The Scottish Parliament
Pàrlamaid na h-Alba

DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

11th Meeting, 2016 (Session 4)

Thursday 10 March 2016

The Committee will meet at 1.30 pm in the Robert Burns Room (CR1).

1. **Land Reform (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

2. **Land Reform (Scotland) Bill:** The Committee will consider correspondence from the Minister for Environment, Climate Change and Land Reform.

3. **Instruments subject to negative procedure:** The Committee will consider the following—

   Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2016 (SSI 2016/131).

4. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

   Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No. 2) (Serious Crime Prevention Orders) 2016 (SSI 2016/137).

5. **Private Housing (Tenancies) (Scotland) Bill:** The Committee will consider correspondence from the Minister for Housing and Welfare.

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The papers for this meeting are as follows—

Agenda Items 1 and 2

Land Reform (Scotland) Bill - as amended

Land Reform (Scotland) Bill - Supplementary Delegated Powers Memorandum

Briefing Paper (private)	DPLR/S4/16/11/1(P)

Agenda Items 3 and 4

Briefing on Instruments (private)	DPLR/S4/16/11/2(P)
Instrument Responses	DPLR/S4/16/11/3

DELEGATED POWERS AND LAW REFORM COMMITTEE

11th Meeting, 2016 (Session 4)

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Instrument Responses

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2016 (SSI 2016/131)

On 4 March 2016, the Scottish Government was asked:

Rule 2(17) amends rule 134 of the principal 2011 Rules, to provide that prisoners subject to a deportation order are disqualified from obtaining temporary release unless they have been granted temporary release in the 3 months prior to the order being made.

In the case of *Ploski v Poland* (App. No. 26761/95), the European Court of Human Rights held in relation to an application for temporary release from prison (to attend the funerals of both parents) that there was a breach of Article 8. The Court held that it was the duty of the State to demonstrate that, in relation to the interference with private life, a pressing social need for the rule existed. The Court reiterated that Article 8 does not guarantee a detained person an unconditional right to temporary leave, but it is up to the domestic authorities to assess each request on its merits.

(1) In respect therefore that rule 2(17) entirely disqualifies an applicant from obtaining temporary release in particular circumstances, please explain why the provision is compatible with Article 8 of the Convention (right to private life).

(2) Rule 2(17) differentiates between prisoners who may apply for temporary release, according to whether or not they are subject to a deportation order, and if so whether they have been granted temporary release within 3 months prior to the order. Please explain therefore why the provision is compatible with Article 14 of the Convention (prohibition of discrimination).

The Scottish Government responded as follows:

1. The *Ploski* case concerned a prisoner who was refused temporary release to attend the funerals of his parents on grounds that there were no compassionate circumstances which would justify release and the prisoner was a “recidivist posing a risk of absconding”. The refusal to allow the prisoner to attend these funerals was held to constitute an interference with the prisoner’s Article 8 rights. The court held that the interference was not justified citing the existence of escorted leave as an alternative solution to unescorted leave and also the seriousness of allowing a person to attend the funerals of their parents.

Is there an interference with Article 8 rights?

There is some doubt as to whether the existence of a general scheme of *unescorted* temporary release is necessary to prevent an interference with a prisoner's Article 8 rights. Indeed the 2006 European Prison Rules only call for prisoners to be released (escorted or unescorted) to allow them to visit a sick relative, attend a funeral or for other humanitarian reasons. What is clear from the *Ploski* case is that the refusal of a request for temporary release in order to attend a family funeral is likely to constitute an interference with Article 8 rights.

It could be extrapolated from the *Ploski* judgement that, where a request for temporary release is for a sufficiently serious purpose (i.e. a family funeral), the lack of availability of temporary release could constitute an interference with the prisoner's Article 8 rights. The interference would occur at the point where there was an outright prohibition on temporary release or a refusal of temporary release on application.

There is no indication in the Ploski case that temporary release would require to be on an unescorted basis. Indeed the court in *Ploski* noted that escorted release could have been granted to Mr Ploski as an "alternative solution" to unescorted release. It could be implied from this that the refusal of unescorted temporary release and the grant instead of escorted release could prevent an interference with the prisoner's Article 8 rights or, at the very least, could constitute a far lesser interference with those rights.

