

2017 No. 26

COURT OF SESSION

**Act of Sederunt (Rules of the Court of Session 1994
Amendment) (Temporary Exclusion Orders) 2017**

<i>Made</i>	- - - -	<i>31st January 2017</i>
<i>Laid before the Scottish Parliament</i>		<i>1st February 2017</i>
<i>Coming into force</i>	- -	<i>14th February 2017</i>

In accordance with section 4 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013(a), the Court of Session has approved draft rules submitted to it by the Scottish Civil Justice Council.

The Court of Session therefore makes this Act of Sederunt under the powers conferred by section 103(1) of the Courts Reform (Scotland) Act 2014(b) and paragraphs 2 to 4 and 6 of schedule 3 of the Counter-Terrorism and Security Act 2015(c) and all other powers enabling it to do so.

Citation and commencement, etc.

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Temporary Exclusion Orders) 2017.

(2) It comes into force on 14th February 2017.

(3) A certified copy is to be inserted in the Books of Sederunt.

Amendment of the Rules of the Court of Session 1994

2.—(1) The Rules of the Court of Session 1994(d) are amended in accordance with this paragraph.

(2) After Chapter 106 (mutual recognition of protection measures in civil matters) insert—

(a) 2013 asp 3. Section 4 was amended by the Courts Reform (Scotland) Act 2014 (asp 18), schedule 5, paragraph 31(3) and the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (asp 2), schedule 1, paragraph 1(4).
(b) 2014 asp 18.
(c) 2015 c.6.
(d) The Rules of the Court of Session 1994 are in schedule 2 of the Act of Sederunt (Rules of the Court of Session 1994) 1994 (S.I. 1994/1443, last amended by S.S.I. 2017/4).

“CHAPTER 107
COUNTER-TERRORISM AND SECURITY ACT 2015 – TEMPORARY
EXCLUSION ORDERS

Interpretation and application of this Chapter

107.1.—(1) In this Chapter—

“the 2015 Act” means the Counter-Terrorism and Security Act 2015(a);

“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, a TEO;

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

“legal representative” is to be construed in accordance with paragraph 4(4)(b) of schedule 3 of the 2015 Act;

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

“special advocate” means a person appointed under paragraph 10(1) of schedule 3 of the 2015 Act;

“TEO” means a temporary exclusion order as defined by section 2(1) of the 2015 Act; and

“TEO proceedings” has the same meaning as in paragraph 1 of schedule 3 of the 2015 Act.

(2) This Chapter applies in relation to TEO proceedings and appeal proceedings.

TEO petitions

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

(a) an application made under section 3(1)(b) of the 2015 Act for permission to impose a TEO on an individual;

(b) a reference made under paragraph 3(1) of schedule 2 of the 2015 Act;

(c) a review made under section 11(2) of the 2015 Act.

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

(a) rule 4.3 (lodging of processes);

(b) rule 4.4 (steps of process);

(c) rule 4.5(1)(b) (copy inventory of productions to be sent to other parties);

(d) rule 4.6 (intimation of steps of process);

(e) rule 4.11 (documents not to be borrowed);

(f) rule 4.12 (borrowing and returning documents);

(g) rule 14.5 (first order in petitions);

(h) rule 14.6 (period of notice for lodging answers);

(i) rule 14.7 (intimation and service of petitions);

(j) rule 14.8 (procedure where answers lodged); and

(k) rule 14.9 (unopposed petitions).

(a) 2015 c.6.

- (3) Subject to rule 107.6 (permission not to disclose relevant material etc.)—
- (a) a petition referred to in paragraph (1)(a) must include, in numbered paragraphs, statements of reasons to support the application;
 - (b) a petition referred to in paragraph (1)(b) must include, in numbered paragraphs, statements of reasons for imposing the TEO; and
 - (c) a petition referred to in paragraph (1)(c) must include, in numbered paragraphs, statements of reasons setting out—
 - (i) the details of each decision which it is sought to review;
 - (ii) details of how the affected person is affected by the decision; and
 - (iii) the grounds on which the affected person seeks to review the decision.
- (4) Subject to rule 107.6, the following documents must be lodged with the petition—
- (a) in the case of a petition under paragraph (1)(a), the productions of the Secretary of State; and
 - (b) in the case of a petition under paragraph (1)(b), the productions of the Secretary of State and a copy of the TEO.
- (5) Subject to rule 107.6, the following documents must be lodged with a petition under paragraph (1)(c)—
- (a) the productions of the affected person in support of the application;
 - (b) a copy of the notice under section 4 of the 2015 Act of the imposition of the TEO; and
 - (c) where relevant, any notice under section 9 of the 2015 Act imposing any or all of the permitted obligations.

