

2013 No. 238

COURT OF SESSION

**Act of Sederunt (Rules of the Court of Session Amendment
No. 5) (Miscellaneous) 2013**

Made - - - - - *30th July 2013*

Laid before the Scottish Parliament *1st August 2013*

Coming into force - - - *19th August 2013*

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), section 13(6A) of the Tribunals, Courts and Enforcement Act 2007(b), sections 6(9) and (10), 7(6), 8, 10 and 11 of the Justice and Security Act 2013(c) 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. 5) (Miscellaneous) 2013.

(2) It comes into force on 19th August 2013.

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

(4) The Rules of the Court of Session(d) are amended in accordance with the following paragraphs.

Permission to appeal against decisions of the Upper Tribunal

2. After rule 41.56 (appeals)(e), insert—

(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); the Judiciary and Courts (Scotland) Act 2008, (asp 6), section 46(3) and the Legal Services (Scotland) Act 2010 (asp 16), section 126(a).
(b) 2007 c.15; section 13(6A) was inserted by the Crime and Courts Act 2013 (c.22), section 23.
(c) 2013 c.18.
(d) 1994 S.I. 1994/1443, last amended by S.S.I. 2013/120.
(e) Rule 41.56 was substituted by S.S.I. 2011/303.

“PART XI
APPEALS UNDER THE TRIBUNALS, COURTS AND ENFORCEMENT
ACT 2007

Permission to appeal against decisions of the Upper Tribunal

41.57.—(1) This rule applies where an application is made to the court under section 13(4) of the Tribunals, Courts and Enforcement Act 2007 for permission to appeal a decision of the Upper Tribunal which falls within section 13(7) of that Act and for which the relevant appellate court is the Court of Session.

(2) Permission shall not be granted on the application unless the court considers that—

- (a) the proposed appeal would raise some important point of principle or practice; or
- (b) there is some other compelling reason for the court to hear the appeal.”.

Justice and Security Act 2013

3. After Chapter 103 (forced marriage)(a) insert—

“CHAPTER 104
JUSTICE AND SECURITY ACT 2013

Interpretation and application of this Chapter

104.1.—(1) In this Chapter—

“the Act of 2013” means the Justice and Security Act 2013;

“Advocate General” means the Advocate General for Scotland;

“closed material application” means an application of the kind mentioned in section 8(1)(a) of the Act of 2013;

“legal representative” is to be construed in accordance with section 14(1) of the Act of 2013;

“relevant civil proceedings” is to be construed in accordance with section 14(1) of the Act of 2013;

“relevant person” is to be construed in accordance with section 14(1) of the Act of 2013;

“section 6 proceedings” is to be construed in accordance with section 14(1) of the Act of 2013;

“sensitive material” is to be construed in accordance with section 14(1) of the Act of 2013;

“special advocate” means a person appointed under section 9(1) of the Act of 2013;

“specially represented party” means a party whose interests a special advocate represents.

(2) This Chapter applies to closed material proceedings under Part 2 of the Act of 2013.

(a) Chapter 103 was inserted by S.S.I. 2011/385.

Potential disclosure: notification to Secretary of State

104.2.—(1) This rule applies where the Secretary of State is not a party to relevant civil proceedings and a declaration under section 6 of the Act of 2013 has not been applied for or made.

(2) Where it appears to a party that they may be required to disclose material which might be damaging to the interests of national security the party shall notify the court in writing.

(3) Where the court has been notified in accordance with paragraph (2), or it appears to the court that a party may be required to disclose material which might be damaging to the interests of national security, the court shall—

- (a) notify the Secretary of State in writing;
- (b) order that the material is not to be disclosed.

(4) Within 14 days of being notified in accordance with paragraph (3) the Secretary of State shall respond in writing to the court—

- (a) confirming that the Secretary of State intends to apply for a declaration under section 6 of the Act;
- (b) confirming that the Secretary of State does not intend to apply for such a declaration; or
- (c) requesting further time to consider whether to apply for such a declaration.

(5) The court may make such orders as it thinks necessary pending the Secretary of State's response.

Closed material declaration: applications

104.3.—(1) An application under the following provisions of the Act of 2013 shall be made by lodging a note in process with the Deputy Principal Clerk—

- (a) section 6(2)(a) (declaration permitting closed material applications in proceedings);
- (b) section 7(4)(a) (review and revocation of declaration under section 6).