This rhetoric is reflected in more recent ECtHR judgements such as *Giszczak v Poland* (App *40195/08)* where a prisoner was refused permission to visit his daughter in hospital and given imprecise information about his attendance at her funeral. The Court in *Giszczak* found that there was an Article 8 breach and noted that the security concerns "could easily have been addressed by an escorted leave". The case of *Czarnowski v Poland* (App 28586/03) also centred on the refusal of release to allow a prisoner to attend a family funeral and the court noted:
"*taking into account the seriousness of what was at stake, namely refusing an individual the right to attend the funeral of his parent, the Court is of the view that the respondent State could have refused attendance only if there had been compelling reasons and if no alternative solution – like escorted leave – could have been found.*"

The changes brought about by rule 2(17) of the Amendment Rules would not prevent escorted release being granted to a prisoner under rules 100 or 101 of the Prison Rules to enable them to attend a funeral or visit a sick relative. Accordingly, the Scottish Government submits that the prohibition of unescorted temporary release for certain prisoners does not represent an interference with the Article 8 rights of those prisoners as they can still obtain escorted release.

Is the interference justified?

If the Scottish Government's argument that there is no interference with Article 8 rights is not accepted, the Scottish Government submits that any interference with Article 8 rights is nevertheless justified. An interference with Article 8 rights will only be justified if: (1) it is in accordance with the law, (2) it is for a legitimate aim (national security, public safety, national economic well-being, prevention of disorder or crime, protection of health or morals or protection of the rights and freedoms of others); and (3) it is necessary in a democratic society (i.e. proportionate).

The Scottish Government submits that the first two tests are met as the prohibition on unescorted temporary release will be on the face of the Prison Rules and it is intended to prevent disorder or crime and to protect public safety. The reason for the prohibition is primarily to prevent temporary release being granted in circumstances where there may be an increased risk of absconding. The prohibition is also designed to prioritise finite prison resources for those who will be resettling in the communities they will be released into.

The Scottish Government considers that the prohibition on unescorted temporary release for those subject to a deportation order is a proportionate means to address these concerns. The prohibition will only apply to those prisoners who have not recently been tested in the community. If a prisoner has received temporary release in the three months prior to the deportation order being made they may continue to receive temporary release as they have already been tested in the community. In addition, should a prisoner require temporary release to attend a family funeral or visit a sick relative, or if there are other exceptional circumstances, that prisoner can obtain escorted day absence under rule 101. Special escorted leave may also be available to that prisoner subject to the prisoner having the required supervision level.

The prohibition on unescorted temporary release for prisoners who are subject to deportation orders mirrors the prohibition on those prisoners obtaining home detention curfew under section 3AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993. The prohibition is also similar to the existing prohibition on granting temporary release to those who are subject to proceedings under the Extradition Act 2003 (rule 134(3)(a) of the Prison Rules. Recent amendments to the Prison Rules in England and Wales also prohibit the granting of temporary release for prisoners subject to deportation orders (see rules 7 and 9 of the Prison Rules 1999 (SI 1999/728) as amended by Prison and Young Offender Institution (Amendment) Rules 2014 (SI 2014/2169)).

The Scottish Government submits that, if the prohibition on unescorted temporary release for certain prisoners is an interference with a prisoner's Article 8 rights, it is a proportionate interference by virtue of the safeguards described above.

2. Article 14 of the Convention on Human Rights prohibits discrimination in the enjoyment of the substantive Convention Rights. For a breach of Article 14 there must be

- a difference in treatment within the ambit of another Convention right;
- the difference in treatment must be between persons in analogous situations;
- the difference in treatment is on a ground mentioned in Article 14; and
- the difference in treatment cannot be justified.

The Scottish Government's primary position is that, as the prohibition on unescorted temporary release does not constitute an interference with Article 8 rights, Article 14 is not engaged.

If the Scottish Government's argument that Article 14 is not engaged is not accepted, the Scottish Government submits the difference in treatment between prisoners who are subject to deportation orders and those who are not is justified. Rule 2(17) of the Amendment Rules will prohibit the granting of temporary release to prisoners who

are subject to a deportation order and who have not obtained temporary release in the preceding three months. Accordingly, there will be a difference in the availability of temporary release for prisoners subject to a deportation order and those who are not.

