96.5, the Deputy Principal Clerk shall, unless paragraph (2) applies—

- (a) allocate a diet for a hearing of such an application; and
- (b) intimate that date and time in writing to—
 - (i) the Treasury; and
 - (ii) any special advocate.

(2) This paragraph applies where—

- (a) the special advocate has given notice that he does not oppose the application;
- (b) the court has previously considered an application by the Treasury for prohibition of disclosure of the same or substantially the same matters, and is satisfied that it would be just to prohibit disclosure without a hearing; or
- (c) the Treasury and the special advocate have consented to the court deciding the issue without a hearing.

(3) Where paragraph (2) applies, the Deputy Principal Clerk shall place the application before the court in chambers, and it shall determine whether to—

- (a) decide the application without a hearing; or
- (b) hear the Treasury and any special advocate.

(4) A hearing on the application shall take place in the absence of every party to the proceedings and every party's legal representative, in private.

(5) The court shall grant the application where it considers that the disclosure of the material would be contrary to the public interest.

Summary of material

96.7.—(1) On granting an application made under rule 96.5, the court must consider ordering the Treasury to serve upon every party a summary of the material.

(2) The court is required to ensure that any such summary does not contain material the disclosure of which would be contrary to the public interest.

(3) Where the court is of the view that such a summary should be provided it shall consider the draft summary mentioned in rule 96.5(7)(c).

(4) Having done so, the court may—

- (a) order the Treasury to serve a copy of the summary on every party and every party's representative; or
- (b) order the Treasury to lodge with the Deputy Principal Clerk within a specified time period a revised summary with such changes as the court directs.

(5) Where paragraph (4)(b) applies, the court shall—

- (a) consider that revised summary and make any further revisions that it considers necessary; and
- (b) order the Treasury to serve a copy of the summary as revised by the court on every party to the proceedings and every party's legal representative.

Election by Treasury not to disclose material or to provide summary

96.8.—(1) Paragraphs (2) and (3) apply where, in relation to an application made under rule 96.5—

- (a) the Treasury do not receive the court's permission to withhold material, but elect not to disclose it; or
- (b) the Treasury are required to provide a party to the proceedings with a summary of material that is withheld, but elect not to provide the summary.

(2) The Treasury shall, within 7 days, notify the Deputy Principal Clerk of that matter in writing.

(3) The court shall—

- (a) if it considers that the material or anything that is required to be summarised might adversely affect the Treasury's case or support the case of a party to the proceedings, in relation to a matter under consideration by the court, order that the Treasury shall not rely on such points in their case, or shall make such concessions or take such other steps as the court may specify;
- (b) in any other case, ensure that the Treasury does not rely in the proceedings on the material or (as the case may be) on what is required to be summarised.

Appointment of special advocates

96.9.—(1) Subject to paragraphs (2) and (3), the Treasury shall, upon—

- (a) being served with any application;
- (b) making any motion;
- (c) a reclaiming motion being intimated or on intimating a reclaiming motion; or
- (d) being served with or serving any other application,

in financial restrictions proceedings give notice of that matter to the Advocate General for Scotland, so that he may consider whether to appoint a special advocate to represent the interests of any party to the proceedings.

(2) Paragraph (1) applies only where there is at least one party to the proceedings in respect of whom a special advocate has not been appointed under section 70 of the 2008 Act to represent their interests in the proceedings.

(3) Paragraph (1) does not apply where the Treasury does not intend to—

- (a) oppose the application concerned; or
- (b) make an application under rule 96.5.

(4) Any party may at any time request the Advocate General to appoint a special advocate to represent the interests of a party in financial restrictions proceedings.

(5) On the appointment of any special advocate, the Advocate General shall intimate the name of the special advocate to the Deputy Principal Clerk in writing.

(6) The special advocate may address the court in any financial restrictions proceedings from which the petitioner or pursuer is excluded.

Special advocates: communication about proceedings

96.10.—(1) A special advocate shall not communicate about the proceedings or any matter connected with the proceedings except in accordance with this rule.

(2) The special advocate may, without the authority of the court, communicate with—

- (a) the court;
- (b) the Treasury or their legal representative;
- (c) the Advocate General for Scotland or any person acting for him;
- (d) any other person, except the petitioner or pursuer or his legal representative or any other party to the proceedings, with whom it is necessary for administrative purposes for him to communicate about matters not connected with the substance of the proceedings.

(3) The special advocate may apply by motion for authority to communicate with the petitioner or pursuer or his legal representative or with any other person.

(4) The motion shall be intimated to the Treasury only.

(5) A notice of opposition to the motion shall be intimated by the Treasury—

- (a) to the special advocate only; and
- (b) within 7 days of intimation of the motion.

(6) Where the Treasury oppose the motion, the court shall fix a hearing.

