

**EXPLANATORY MEMORANDUM TO**  
**THE CIVIL PROCEDURE (AMENDMENT No. 4) RULES 2010**

**2010 No. 3038 (L.20)**

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
  - 2.1 This instrument amends the Civil Procedure Rules 1998 (S.I. 1998/3132) (“the CPR”) to provide for rules of court for applications under section 26 (appeal to the court in relation to designations) of the Terrorist Asset-Freezing etc. Act 2010 (“the Act”).
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None
4. **Legislative Context**
  - 4.1 Part 6 of the Counter-Terrorism Act 2008 (“the 2008 Act”) provides for applications to set aside “financial restriction decisions”, which included decisions of the Treasury in connection with the exercise of any of their functions under specified terrorism legislation. Such decisions could require consideration of material the disclosure of which would be contrary to the public interest (“closed material”), and which would require the appointment of special advocates in the event of a legal challenge.
  - 4.2 Financial restrictions decisions included decisions to “designate” persons suspected of involvement in terrorism, made under the Terrorism (United Nations Measures) Order 2009 (2009/1747) (“the 2009 Order”). The effect of a designation was that the funds and economic resources of the designated person could not be dealt with except under a licence from the Treasury, and that the provision of funds, and, in some circumstances, economic resources, to a designated person is only permitted under licence from the Treasury.
  - 4.3 Challenges to financial restrictions decisions were considered by the court on the basis of the principles applicable to judicial review.
  - 4.4 Part 79 of the Civil Procedure Rules, created by the Civil Procedure (Amendment No.2) Rules 2008 (S.I. 2008/3085), provided rules of court in relation to financial restriction proceedings. The rules cover the use of closed material and special advocates, and are intended to ensure that information is not disclosed contrary to the public interest whilst ensuring that proceedings are properly determined.
  - 4.5 The ruling of the Supreme Court in the case of *Ahmed and Others v HM Treasury* [2010] UKSC 2, placed the legality of the 2009 Order in doubt. Consequently, the

Order has been revoked and the Act now replaces the designation powers formerly provided by the 2009 Order.

4.6 In a change from the earlier provisions, however, section 26 of the Act provides that a designated person may appeal to the High Court against any decision to make vary, revoke or renew or not to vary or revoke a designation, rather than judicially review it. The inclusion of a right to appeal in relation to designation decisions recognises the potentially far reaching effects of an asset freeze and is designed to ensure a robust and rigorous judicial scrutiny of both procedures and decisions.

4.7 This instrument makes the rules of court for such appeals under sections 28 and 29 of the Act, which provide a power for the Lord Chancellor to make such rules in the first instance in order to implement these provisions, after which the power will revert to the Civil Procedure Rule Committee in England and Wales. The Act has separately amended Part 79 to apply Part 79 to challenges to decisions made by the Treasury under the Act other than designation decisions.

## **5. Territorial Extent and Application**

5.1 This instrument applies to England and Wales.

## **6. European Convention on Human Rights**

6.1 The Parliamentary Under Secretary of State, Jonathan Djanogly, MP, has made the following statement regarding Human Rights:

6.2 In my view the provisions of the Civil Procedure (Amendment No.4) Rules 2010 are compatible with the Convention Rights.

## **7. Policy background**

### **• *What is being done and why***

7.1 The rules in Part 79 of the CPR which cover financial restriction proceedings, the disclosure of closed material and the appointment of special advocates do not include provisions relating to the determination of decisions on an appeal basis.

This instrument amends Part 79 by applying it to appeals under section 26 of the Act. A new Section 3 is inserted which:

- sets out the details to be included in the notice filed by a person to start an appeal against a designation decision and the material to be filed with the notice;
- applies the existing provisions in Part 79 concerning the appointment of special advocates, the requirements for disclosure (save for one amendment noted at 7.2 below) and procedures for determination of proceedings to appeals relating to designation decisions; and
- applies Part 52 of the CPR (which are the rules which govern appeals) to any appeal from a High Court determination of a Section 3 appeal.

7.2 The instrument makes one other substantive amendment to the application of Part 79 to appeals relating to designation decisions. Rule 79.23 requires the ‘disclosing party’ to search for material that is relevant and, under rule 79.23(1)(b), to file and serve “material other than closed material-

- i. on which the disclosing party relies;
- ii. which adversely affects the disclosing party’s case;
- iii. which adversely affects the other party’s case; or
- iv. which supports the other party’s case.”

7.3 Material in categories (i), (ii) and (iv) will fall within the definition of “closed material” set out in rule 79.1(2)(b), if the Treasury object to disclosing it to the other party (disclosure would be made instead to the special advocate). However, material which adversely affects the other party’s case, and which the Treasury objects to disclosing is not included in the definition of “closed material”. Therefore it could be argued that material in category (iii) above, which the Treasury has chosen (for example for national security reasons) not to rely upon, and which they object to disclosing, is not exempt from disclosure, and so must be disclosed, under rule 79.23, as part of the “open” disclosure.

7.4 Such an interpretation is difficult to sustain because it would be contrary to the obligations in Part 6 of the 2008 Act and in rule 79.2 to have regard to the need to secure that disclosures of information are not made where they would be contrary to the public interest. This instrument therefore omits the provision in rule 79.23(1)(b)(iii) so as to remove this anomaly and a potential conflict between the requirement to ensure that information is not disclosed contrary to the public interest and a reading of rule 79.23 which could require such disclosure.

7.5 The disapplication of this provision does not adversely affect the other party or the proper determination of the appeal because it does not affect the Treasury’s obligation to disclose all information which adversely affects the Treasury’s case or which supports the other party’s case.

7.6 This provision is being omitted in the application of Part 79 to appeals against designation decisions. Challenges to other financial restrictions decisions will continue to be determined on the basis of the principles applicable to judicial review under Part 79 which are not within the scope of this instrument. In due course the Treasury will be asking the Civil Procedure Rules Committee to exercise its power to omit rule 79.23(1)(b)(iii) from Part 79 as it applies to other financial restrictions proceedings which are determined according to judicial review principles for the reasons outlined above.

- ***Consolidation***

7.7 It is not expected that there will be any consolidation of this instrument.

## **8. Consultation outcome**

8.1 The Lord Chancellor has consulted the Lord Chief Justice, who has indicated that he is content with the rules. The Act does not require any other consultation on these rules.

## **9. Guidance**

9.1 These rules will be published on the Ministry of Justice website together with a note summarising the changes to the Civil Procedure Rules at [www.justice.gov.uk/civil/procrules\\_fin/index](http://www.justice.gov.uk/civil/procrules_fin/index). The Ministry of Justice will also write to key stakeholders detailing the changes in January 2011.

9.2 The consolidated version of the rules will be updated on 6 April 2011 and published by the Stationery Office together with other amendments made to the rules.

## **10. Impact**

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is minimal.

10.3 An Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

## **12. Monitoring & review**

12.1 These rules will form part of the Civil Procedure Rules 1998 which are kept under review by the Civil Procedure Rule Committee. Any subsequent amendment to these rules will be made by the Civil Procedure Rule Committee.

## **13. Contact**

Steve Uttley at the Ministry of Justice Tel: 0203 334 3191 or e-mail [Steve.Uttley@justice.gsi.gov.uk](mailto:Steve.Uttley@justice.gsi.gov.uk) can answer any queries regarding the instrument.