

2011 No. 441

COURT OF SESSION

**Act of Sederunt (Rules of the Court of Session Amendment
No. 8) (Terrorism Prevention and Investigation Measures) 2011**

Made - - - - *14th December 2011*
Laid before the Scottish Parliament *16th December 2011*
Coming into force - - *21st December 2011*

The Lords of Council and Session, under and by virtue of the powers conferred by section 5 of the Court of Session Act 1988(a) and paragraphs 2 to 6 of Schedule 4 to the Terrorism Prevention and Investigation Measures Act 2011(b) and of all other powers enabling them in that behalf, do hereby enact and declare:

Citation, commencement etc.

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment No. 8) (Terrorism Prevention and Investigation Measures) 2011 and comes into force on 21st December 2011.

(2) A certified copy of this Act of Sederunt is to be inserted in the Books of Sederunt.

(3) In this Act of Sederunt, “the Rules” means the Rules of the Court of Session 1994(c).

Terrorism prevention and investigation measures

2.—(1) The Rules are amended in accordance with the following subparagraph.

(2) For Chapter 89 (Prevention of Terrorism Act 2005)(d) substitute—

“CHAPTER 89

TERRORISM PREVENTION AND INVESTIGATION MEASURES

Interpretation and application of this Chapter

89.1.—(1) In this Chapter—

(a) 1988 c.36; section 5 was amended by the Civil Evidence (Scotland) Act 1988 (c.32), section 2(3); the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40), Schedule 9; the Children (Scotland) Act 1995 (c.36), Schedule 4, paragraph 45; the Vulnerable Witnesses (Scotland) Act 2004 (asp 3), section 14(1); and the Judiciary and Courts (Scotland) Act 2008, (asp 6), section 46(3).

(b) 2011 c.23.

(c) S.I. 1994/1443, last amended by S.S.I. 2011/402.

(d) Chapter 89 was inserted by S.S.I. 2005/153.

“the Act of 2011” means the Terrorism Prevention and Investigation Measures Act 2011;

“Advocate General” means the Advocate General for Scotland;

“affected person” means an individual on whom the Secretary of State has imposed, or is proposing to impose, measures by means of a TPIM notice;

“appeal proceedings” means proceedings in the Inner House on an appeal relating to TPIM proceedings;

“legal representative” is to be construed in accordance with paragraph 4(4)(b) of Schedule 4 to the Act of 2011;

“measures” means terrorism prevention and investigation measures (which has the same meaning as in section 2 of the Act of 2011);

“relevant party” means any party to the TPIM proceedings or appeal proceedings other than the Secretary of State;

“special advocate” means a person appointed under paragraph 10(1) of Schedule 4 to the Act of 2011;

“TPIM notice” has the same meaning as in section 2(1) of the Act of 2011; and

“TPIM proceedings” has the same meaning as in section 30(1) of the Act of 2011.

(2) This Chapter applies to TPIM proceedings and appeal proceedings.

TPIM orders and imposed measures: petitions

89.2.—(1) The following shall be made by lodging a petition with the Deputy Principal Clerk—

- (a) an application made under section 6(1)(b) of the Act of 2011 for permission to impose measures on an individual;
- (b) a reference under paragraph 3(1) of Schedule 2 to the Act of 2011.

(2) The following rules do not apply to the petition:—

- rule 4.3 (lodging of processes),
- rule 4.4 (steps of process),
- 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),
- rule 4.12 (borrowing and returning of documents),
- rule 14.5 (first order in petitions),
- rule 14.6 (period of notice for lodging answers),
- rule 14.7 (intimation and service of petitions),
- rule 14.8 (procedure where answers lodged),
- rule 14.9 (unopposed petitions).

(3) Subject to rule 89.7 (permission not to disclose relevant material etc.), a petition referred to in paragraph (1)(a) shall include, in numbered paragraphs, statements of reasons—

- (a) to support the application; and
- (b) for imposing each of the measures under the proposed TPIM notice.