(2) The note shall include, in numbered paragraphs, statements of reasons in support of the application.

(3) Where, in relation to an application under section 6(2)(a) of the Act of 2013, the applicant is the Secretary of State, the note shall include the Secretary of State's reasons for not making, or not advising another person to make, a claim for public interest immunity in relation to the material in question.

(4) An application mentioned in paragraph (1)(a) shall be intimated to those persons mentioned in paragraph (6) no later than 14 days before the application is made.

(5) An application mentioned in paragraph (1)(b) shall be intimated to those parties mentioned in paragraph (6) no later than 28 days before the application is made.

(6) An application shall be intimated to—

- (a) the Deputy Principal Clerk;
- (b) the parties to the proceedings;
- (c) where the Secretary of State is not a party to the proceedings, the Secretary of State;
- (d) where a special advocate has been appointed, the special advocate.

(7) The court may vary the period of notice mentioned in paragraph (4) or (5) on cause shown.

Initial diets

104.4.—(1) On receipt of an application under rule 104.3(1) (closed material declaration: applications), or where directed to do so by the court acting of its own motion under section 6(2)(b) or 7(4)(b) of the Act of 2013, the Deputy Principal Clerk shall allocate an initial diet for the court’s consideration to begin.

(2) The Deputy Principal Clerk shall, unless the court otherwise directs, notify the time and date of the initial diet to those parties mentioned in rule 104.3(6)(b) to (d).

(3) Where the court is acting of its own motion the notification mentioned in paragraph (2) shall be on a period of notice of 28 days.

(4) Parties shall, no later than the date of the initial diet, lodge with the Deputy Principal Clerk any answers or, as the case may be, written submissions that are to be founded upon at the initial diet.

(5) Where the application is unopposed the court may determine the application in chambers.

(6) At the initial diet parties shall state their proposals for further procedure and the court shall make such orders for further procedure as it thinks fit.

(7) The court may discharge the initial diet and make such orders for further procedure as it thinks fit.

Hearing on applications

104.5.—(1) Where the court has fixed a hearing on the application under rule 104.4(6) or (7), the Deputy Principal Clerk shall, unless the court otherwise directs, notify the time and date to those parties mentioned in rule 104.3(4)(b) to (d).

(2) The hearing shall take place in the absence of the specially represented party and the specially represented party’s legal representatives.

(3) Within seven days of the application being determined, the applicant shall serve a copy of the interlocutor on the parties to the proceedings.

Evidence

104.6. Subject to the provisions of the Act of 2013—

- (a) where the court hears any evidence it shall do so in accordance with existing law and practice as to the taking of evidence in civil proceedings in Scotland; and
- (b) Chapter 35 (recovery of evidence)(a) continues to apply.

Formal review of declaration

104.7.—(1) For the purposes of section 7(3) of the Act of 2013 a formal review shall take place after the court has fixed a hearing to determine the merits of the proceedings.

(2) Where paragraph (1) applies the court shall proceed as mentioned in rule 104.4 (initial diets).

Closed material procedure: application

104.8.—(1) This rule applies where there is a declaration under section 6 of the Act of 2013.

(2) The relevant person may apply to the court for permission not to disclose sensitive material otherwise than to—

(a) Chapter 35 was last amended by S.S.I. 2007/282.

- (a) the court;
 - (b) any person appointed as a special advocate;
 - (c) where the Secretary of State is not the relevant person but is a party to the proceedings, the Secretary of State.
- (3) The application shall be made by lodging a note in process with the Deputy Principal Clerk.
- (4) The note shall include, in numbered paragraphs, statements of reasons in support of the application and the sensitive material in question.
- (5) A copy of the note in process shall be served only on the special advocate and, where the Secretary of State is not the relevant person, the Secretary of State.
- (6) The relevant person may at any time amend or supplement material lodged under this rule, but only with the agreement of the special advocate or the permission of the court.
- (7) The relevant person may not rely on sensitive material at a hearing unless a special advocate has been appointed to represent the interests of the specially represented party.
- (8) Documents lodged in relation to an application shall be kept separately from the process by the Deputy Principal Clerk.
- (9) Documents lodged in relation to an application shall not be borrowed or inspected by any party other than by a legal representative of the Secretary of State or by any special advocate.
- (10) The following shall not apply to the application—
- (a) rule 4.5(1)(b) (copy of inventory of productions to be sent to other parties);
 - (b) rule 4.6 (intimation of steps of process);
 - (c) rule 4.11 (documents not to be borrowed).

