

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Fourth Delegated Legislation Committee

DRAFT INVESTIGATORY POWERS
TRIBUNAL RULES 2018

Tuesday 20 November 2018

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The Committee consisted of the following Members:

Chair: SIR DAVID AMESS

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|-------------------------------------------------------------------|-----------------------------------------------------------------------|
| † Dakin, Nic (<i>Scunthorpe</i>) (Lab) | † Newlands, Gavin (<i>Paisley and Renfrewshire North</i>) (SNP) |
| † Docherty, Leo (<i>Aldershot</i>) (Con) | Pawsey, Mark (<i>Rugby</i>) (Con) |
| † Donelan, Michelle (<i>Chippenham</i>) (Con) | Rashid, Faisal (<i>Warrington South</i>) (Lab) |
| † Grant, Bill (<i>Ayr, Carrick and Cumnock</i>) (Con) | Smith, Eleanor (<i>Wolverhampton South West</i>) (Lab) |
| † Grant, Mrs Helen (<i>Maidstone and The Weald</i>) (Con) | † Stevenson, John (<i>Carlisle</i>) (Con) |
| † Green, Kate (<i>Stretford and Urmston</i>) (Lab) | † Thomas-Symonds, Nick (<i>Torfaen</i>) (Lab) |
| † Howell, John (<i>Henley</i>) (Con) | † Wallace, Mr Ben (<i>Minister for Security and Economic Crime</i>) |
| † Killen, Ged (<i>Rutherglen and Hamilton West</i>) (Lab/Co-op) | Bradley Albrow, <i>Committee Clerk</i> |
| † Maclean, Rachel (<i>Redditch</i>) (Con) | |
| † McGovern, Alison (<i>Wirral South</i>) (Lab) | † attended the Committee |

Fourth Delegated Legislation Committee

Tuesday 20 November 2018

[SIR DAVID AMESS *in the Chair*]

Draft Investigatory Powers Tribunal Rules 2018

2.30 pm

The Minister for Security and Economic Crime (Mr Ben Wallace): I beg to move,

That the Committee has considered the draft Investigatory Powers Tribunal Rules 2018.

It is a pleasure to serve under your chairmanship, Sir David. I am pleased to have this opportunity to debate these important updates with the Committee. The Investigatory Powers Tribunal, which was established under the Regulation of Investigatory Powers Act 2000, investigates and determines complaints that allege that public authorities have used covert techniques unlawfully. The tribunal also investigates complaints against the security and intelligence agencies for conduct that breaches human rights.

The tribunal has delivered judgments on a number of landmark cases over the past 18 years. A notable example is its widely publicised 2015 judgment that the so-called Wilson doctrine, thought to protect the communications of parliamentarians from interception, was not enforceable in English law. That led to an emergency debate in Parliament and a statement from the Prime Minister, paving the way for the Wilson doctrine to be placed on a statutory footing in the Investigatory Powers Act 2016.

The tribunal's rules set out the procedure that the tribunal should follow. They include details on such important matters as how complaints may be brought, how hearings should be conducted, how evidence should be received, in what circumstances sensitive information may be disclosed, and how complainants should be notified of the outcome of their case. The rules have not changed since the tribunal was established in 2000, so the time is ripe to update them to better reflect current tribunal practice.

I will briefly outline the changes that the statutory instrument will bring in. First, to improve the efficiency of decision making in the tribunal, we have amended the rules to allow further functions of the tribunal to be exercised by a single member of that tribunal. Secondly, to strengthen the power of the tribunal, we have added an explicit process for when the respondent refuses to consent to disclosure but the tribunal considers that disclosure is required. Thirdly, to further increase the transparency of the work of the tribunal, we have included the commitment to hold open hearings as far as is possible. Fourthly, to assist complainants and respondents to the tribunal, we have provided details of the function of counsel to the tribunal, including by listing the functions that a tribunal may request counsel to perform.

Finally, we have amended the rules to set out the process for the making and determination of applications to the tribunal for leave to appeal, as well as determining in which court the appeal should be heard. This is in

preparation for the new right of appeal, which is coming into force as a result of the Investigatory Powers Act 2016. Appeals may be made in certain circumstances on a point of law against any determination or final decision of a preliminary issue made by the tribunal. Appeals will be heard in the Court of Appeal in England and Wales and in the Court of Session in Scotland. As is necessary, the tribunal undertakes much of its work behind closed doors and many of its judgments are not published in full. The introduction of an appeals route will allow for greater transparency and greater levels of reassurance that justice has been done.

