

**EXPLANATORY MEMORANDUM TO THE
CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2005**

2005 No.656 (L.16)

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.
2. **Description**
 - 2.1 The instrument amends the Civil Procedure Rules (“CPR”) by—
 - (a) inserting a new Part 76 containing rules about—
 - (i) control order proceedings in the High Court, and
 - (ii) appeals to the Court of Appeal against orders in such proceedings;

brought under the Prevention of Terrorism Act 2005
 - (b) making consequential amendments and modifications to the CPR for the purposes of those proceedings.
3. **Matters of special interest to the Joint Committee on Statutory Instruments.**
 - 3.1 None.
4. **Legislative Background**
 - 4.1 The Prevention of Terrorism Act 2005 provides for the making of ‘control orders’ imposing obligations on individuals suspected of involvement in terrorism-related activity.
 - 4.2 The legislation 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 (the right to liberty). All other control orders are ‘non-derogating control orders’. The question of involvement in terrorist-related activity must be satisfied to the civil standard of proof (balance of probabilities) when applying for a derogating control order.

Derogating control orders
 - 4.3 The procedure for making control orders is as follows. The Secretary of State may apply to the High Court for a derogating control order, without notice to the individual who is to be made the subject of the order (“the controlled person”). That application must be considered immediately by the court at a preliminary hearing, where the court will consider whether there is a *prima facie* case for making the control order. If the court makes a control order at

this stage, it must give directions for the holding of a full hearing to determine whether to confirm the order (with or without modifications) or to revoke it. Derogating control orders may be renewed on application by the Secretary of State, or modified or revoked on application by either party.

Non-derogating control orders

- 4.4. The Secretary of State may make a non-derogating control order, subject to the following procedure. He must apply to the High Court for permission to make the control order, except in specified (and limited) circumstances. That application may be made without notice to the controlled person. If the court gives permission to make the control order, it must give directions for a hearing in relation to that order, to be determined on judicial review principles. If the Secretary of State makes a control order without the permission of the court, he must immediately refer that order to the High Court for its consideration, which must begin no later than 7 days after the order was made. If the court confirms the control order, it must give directions for a hearing in relation to that order, to be determined on judicial review principles.
- 4.5 Non-derogating control orders may be renewed, modified or revoked by the Secretary of State, but the controlled person has a right of appeal to the High Court against any such renewal or any non-consensual modification. That person may also apply to the Secretary of State to revoke the control order, or modify the obligations imposed by it, and may appeal to the High Court against the Secretary of State's decision on such an application. Such appeals must be determined on judicial review principles.
- 4.6 A party may appeal (on a question of law) to the Court of Appeal against any decision of the High Court in control order proceedings.

Rules of court

- 4.7 The Schedule to the Act extends the powers to make Civil Procedure Rules to allow the introduction of special procedures for dealing with material that includes information the disclosure of which would be contrary to the public interest. In particular, and by virtue of paragraphs 4(2)(c) and 7 of the Schedule, rules may provide for the use of special advocates to represent the interests of anyone other than the Secretary of State in relation to such evidence.
- 4.8 The Schedule also modifies the procedure by which Civil Procedure Rules normally are made, namely—
- (a) by the Civil Procedure Rule Committee under the power conferred by section 1 of the Civil Procedure Act 1997; and
 - (b) subject to the negative resolution procedure.
- 4.9 Paragraph 3 of the Schedule provides that—
- (a) when the relevant rule-making powers are *first* exercised after the passing of the Act, the Lord Chancellor may exercise that power to make the rules (after consulting with the Lord Chief Justice) instead of the Civil Procedure Rule Committee; and

- (b) rules made by the Lord Chancellor by virtue of this provision must be laid before Parliament and will cease to have effect unless approved by affirmative resolution within 40 days.

These Rules are made by the Lord Chancellor in exercise of that power.

5. Extent

5.1 This instrument applies to England and Wales only.

6. European Convention on Human Rights

The Lord Chancellor has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Civil Procedure (Amendment No. 2) Rules 2005 are compatible with the Convention rights.

7. Policy background

7.1 These Rules are designed to balance—

- (a) the need to secure that the making and renewal of control orders and the imposition and modification of the obligations contained in such orders are properly reviewed by the court; and
- (b) the need to secure that no disclosure of information is made where that would be contrary to the public interest.

Hearings in private and special advocates

7.2 The procedure prescribed by these rules is modelled on that adopted for the Special Immigration Appeals Commission (SIAC), following a Canadian precedent, and was approved by the European Court of Human Rights in the case of *Chahal v UK* (1996) 23 EHRR 413. In control order proceedings—as in proceedings before SIAC—the court will consider material that includes intelligence information. Although the court must be given all the material relevant to the proceedings, some of the Secretary of State’s material may not be capable of being disclosed to the other party or his lawyer, for fear of compromising intelligence sources and/or techniques. In those circumstances, a special advocate will be appointed to represent the interests of that party.

7.3 The special advocate is a security-vetted lawyer who, like the court, is able to see all the relevant material. The special advocate can, therefore, play an important role in protecting a party’s interests. He can make oral submissions to the court at any hearing from which that party and his legal representative are excluded, to test the strength of the Secretary of State’s case. He can cross-examine any witness. He can challenge the withholding of material – “closed material” – that the Secretary of State objects to disclosing to another party to the proceedings.

Exculpatory material

7.4 During the passage of the Bill concern was expressed about a procedure that did not provide for the disclosure by the Secretary of State of “exculpatory

material”, that is material that might be of assistance to another party in relation to a matter under consideration by the court in the proceedings. The Government responded to that concern by moving an amendment to the Schedule of the Bill. Paragraph 4(3) of the Schedule requires that rules of court must, among other things—

- (a) require the Secretary of State to provide the court with all the material available to him and which is relevant to the matters under consideration;
- (b) require the Secretary of State to disclose to the other party all that material, except what the court permits him to withhold on the ground that its disclosure would be contrary to the public interest; and
- (c) provide that if the Secretary of State chooses nonetheless to withhold material that he has been directed to disclose, then—
 - (i) he may not rely on that material himself, and
 - (ii) if that material might assist the other party in opposing an argument put by the Secretary of State then that argument will be withdrawn from consideration.

Modification of Civil Procedure Rules

7.5 For the purposes of the new Part 76 some other provisions of the Civil Procedure Rules are disapplied or modified. The overriding objective in Part 1, which requires the court to deal with cases justly, is to be read as including a requirement that the court must ensure that information is not disclosed contrary to the public interest. Some general rules about evidence and disclosure are disapplied in favour of the rules dealing with those matters in Part 76. Some rules about the procedure on appeals are disapplied also in favour of the special provisions made in this Part.

8. Impact

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

9. Contact

Fen Fernandes at the Department for Constitutional Affairs Tel: 020 7210 8944 or e-mail: fen.fernandes@dca.gsi.gov.uk can answer any queries regarding the instrument.