Unlike Article 8, there are no express grounds on which a derogation from Article 14 would be permitted but the ECtHR has held that differential treatment in the enjoyment of a Convention right can be justified. The ECtHR in the *Belgian Logistic case (No 2)* (App 2162/64) was faced with an argument that the lack of express grounds on which to derogate from Article 14 meant that there could be no such derogation. The Court addressed this argument as follows:
"*One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities. The extensive interpretation mentioned above cannot consequently be accepted.*"

The ECtHR noted in the case of Willis v UK ((2002) 35 EHRR 21) that:
"*According to the Court's case law, a difference of treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".*"

The prohibition on unescorted temporary release for those prisoners who are subject to deportation orders pursues the legitimate aim of reducing the risk of prisoners absconding. It is also intended to ensure that finite prison resources are focused on those who need them most – those who will be resettling in the communities they are being released into.

The prohibition is proportionate as it does not remove the right to unescorted temporary release for those who have recently been tested in the community. In addition, *escorted* release will remain available for all prisoners regardless of immigration status or supervision level. There is no question of any prisoner being forced to miss a family funeral or being unable to visit a sick relative purely as a result of their immigration status.

The Scottish Government submits that, in the event that Article 14 is engaged, the difference in treatment brought about by the prohibition on unescorted temporary release is objectively justified as it pursues a legitimate aim in a proportionate manner.

INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No. 2) (Serious Crime Prevention Orders) 2016 (SSI 2016/137)

On 7 March 2016, the Lord President's Private Office was asked:

1. New rule 63.2, inserted by the Act of Adjournal into the Criminal Procedure Rules 1996, specifies that an application by the Lord Advocate under section 22A of the Serious Crime Act 2007 is to be in Form 63.2-A. Form 63.2-A, set out in the Schedule to the Act of Adjournal, also refers to an application under section 22A. It is noted, however, that section 22A makes no reference to an application being made (unlike for example, sections 22B and 22C which make specific reference to applications by the Lord Advocate), but appears only to give the court the power to make a serious crime prevention order if the court has reasonable grounds to believe that the order would protect the public.

Is it considered that the references to an application under section 22A are sufficiently clear, or is any corrective action proposed?

2. The amendments to the Serious Crime Act 2007, which extended the availability of serious crime prevention orders so that they may be made in Scotland, came into force on 1 March 2016. The Act of Adjournal comes into force on 17 March 2016.

Paragraph 3(1) disapplies paragraphs 2(2) and 2(4)(b) of the Act of Adjournal in relation to a person who is being dealt with on or after 1 March 2016 in relation to an offence of which the person was convicted before that date. Paragraphs 2(2) and 2(4)(b) insert into the Rules new Chapter 63, which specifies the forms to be used in relation to the serious crime prevention orders regime in Scotland, and the forms themselves.

It is noted that a person being dealt with on or after 1 March in relation to an offence for which they were convicted on or after that date may be made subject to a serious crime prevention order, but that the relevant forms which the Act of Adjournal introduces will not be in force until 17 March. Can you explain what will be the effect of this on the administration of the serious crime prevention orders regime?

The Lord President's Private Office responded as follows:

<u>Question 1</u>

The Lord President's Private Office had considered this point at some length before the Act of Adjournal was made. We accept that the absence of an express reference in section 22A of the Serious Crime Act 2007 ("the 2007 Act") to the making of an application by the Lord Advocate, particularly when contrasted with sections 22B and 22C, would tend to suggest that the order is made of the court's own accord. The Lord President's Private Office is of the view that an application by the Lord Advocate is required under section 22A, despite the absence of any express reference, for the following reasons.

Section 22A(5) provides that the powers of the High Court and the sheriff in respect of an order under section 22A are subject to sections 6 to 15 (safeguards). These are the safeguards that apply when the Court of Session or the sheriff makes a serious crime prevention order ("SCPO") under section 1(1A) (i.e. an SCPO made on application to the civil courts). Section 1(4) equally applies the sections 6 to 15 safeguards to "civil" SCPOs. Among those safeguards, section 8(aa) provides that an SCPO may be made only on an application by, in the case of an order in Scotland, the Lord Advocate. As the safeguards in sections 6 to 15 are said to apply to orders made under section 22A, we tend to the conclusion that an application by the Lord Advocate is required.

