

EXPLANATORY MEMORANDUM TO
THE CIVIL PROCEDURE (AMENDMENT NO. 4) RULES 2023

2023 No. 1397 (L. 11)

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends the Civil Procedure Rules 1998 (CPR) to provide procedure, including provision for closed material procedure, for court proceedings relating to State Threats Prevention Investigation Measures (STPIMs). STPIMs are new measures established under provisions in Part 2 of the National Security Act 2023 (the NS Act) which are closely modelled on the provisions for TPIMs (Terrorism Investigation and Prevention Measures) in the Terrorism Prevention and Investigation Measures Act 2011 (the TPIM Act); and so this instrument amends Part 80 of the CPR, which contains rules relating to TPIM proceedings, so that the rules cover the equivalent STPIM proceedings.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction which the instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. European Convention on Human Rights

- 5.1 Lord Bellamy KC has made the following statement regarding Human Rights:
“In my view the provisions of the Civil Procedure (Amendment No. 4) Rules 2023 are compatible with the Convention rights.”.

6. Legislative Context

- 6.1 Instruments amending the CPR are normally made by the Civil Procedure Rule Committee. However, following a precedent which was first set by provisions in the Prevention of Terrorism Act 2005 (under which a new Part 76 was inserted into the CPR providing for procedure in relation to control order proceedings) and which has been followed on six further occasions (resulting in Parts 79 (amended twice to extend its scope to new measures), 80, 82 and 88 of the CPR), paragraph 7 of Schedule 10 to the NS Act provides that the first time that rules of court are made in exercise of the powers conferred by that Schedule in relation to proceedings in England and Wales or

in Northern Ireland¹, the rules may be made by the Lord Chancellor instead of by the person who would otherwise make them. This instrument is being made by the Lord Chancellor pursuant to that provision (and in consequence, it is subject to the “made affirmative” procedure and will cease to have effect unless approved by a resolution of each House within 40 days of its making (excepting periods during which Parliament is dissolved or prorogued or both Houses are adjourned for more than four days).

- 6.2 The requirements for what rules made under the NS Act powers must contain, and the powers themselves, are identical to those in Schedule 4 to the TPIM Act. The provisions about the nature of STPIMs, what they may contain, the conditions for making them and the nature of court proceedings relating to them, are similarly identical (except in some minor respects which do not have any impact on court procedure) to those in the TPIM Act concerning TPIMs. It is therefore possible, rather than inserting a new Part into the CPR to cover STPIM proceedings, to amend Part 80 of the CPR so that it covers STPIM proceedings as well as TPIM proceedings; and this instrument takes that approach. It should be noted that while “STPIMs” is the term used for these measures in this Memorandum, as it was through the passage of the National Security Bill, the NS Act refers to “Part 2” notices etc. rather than to STPIMs (referring to their being under Part 2 of the NS Act), and so this instrument also adopts the “Part 2” terminology.

7. Policy background

What is being done and why?

- 7.1 The NS Act provides a major update in legislation to counter state threats. These measures are designed to further protect the UK’s national security, the safety of the British public and the UK’s vital interests from the hostile activities of foreign states. They include a suite of tools and powers to deter, detect and disrupt this hostile activity, making the UK a harder operating environment for those who seek to do the UK harm. One of those tools is the STPIM.
- 7.2 STPIMs require specific procedural provision to be workable, and this instrument, while not establishing STPIMs, makes that procedural provision necessary to their operation.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.3 Before the changes made by the NS Act, there was no available measure tailored to the specific terrorist threats posed by foreign state activity, because TPIMs are available only in relation to terrorist threats posed by individuals rather than foreign states. There was accordingly no procedural provision in relation to measures to combat foreign state terrorist threats.

Why is it being changed?

- 7.4 Now that the NS Act has made provision for the STPIM regime, there is a scheme of measures, functionally identical to TPIMs but tailored to the specific terrorist threats posed by foreign state activity; but in the absence of this instrument, there is no

¹ Corresponding rules relating to STPIM proceedings in Northern Ireland will be made separately.

procedural provision for proceedings relating to those measures equivalent to that which exists for TPIMs.

What will it now do?