Consideration of closed material procedure application or objection to special advocate’s communication

- 104.9.**—(1) This rule applies where—
- (a) the relevant person has applied under rule 104.8 (closed material procedure: application); or
 - (b) the Secretary of State has objected under rule 104.13(6) (special advocate: communicating about proceedings) to a proposed communication by the special advocate.
- (2) The court shall fix a hearing for the relevant party, the Secretary of State and the special advocate to make representations.
- (3) The court may determine an application or objection in chambers where—
- (a) the special advocate gives notice that he or she does not challenge the application or objection;
 - (b) the court has previously, in determining the application for a declaration under section 6 of the Act of 2013, found that the first condition in that section is met in relation to the same or substantially the same material and is satisfied that it would be just to give permission without a hearing;
 - (c) the court has previously considered—
 - (i) an application under rule 104.8 for permission to withhold the same or substantially the same material; or
 - (ii) an objection under rule 104.13(6) to the same or substantially the same proposed communication; and
 is satisfied that it would be just to give permission or uphold the objection without a hearing; or

(d) the relevant person, the Secretary of State and the special advocate consent to the court deciding the case without a hearing.

(4) Where the special advocate does not challenge the application or the objection, he or she must give notice of that fact to the court, the relevant person and the Secretary of State no later than—

(a) 14 days after being notified in accordance with rule 104.8(5), or

(b) such other period as the court may direct.

(5) Where the court fixes a hearing under this rule, the relevant person, the Secretary of State and the special advocate shall, before the hearing, lodge with the Deputy Principal Clerk a joint minute identifying the issues which cannot be agreed between them.

(6) A hearing under this rule shall take place in the absence of the specially represented party and the specially represented party's legal representatives.

(7) Where the court has, in determining an application for a declaration under section 6 of the Act of 2013, found that the first condition in that section is met in relation to any material, it may give permission to withhold that material without a hearing in relation to that material.

Closed material procedure: non-disclosure of sensitive material etc.

104.10.—(1) Where the court gives permission to the relevant person not to disclose sensitive material, the court must—

(a) consider whether to direct the relevant person to serve a summary of that material on the specially represented party and the specially represented party's legal representative; but

(b) ensure that any such summary does not contain information or other material the disclosure of which would be damaging to the interests of national security.

(2) If the court is satisfied that the relevant person does not intend to rely on sensitive material, and that that material does not adversely affect the relevant person's case or support the case of another party to the proceedings, the court may direct that the relevant person must not rely in the proceedings on that material, without first requiring the relevant person to serve a summary of that material on the specially represented party and the specially represented party's legal representative.

(3) Where the court has not given permission to the relevant person not to disclose sensitive material to, or has directed the relevant person to serve a summary of that material on, the specially represented party and the specially represented party's legal representative—

(a) the relevant person shall not be required to serve that material or summary; but

(b) if the relevant person does not do so, at a hearing the court may—

(i) if it considers that the material or anything that is required to be summarised might be of assistance to the specially represented party in relation to a matter under consideration by the court, direct that the matter is withdrawn from its consideration or that the relevant person makes such concessions or takes such other steps as the court may direct; and

(ii) in any other case, direct that the relevant person must not rely in the proceedings on that material or, as the case may be, on what is required to be summarised.

(4) The court must give permission to the relevant person not to disclose sensitive material where it considers that disclosure of that material would be damaging to the interests of national security.

Appointment of special advocate

104.11.—(1) Where the Secretary of State has given or received notification of an application under rule 104.3(1) (closed material declaration: applications) he or she shall give notice of the proceedings to the Advocate General (who, under section 9(1) of the Act of 2013, has the power to appoint a special advocate).

(2) Paragraph (1) applies unless a special advocate has already been appointed and that special advocate is not prevented from communicating with the specially represented party by virtue of rule 104.13.

(3) Where a special advocate has not been appointed any party or, as the case may be, the Secretary of State may request that the Advocate General appoint a special advocate.

(4) 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.

Functions of a special advocate

104.12. The functions of a special advocate are to represent the interests of a specially represented party by—

- (a) making submissions to the court at any hearing or part of a hearing from which the specially represented party and the specially represented party's legal representatives are excluded;
- (b) leading evidence and cross-examining witnesses at any such hearing, or part of a hearing;
- (c) making written submissions to the court.