(4) Subject to rule 89.7, a petition referred to in paragraph (1)(b) shall include, in numbered paragraphs, statements of reasons—

- (a) to support the making of the TPIM notice; and
- (b) for imposing each of the measures contained in that notice.

- (5) Subject to rule 89.7, the following documents shall be lodged with the petition—
- (a) the productions of the Secretary of State;
 - (b) in the case of an application under section 6(1)(b) of the Act of 2011 for permission to impose measures on an individual, a draft of the proposed TPIM notice; and
 - (c) in the case of a reference under paragraph 3(1) of Schedule 2 to the Act of 2011, a copy of the TPIM notice.

Initial diets

89.3.—(1) On receipt of a petition under rule 89.2 (TPIM notices and imposed measures: petitions), the Deputy Principal Clerk shall allocate an initial diet for the court's consideration to begin.

(2) The Deputy Principal Clerk shall notify the date and time of an initial diet to the Secretary of State and, unless the Lord Ordinary orders otherwise, the affected person, any legal representative of the affected person and any special advocate.

(3) The affected person shall, not later than the date of the initial diet, lodge with the Deputy Principal Clerk and serve on the Secretary of State a copy of any answers and productions that are to be founded upon by the affected person at the initial diet.

(4) Where a special advocate is appointed for the purposes of the initial diet, he or she shall lodge with the Deputy Principal Clerk and serve on the Secretary of State a copy of any answers that are to be founded upon by the special advocate at the initial diet.

(5) At the initial diet, the parties present shall state their proposals for further procedure in respect of any directions hearing under section 8 of the Act of 2011 and any subsequent review hearing under section 9 of the Act of 2011.

(6) An interlocutor of the Lord Ordinary giving directions for a directions hearing under section 8 of the Act of 2011 shall include such order for further procedure as he or she thinks fit, subject to the requirements set out in section 8 of the Act of 2011.

(7) An interlocutor of the Lord Ordinary giving directions for a review hearing under section 9 of the Act of 2011 shall include such order for further procedure as he or she thinks fit, subject to the requirements set out in section 9 of the Act of 2011.

(8) Where an initial diet has been held in the absence of the affected person the Deputy Principal Clerk shall serve a copy of the interlocutor of the Lord Ordinary on that person.

Appeals relating to terrorism prevention and investigation measures

89.4.—(1) Subject to paragraphs (2) and (3) and to the modifications set out in rule 41.51 (application of Parts II and III to Part IX of Chapter 41), Part III of Chapter 41 (appeals in Form 41.25) applies to appeals under section 16 of the Act of 2011.

(2) An appeal under section 16 of the Act of 2011 shall be lodged with the Deputy Principal Clerk and served on the Secretary of State within 28 days after the date on which the affected person received notice of—

- (a) the decision by the Secretary of State to extend or revive a TPIM notice;
- (b) the decision of the Secretary of State to vary measures specified in a TPIM notice without the consent of the affected person;
- (c) the decision of the Secretary of State on an application for the variation of measures specified in a TPIM notice;
- (d) the decision of the Secretary of State on an application for the revocation of the TPIM notice; or
- (e) the decision of the Secretary of State on an application for permission for the purposes of measures specified in a TPIM notice.

(3) In a case where the Secretary of State has failed to determine an application for the revocation of the TPIM notice, for the variation of measures specified in such a notice, or for permission in connection with a measure specified in such a notice, any appeal under section 16 of the Act of 2011 shall be lodged—

- (a) not earlier than 28 days; and
- (b) not later than 42 days,

after the date on which the application was made.

Appointment of special advocates

89.5.—(1) Subject to paragraph (2), the Secretary of State shall give notice to the Advocate General, upon—

- (a) making any application or reference under the Act of 2011;
- (b) making any motion in respect of TPIM proceedings or appeal proceedings; or
- (c) being served with a note of appeal, reclaiming motion or other application in respect of TPIM proceedings or appeal proceedings.