- 7.5 This instrument will ensure that there is procedural underpinning for the STPIM scheme and proceedings relating to STPIMs.
- 7.6 The criteria for imposing a STPIM are that:
- The Secretary of State reasonably believes that the individual is or has been involved in foreign power threat activity (“condition A”);
 - Some or all of the foreign power threat activity in which the individual is, or has been, involved is new foreign power threat activity. (“condition B”);
 - The Secretary of State reasonably considers that it is necessary, for purposes connected with protecting the United Kingdom from the risk of acts or threats within section 33(3), for prevention and investigation measures to be imposed on the individual. (“condition C”);
 - The Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual’s involvement in foreign power threat activity, for the specified measures to be imposed on the individual (“condition D”);
 - The court has given permission for the measures to be imposed, or the Secretary of State reasonably considers that the urgency of the case requires measures to be imposed without such prior permission (“condition E”). (An urgent STPIM notice must immediately be referred by the Secretary of State to the court for confirmation.)
- 7.7 If, following the Secretary of State’s application, the court gives permission for the imposition of a STPIM notice – or if the court confirms a STPIM notice imposed without permission – the court will subsequently hold a directions hearing. At the directions hearing, the court will give directions for a substantive review hearing in relation to the STPIM notice.
- 7.8 At the substantive hearing, the court will review the Secretary of State’s decisions that conditions A to D were met when the measures were imposed, and continue to be met. The individual also has a number of rights of appeal against decisions taken by the Secretary of State in relation to the STPIM notice (including decisions relating to the variation, revocation, revival or extension of the STPIM notice). At these hearings, the court has the power to quash the STPIM notice, to quash particular measures in the notice or to direct the Secretary of State to revoke the notice or vary the measures specified in the notice.
- 7.9 A party may appeal (on a question of law) to the Court of Appeal against any decision of the High Court in STPIM proceedings.
- 7.10 All High Court STPIM proceedings are likely to involve the use of ‘closed material’ (that is, material the disclosure of which would be contrary to the public interest). And STPIM proceedings in the Court of Appeal may also involve closed material. Pursuant to paragraphs 2 to 4 of Schedule 10 to the NS Act, rules of court must secure that the Secretary of State is required to disclose all the material which is relevant to the proceedings, but also must secure that, with the permission of the court, the Secretary of State may withhold closed material from the individual, although such

material must be disclosed to the court and to the special advocate. The rules must also make provision in relation to the summarising of closed material and the withdrawing of material (or other measures) where the Secretary of State elects not to make disclosure of material which the court does not grant permission to withhold. This instrument, therefore, makes that provision to ensure that in STPIM proceedings and appeals, closed material may be relied on and is protected.

- 7.11 Provision is also made in relation to ‘special advocates’, who may be appointed by the Attorney General pursuant to paragraph 10 of Schedule 10 to the NS Act, to represent the interests of anyone other than the Secretary of State in relation to closed evidence and in closed proceedings at which the individual and the individual’s legal representative cannot be present.
- 7.12 This is subject to the overarching provision of paragraph 5 of Schedule 10 to the NS Act, that nothing in the relevant paragraphs of the Schedule or the rules made under them (which is to say, Part 80 of the CPR as amended by this instrument) is to be read as requiring the court to act in a manner inconsistent with Article 6 (the right to a fair trial) of the European Convention on Human Rights.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There are no immediate plans for consolidation of the Civil Procedure Rules. The Civil Procedure Rule Committee is, however, engaged in a rolling programme of review of the CPR Part by Part with a view to shortening and simplifying the Rules, and this is producing a certain amount of consolidation within Parts of the Rules.

10. Consultation outcome

- 10.1 The Lady Chief Justice was (as required by paragraph 7(2)(a) of Schedule 10 to the NS Act) consulted on the draft Rules, and did not suggest any changes. Paragraph 7(3) of Schedule 10 to the NS Act provides that no further consultation is required before making the Rules, although the Deputy Head of Civil Justice, as Chair of the Civil Procedure Rule Committee, was informed of the drafting approach (of amending Part 80 of the CPR rather than inserting a new Part) and had no objections.

11. Guidance

- 11.1 Amendments to the CPR are drawn to the attention of participants in the civil justice system by correspondence addressed by the CPR Committee secretariat to members of the judiciary, to other relevant representative bodies (for example the Law Society of England and Wales, the General Council of the Bar and the advice sector) and to the editors of relevant legal publications; as well as by publicity within HMCTS. News of changes to the rules, together with the consolidated version of the rules, are published on the Ministry of Justice website.²

² www.justice.gov.uk/courts/procedure-rules/civil

11.2 No specific guidance on the changes made by this instrument is anticipated, as the provisions align with existing procedure relating to TPIMs, and existing guidance relating to proceedings will be applicable.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because no, or no significant, impact on businesses, charities, the voluntary sector or the public sector is anticipated.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is for the amendments to form part of the Civil Procedure Rules which are kept under continuous review by the Civil Procedure Rule Committee and may be subject to amendment accordingly.

15. Contact

15.1 Amrita Dhaliwal at the Ministry of Justice email: amrita.dhaliwal@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Steven Jarman, Deputy Director for Civil Justice & Law Policy, Access to Justice Directorate, at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Bellamy KC at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.