(7) The hearing shall take place in the absence of every party to the proceedings and every party's legal representative, in private.

(8) The petitioner or pursuer or any other party to the proceedings shall not communicate with the special advocate upon whom material has been served under rule 96.5(6) other than through a legal representative in writing.

(9) The special advocate may, without the authority of the court, send a written acknowledgement of receipt of a communication under paragraph (8).

Exclusion from hearings

96.11.—(1) If the court considers it necessary for the petitioner or pursuer and his legal representative, or any other party to the proceedings, to be excluded from any hearing in relation to financial restrictions proceedings or any part of such a hearing to secure that information is not disclosed contrary to the public interest, it shall—

- (a) make an order in that respect; and
- (b) conduct that hearing, or that part of it from which the petitioner or pursuer and his legal representative, or any other party to the proceedings, are excluded, in private.

(2) The court may otherwise order any hearing in relation to financial restrictions proceedings to be conducted in private if it thinks fit.

(3) Where the court considers it necessary under this rule to exclude any party to the proceedings from any hearing or part of a hearing it shall make such order as it considers

appropriate in relation to access to the process or inspection of documents, or in relation to any other matter, to secure that information is not disclosed contrary to the public interest.

Opinions of the court

96.12.—(1) When the court issues an opinion in financial restrictions proceedings, the court may withhold any or part of its reasons if and to the extent that it is not possible to give reasons without disclosing information contrary to the public interest.

(2) Where an opinion of the court does not include the full reasons for its decision—

- (a) the court shall prepare a separate opinion including those reasons; and
- (b) the Deputy Principal Clerk shall serve that separate opinion on the Treasury and the special advocate.

Recording of financial restrictions proceedings

96.13.—(1) Financial restrictions proceedings shall be recorded by—

- (a) a shorthand writer to whom the oath *de fidei administratione officii* has been administered on his appointment as a shorthand writer in the Court of Session; or
- (b) tape recording or other mechanical means approved by the Lord President.

(2) The record of the proceedings shall include—

- (a) any objection to a question or line of evidence;
- (b) any submission made in relation to such an objection; and
- (c) the ruling of the court in relation to the objection and submission.

(3) A transcript of the record of the proceedings shall only be made on the direction of the court and shall be subject to such order as to the cost of the transcript as the court thinks fit.

(4) The transcript of the record of the proceedings shall be certified as a faithful record of the proceedings by—

- (a) the shorthand writer or shorthand writers, if more than one, who recorded the evidence; or
- (b) where the evidence was recorded by tape recording or other mechanical means, the person who transcribed the record.

(5) The court may make such alterations to the transcript of the record of the proceedings as appear to it to be necessary after hearing the parties; and where such alterations are made, the court shall authenticate the alterations.”.

A.C. HAMILTON
Lord President
I.P.D.

Edinburgh
2nd December 2008

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt makes amendments to the Rules of the Court of Session 1994 to make provision in respect of financial restrictions proceedings under the Counter-Terrorism Act 2008 (“the 2008 Act”).

Paragraph 2(2) inserts a new Chapter 96. The new Chapter applies to financial restrictions proceedings in the Outer House of the Court of Session and appeals to the Inner House of the Court of Session in respect of those proceedings.

Rule 96.1 sets out various definitions and provides that the Chapter applies to reclaiming motions in financial restrictions proceedings as well as to first instance proceedings.

Rule 96.2 sets out the procedure for making applications to set aside financial restrictions decisions.

Rule 96.3 requires processes in financial restrictions proceedings to be lodged with the Deputy Principal Clerk.

Rule 96.4 obliges the Treasury to disclose all material on which they intend to rely, which may adversely affect their case or support the case of another party to the proceedings.

Rules 96.5 to 96.8 relate to applications by the Treasury for permission not to disclose information in financial restrictions proceedings under the 2008 Act and make provision for the procedure to be followed. Rule 96.5 provides that specified rules do not apply to such an application and provides that certain documents including the closed material and a summary of that material must be served on any special advocate who has been appointed. Further provision is made regarding those documents. Rule 96.6 makes provisions for the court’s determination of an application under rule 96.5 including provisions for a hearing. Rule 96.7 makes further provision regarding the summary lodged by the Treasury. Rule 96.8 applies when the Treasury elect not to disclose material or not to provide a summary and provides that the court shall take certain steps required by the 2008 Act.

Rules 96.9 and 96.10 concern the appointment of special advocates by the Advocate General for Scotland to represent the interests of parties to the proceedings and make provision about communication about the proceedings.

Rule 96.11 provides for the exclusion of parties and their legal representatives from financial restrictions proceedings under the 2008 Act.

Rule 96.12 makes provision regarding court opinions.

Rule 96.13 makes provision in respect of the recording of financial restrictions proceedings.

£5.00