Another point that tends to support this interpretation is the fact that section 1(5)(c), as amended, provides that "serious crime prevention order" (for the purposes of Part 1 of the 2007 Act) means an order under section 1, an order under section 22A or an order under section 19 (the section 22A equivalent for the rest of the UK). Accordingly, when section 8 refers to an SCPO then we take the view that it means any SCPO, regardless of whether it is made under section 1, 19 or 22A.

Accordingly, we take the view that an application by the Lord Advocate is required under section 22A. In the circumstances, we do not consider that any corrective action can be taken by the Lord President's Private Office.

Question 2

The Lord President's Private Office understands that, although there is a gap between SCPOs becoming available in Scotland on 1 March 2016 and the coming into force of new Chapter 63 on 17 March, this is unlikely to have any significant effect on the administration of the SCPO regime. Where the rules of court do not provide specifically for the form of an application, the usual approach would be for the applicant to prepare a petition containing all of the necessary information and lodge it with the Court. Given that the sole applicant is the Lord Advocate (for the reasons set out above), we do not expect that this will cause an undue burden. The forms associated with Chapter 63 were prepared in consultation with the Crown Office and we expect that if an application had to be made before 17 March then it would closely follow that style, even if it were not strictly an application in the form prescribed by Chapter 63. We are also advised that SCPOs are not likely to be sought frequently, and so we do not understand that the volume of applications between 1 and 17 March is likely to prove problematic either for the Scottish Courts and Tribunals Service or for the Crown Office.

That said, the Lord President's Private Office recognises that it would be preferable, wherever possible, for rules to come into force at the same time as the enactment that they underpin. On this occasion, it was not possible to do so as a result of certain relatively unusual circumstances. As the Committee will be aware, nearly all acts of adjournal are made under section 305 of the Criminal Procedure (Scotland) Act 1995. That power enables the High Court, among other things, to regulate practice and procedure in relation to criminal procedure. However, new section 36A of the 2007 Act provides that proceedings under sections 22A to 22C and 22E are civil proceedings (despite the fact that they arise in the course of criminal proceedings). Accordingly, bespoke provision was required to enable an act of adjournal to regulate practice and procedure in relation to these proceedings: section

36A(4) extends section 305 so that an act of adjournal may be made in respect of them.

The Lord President's Private Office was advised on 10 February 2016 that the UK Government intended to commence the relevant provisions of the Serious Crime Act 2015 to extend SCPOs to Scotland on 1 March 2016. That included paragraph 25 of Schedule 1 to the 2015 Act, which inserted section 36A into the 2007 Act. At that point, it became apparent to this office that the act of adjournal could not be made before 1 March 2016, as the enabling power was not yet in force.

We carefully considered whether there could be an anticipatory exercise of powers, but it appeared to us that paragraph 25 of Schedule 1 amends the 2007 Act, and the 2007 Act as amended extends an existing power of the High Court under section 305 of the Criminal Procedure (Scotland) Act 1995. We therefore took the view that the 2015 Act does not of itself confer a power to make subordinate legislation. Even if that view were wrong, it did not appear to us that an exercise of the section 305 power, as extended by inserted section 36A, could be said to be necessary or expedient for the purpose of bringing the [2015] Act or any provision of it into force, or for the purpose of giving full effect to the [2015] Act or any such provision after the time when it comes into force. In reaching that view, we had regard to the view of the Session 3 Subordinate Legislation Committee on this point, as set out in its 19th Report of 2011 (in relation to the Licensing (Food Hygiene Requirements) (Scotland) Order 2011). While we accept that the Committee is not bound by its own previous decisions, much less those of its predecessors, we are not aware of the Committee having taken a different approach since.

Accordingly, it appeared to this office that the proper course of action was to make the act of adjournal as soon as practicable after the enabling powers came into force, and to bring the act of adjournal into force as soon as possible thereafter. The usual practice of this office is to allow 28 days between laying and coming into force, but where this is not possible then we aim to adhere to the convention of allowing 14 days for instruments that are laid under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. We accept that this period could have been further shortened and in the past we have provided a reason to the Committee when an instrument comes into force less than 14 days after laying. However, for the reasons given above, we did not think that any prejudice would arise were the 14 days allowed to elapse in this case.