(2) Paragraph (1) applies unless—

- (a) the Secretary of State does not intend to—
 - (i) oppose the appeal, reclaiming motion or other application; or
 - (ii) make an application under rule 89.7 (permission not to disclose relevant material etc.); or
- (b) a special advocate has already been appointed to represent the interests of the affected person in the proceedings.

(3) Where notice is given to the Advocate General under paragraph (1), the Advocate General may appoint a special advocate to represent the interests of the affected person in the proceedings.

(4) Where there are any TPIM proceedings or appeal proceedings but no special advocate has been appointed, the affected person or the Secretary of State may at any time request the Advocate General to appoint a special advocate.

(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 TPIM proceedings or appeal proceedings from which the affected person (and any legal representative of the affected person) is excluded.

Special advocates: further provisions

89.6.—(1) A special advocate upon whom material has been served under rule 89.7(7)(a) shall not communicate about the TPIM proceedings or appeal proceedings or any matter connected with such proceedings except in accordance with this rule or with the authority of the court.

(2) The special advocate may, without the authority of the court, communicate about the TPIM proceedings or appeal proceedings with—

- (a) the court;
- (b) the Secretary of State, or any person acting for the Secretary of State;
- (c) the Advocate General, or any person acting for the Advocate General;
- (d) any other person, except for the relevant party or his or her legal representative, with whom it is necessary for administrative purposes for the special advocate 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 any relevant party to the proceedings or his or her legal representative or with any other person about the proceedings or a matter connected to the proceedings.

(4) A notice of any opposition to a motion under paragraph (3) shall be intimated to the special advocate and the relevant party.

(5) The relevant party shall not communicate with a special advocate upon whom material has been served under rule 89.7(7) other than through a legal representative in writing.

(6) The special advocate may, without the authority of the court, send a written acknowledgement of receipt of a communication under paragraph (5).

Permission not to disclose relevant material etc.

89.7.—(1) In this rule, “relevant material” means—

- (a) material on which the Secretary of State relies; and
- (b) material which adversely affects the Secretary of State’s case; and
- (c) material which supports the case of another party to the proceedings.

(2) Subject to paragraph (3), the Secretary of State shall lodge all relevant material as productions.

(3) The Secretary of State may apply by motion for permission not to disclose relevant material.

(4) The Secretary of State shall not be required to disclose to the affected person any relevant material which is the subject of an application under paragraph (3).

(5) Subject to paragraph (6), the Secretary of State shall not rely upon any relevant material which is the subject of an application under paragraph (3) unless a special advocate has been appointed.

(6) Paragraph (5) does not apply in respect of an initial diet where the Court has ordered the Deputy Principal Clerk not to notify the affected person of the date and time of the initial diet.

(7) Where the Secretary of State makes an application under paragraph (3) and a special advocate has been appointed, the Secretary of State shall lodge with the Deputy Principal Clerk and serve on the special advocate—

- (a) the relevant material;
- (b) a statement of the reasons for the application for permission not to disclose the relevant material; and
- (c) if and to the extent that it is possible to do so without disclosing information contrary to the public interest, a summary of the relevant material which can be served on the affected person.

(8) On the making of an application under paragraph (3), the court shall, unless paragraph (9) applies, direct the Deputy Principal Clerk to allocate a diet for a hearing of the application and the Deputy Principal Clerk shall intimate the date and time in writing to the Secretary of State and to any special advocate appointed under rule 89.5.

(9) This paragraph applies where—

- (a) the special advocate gives notice that he or she does not oppose an application under paragraph (3);
- (b) the court has previously considered an application by the Secretary of State 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 Secretary of State and the special advocate consent to the court deciding the issue without a hearing.

(10) An application under paragraph (3) shall be considered in the absence of the affected person and his or her legal representative.

(11) The Court must grant the application under paragraph (3) where it considers that the disclosure of the material would be contrary to the public interest.