Special advocate: communicating about proceedings

104.13.—(1) The special advocate may communicate with the specially represented party or the specially represented party's legal representative at any time before a relevant person serves sensitive material on the special advocate.

(2) After the relevant person serves sensitive material on the special advocate, the special advocate shall not communicate with any person about any matter connected with the proceedings, except in accordance with paragraph (3) or with a direction of the court pursuant to a request under paragraph (4).

(3) The special advocate may, without directions from the court, communicate about the proceedings with—

- (a) the court;
- (b) the relevant person (where this is not the Secretary of State);
- (c) the Secretary of State or any person acting for the Secretary of State;
- (d) the Advocate General or any person acting for the Advocate General; or
- (e) any other person, except the specially represented party or the specially represented party's 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.

(4) The special advocate may request directions from the court authorising the special advocate to communicate with the specially represented party or the specially represented party's legal representative or with any other person.

(5) Where the special advocate makes a request for directions under paragraph (4) the court must notify the relevant person and (where the relevant person is not the Secretary of State) the Secretary of State of the request, and of the content of the proposed communication and the form in which it is proposed to be made.

(6) The relevant person or the Secretary of State shall, within a period specified by the court, lodge with the court and serve on the special advocate notice of any objection which the relevant person or the Secretary of State has to the proposed communication or to the form in which it is proposed to be made.

(7) Paragraph (2) does not prohibit the specially represented party from communicating with the special advocate after the relevant person has served material on the special advocate but—

- (a) the specially represented party may only communicate with the special advocate through the specially represented party's legal representative in writing; and
- (b) the special advocate must not reply to the communication other than in accordance with directions of the court, except that the special advocate may without such directions send a written acknowledgment of receipt to the specially represented party's legal representative.

Opinions of the court

104.14.—(1) Where the court issues an opinion in any proceedings to which this Chapter applies, it may withhold any or part of its reasons if and to the extent that it would not be possible to give those reasons without disclosing information which would be damaging to the interests of national security.

(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 relevant person, the Secretary of State (where not the relevant person) and the special advocate.

Participation of Secretary of State

104.15.—(1) Where the court makes a declaration under section 6 of the Act of 2013 and the Secretary of State is not already a party to the relevant civil proceedings, the court shall sist the Secretary of State as a party to the proceedings.

(2) Paragraph (1) does not apply where the Secretary of State has informed the court in writing that he or she does not wish to be sisted as a party to the proceedings.

Hearings in private

104.16.—(1) Unless otherwise provided for in this Chapter, if the court considers it necessary for any party and that party's legal representative to be excluded from any hearing or part of a hearing in order to secure that information is not disclosed where disclosure would be damaging to the interests of national security, it must—

- (a) direct accordingly; and
- (b) conduct the hearing, or that part of it from which that party and that party's legal representative are excluded, in private but attended by a special advocate to represent the interests of the excluded party.

(2) The court may conduct a hearing or part of a hearing in private for any other good reason.

(3) In this rule "hearing" includes initial diet."

Transitional provision

4. Paragraph 2 of this Act of Sederunt shall not apply to applications for leave to appeal lodged before 19th August 2013.

Edinburgh
30th July 2013

BRIAN GILL
Lord President
I.P.D.

EXPLANATORY NOTE

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

This Act of Sederunt amends the Rules of the Court of Session.

Paragraph 2 amends Chapter 41 (appeals under statute) by inserting Part XI (appeals under the Tribunals, Courts and Enforcement Act 2007) and new Rule 41.57 (permission to appeal against decisions of the Upper Tribunal). This change reinstates what is known as the “second appeals test”.

Paragraph 3 inserts new Chapter 104 (Justice and Security Act 2013) in consequence of the coming into force of Part 2 of the Act of 2013. Part 2 makes provision for closed material procedures in proceedings before the Court of Session. It sets out a framework whereby the court can allow, in the interests of national security, elements of a case to be heard in closed, in addition to the open proceedings. The process broadly consists of two stages.

The Secretary of State or any party to the case may make an application to the court to make a declaration that the proceedings are ones in which a closed material application may be made. The court may grant a declaration following an application or of its own motion provided that certain conditions are met.

Once the declaration has been made, a closed material application may then be made by a party to the proceedings not to disclose specific pieces or tranches of material, except to the court, a special advocate and the Secretary of State. An application will be granted where the disclosure of that material would be damaging to the interests of national security.

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