Initial diets

107.3.—(1) On receipt of a petition under rule 107.2, the Deputy Principal Clerk must allocate an initial diet for the court’s consideration to begin.

(2) The Deputy Principal Clerk must 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 must, 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, the special advocate must 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 must state their proposals for further procedure in respect of the petition and the interlocutor of the court must include such order for further procedure as the court thinks fit.

(6) Where an initial diet has been held in the absence of the affected person the Deputy Principal Clerk must serve a copy of the interlocutor of the court on that person.

Appointment of special advocates

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

- (a) making any application or reference under section 3(1)(b) or paragraph 3(1) of schedule 2 of the 2015 Act respectively;
- (b) making any motion in respect of TEO proceedings or appeal proceedings;
- (c) being served with an application for review under section 11(2) of the 2015 Act; or

- (d) being served with a note of appeal, reclaiming motion or other application in respect of TEO 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 107.6(3); or
 - (b) a special advocate has already been appointed to represent the interest 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 TEO 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 must intimate the name of the special advocate to the Deputy Principal Clerk in writing.
- (6) The special advocate may address the court in any TEO proceedings or appeal proceedings from which the affected person (and any legal representative of the affected person) is excluded.

Special advocates: further provision

- 107.5.**—(1) A special advocate upon whom material has been served under rule 107.6(7)(a) must not communicate about the TEO 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 TEO 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) must be intimated to the special advocate and the relevant party.
 - (5) The relevant party must not communicate with a special advocate upon whom material has been served under rule 107.6(7) other than in writing and through a legal representative.
 - (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.

- 107.6.**—(1) In this rule, “relevant material” means—
 - (a) material on which the Secretary of State relies;
 - (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 must 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 is not 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 must 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 must 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 must, unless paragraph (9) applies, direct the Deputy Principal Clerk to allocate a diet for a hearing of the application and the Deputy Principal Clerk must intimate the date and time in writing to the Secretary of State and to any special advocate appointed under rule 107.4.

(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) must 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 must 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 to 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 must 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

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

- (a) in TEO proceedings or appeal proceedings, by motion;
- (b) where there are no TEO 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 3 of the 2015 Act.

Exclusion from diets or hearings etc.

107.8.—(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 must—

- (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 must prepare a separate opinion including those reasons; and
- (b) the Deputy Principal Clerk must serve that separate opinion on the Secretary of State and the special advocate.

Recording of TEO and appeal proceedings

107.9.—(1) TEO proceedings and appeal proceedings must be recorded.

(2) The record of proceedings must 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 must only be made on the direction of the court and must 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 must authenticate the alterations.”.

CJM SUTHERLAND
Lord President
I.P.D.

Edinburgh
31st January 2017

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 Counter-Terrorism and Security Act 2015 (“the 2015 Act”).

Paragraph 2(2) inserts a new Chapter 107 into the Rules.

Rule 107.2 sets out the procedure for making applications under section 3(1)(b) of the 2015 Act (application for permission to impose a temporary exclusion order); references under paragraph 3(1) of schedule 2 of the 2015 Act (references to the court in relation to the making of such an order in cases of urgency); and reviews under section 11(2) of the 2015 Act (review of decisions relating to such orders).

Rule 107.3 makes provision for initial diets to be held in respect of proceedings mentioned in rule 107.2.

Rule 107.4 makes provision in relation to the appointment of special advocates by the Advocate General for Scotland to represent individuals when they are excluded from proceedings under the 2015 Act.

Rule 107.5 makes provision in respect of communications about the proceedings by special advocates.

Rule 107.6 makes provision for the Secretary of State to apply to court for permission not to disclose information in proceedings under the 2015 Act.

Rule 107.7 provides for applications for anonymity in proceedings under the 2015 Act.

Rule 107.8 provides for the exclusion of an affected person and his or her legal representative from proceedings under the 2015 Act.

Rule 107.9 makes provision in respect of the recording of proceedings under the 2015 Act.

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