(12) On granting an application under paragraph (3), the court shall order the Secretary of State to serve upon every relevant party (and their legal representatives) a copy of the summary lodged under paragraph (7)(c) unless the court considers that the summary contains information or other material the disclosure of which would be contrary to the public interest.

(13) Paragraph (14) applies where the court—

- (a) does not grant permission to the Secretary of State to withhold relevant material; or
- (b) requires the Secretary of State to provide a relevant party to the proceedings with a summary of relevant material that is withheld.

(14) In a case where the Secretary of State elects not disclose the relevant material or (as the case may be) not to provide the summary—

- (a) if the court considers that the relevant material or anything that is required to be summarised might adversely affect the Secretary of State's case or support the case of a relevant party to the proceedings, the court may direct that the Secretary of State is not to rely on such points in the proceedings or is to make such concessions or take such other steps as the court may specify; or
- (b) in any other case, the court shall ensure that the Secretary of State does not rely in the proceedings on the material or (as the case may be) on what is required to be summarised.

Anonymity

89.8.—(1) The Secretary of State or the affected person may apply for an order requiring anonymity for the affected person—

- (a) in TPIM proceedings or appeal proceedings, by motion;
- (b) where there are no TPIM proceedings or appeal proceedings, by lodging a petition with the Deputy Principal Clerk.

(2) The reference in this rule to an order requiring anonymity for the affected person is to be construed in accordance with paragraph 6(3) of Schedule 4 to the Act of 2011.

Exclusion from diets or hearings etc.

89.9.—(1) If the court considers it necessary for the affected person and his or her legal representative, or any other relevant party, to be excluded from a diet or hearing or part of a diet or 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 the diet or hearing, or that part of it from which the affected person and his or her legal representative or other relevant party are excluded, in private.

(2) The court may otherwise order a diet or hearing to be conducted in private if it thinks fit.

(3) When the court issues an opinion in any proceedings to which this Chapter applies, 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.

(4) 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 Secretary of State and the special advocate.

Recording of TPIM and appeal proceedings

89.10.—(1) TPIM proceedings and appeal proceedings shall be recorded.

(2) The record of 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) Any 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 court may make such alterations to a 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.”.

(3) Chapter 89 of the Rules as it applied immediately before 21st December 2011 continues to have effect in relation to any matter which may be dealt with by the court under paragraph 3 of Schedule 8 to the Act of 2011.

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

Edinburgh
14th December 2011

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 proceedings under the Terrorism Prevention and Investigation Measures Act 2011 (“the 2011 Act”).

Paragraph 2(2) substitutes a new Chapter 89 into the Rules. It replaces the previous Chapter 89, which made provision in respect of control orders and proceedings under the Prevention of Terrorism Act 2005. The new Chapter 89 applies to proceedings in the Outer House of the Court of Session and appeals to the Inner House of the Court of Session on a point of law in respect of those proceedings.

Rule 89.2 sets out the procedure for making applications under section 6(1)(b) of the 2011 Act (application for permission to make a terrorism prevention and investigation measures notice, or a “TPIM notice”), and references under paragraph 3(1) of Schedule 2 to the 2011 Act (references to the court in relation to the making of such an order in cases of urgency).

Rule 89.3 makes provision for initial diets to be held in respect of proceedings under rule 89.2.

Rule 89.4 sets out the procedure for making an appeal under section 16 of the 2011 Act (appeals relating to terrorism prevention and investigation measures).

Rule 89.5 makes provision in relation to the appointment of special advocates by the Advocate General to represent individuals when they are excluded from proceedings under the 2011 Act.

Rule 89.6 makes provision in respect of communications about the proceedings by special advocates.

Rule 89.7 makes provision for the Secretary of State to apply to court for permission not to disclose information in proceedings under the 2011 Act.

Rule 89.8 makes provision for applications for anonymity in proceedings under the 2011 Act.

Rule 89.9 makes provision for the exclusion of an affected person and his or her legal representative from proceedings under the 2011 Act.

Rule 89.10 makes provision in respect of the recording of proceedings under the 2011 Act.

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