Of course, it is important that the affected parties are properly consulted before such changes are made. For that reason, the Government held a public consultation on the proposed updates to the rules. We have considered the responses carefully with colleagues across Government and with the tribunal itself. We accepted a number of amendments proposed in the consultation responses and they have been subsequently incorporated in the rules we see before us today.

In summary, the updates to the rules make the work of the tribunal more transparent and ensure that the legislation accurately reflects how tribunal processes and proceedings have evolved over time. I commend the draft rules to the House.

2.34 pm

Nick Thomas-Symonds (Torfaen) (Lab): It is a pleasure to serve under your chairmanship, Sir David. I am grateful to the Minister for setting out the position in the way he has. The Opposition welcome the work to update the tribunal. Through its work of investigating and determining complaints that allege that public authorities have used covert techniques unlawfully and infringed the right to privacy, as well as complaints against the security and intelligence services for conduct that breaches human rights, the tribunal is a fundamental part of the framework in this area.

The approach that I always take is that strong powers must be accompanied by strong safeguards. Taken together, I believe that the updated rules will provide us with greater reassurance that justice is both done and seen to be done in the tribunal, and that they will allow for a greater degree of transparency. I make it clear that the Opposition do not oppose the draft rules, and I am grateful to those who responded to the six-week consultation.

As the Minister set out, the rules are essentially being updated to amend the powers that can be exercised by a single tribunal member; implement a process for cases in which a respondent refuses to consent to a disclosure that the tribunal believes is necessary; reflect the practice that hearings are to be held in the open where possible, which is to be welcomed; and set out a list, which I appreciate is non-exhaustive, of the functions that the tribunal may ask its counsel to perform—another important aspect.

I ask the Minister to clarify one point. I understand that 17 amendments were proposed in response to the consultation, of which five have been accepted and incorporated into the rules. First, the function of a single tribunal member to decide on preliminary issues is being removed. Secondly, the tribunal is being given a power in respect of what can be relied upon in circumstances

where a problem arises regarding disclosure. Thirdly, in circumstances in which an arguable error of law is identified by the counsel to the tribunal, the counsel must notify the tribunal, which must disclose it to the complainant. Fourthly, where the tribunal makes a determination that is not in favour of the complainant, it must provide a summary of the determination—a change that is to be welcomed in the interests of justice. Finally, the rules will remove the requirement for an application for leave to appeal to state the ground of appeal where there has already been a notification by counsel of an arguable error of law. Those measures are all welcome, but I ask the Minister to clarify why those five amendments have been incorporated, while the other 12 have not.

2.38 pm

Mr Wallace: I am grateful to the Opposition spokesperson for his question. We received three substantive responses to the public consultation. We rejected the suggestion that an amendment should be made to allow the tribunal to make disclosures to the Investigatory Powers Commissioner, because section 237 of the 2016 Act already permits such disclosures. We also rejected the suggestion that the functions of the counsel to the tribunal should be specifically identified in the rules, because not all the counsel's functions will be relevant in every case and the tribunal should have discretion over which functions would assist the counsel in each individual case.

We further rejected the suggestion that the tribunal should compel a witness to attend and give evidence; such a power could be counterproductive because the tribunal has functioned on the basis of voluntary co-operation. We rejected the use of special advocates in the tribunal, because there are considerable benefits to the tribunal employing its own counsel, which provides specific functions more suited to the tribunal's work.

We have sought to allay concerns about the rule that the tribunal

“may receive evidence that would not be admissible in a court of law.”

Our response to the consultation states:

“It is important that the Tribunal has the flexibility to receive evidence in any form. However...it is inconceivable that a situation would arise wherein the admission of evidence that might have been obtained as a result of torture or inhuman or degrading treatment would not be subject to challenge—either by the complainant or by Counsel to the Tribunal.”

Those are the reasons that we have set out, but we accepted a considerable number of suggestions.

Overall, the draft rules are about improving access to the tribunal and setting out a clear appeals route, as is present in many other tribunal and court processes. They should therefore go some way towards continuing to reassure the public that there is good oversight. The tribunal is chaired by a judge of the Court of Appeal, Lord Justice Singh, so it is a solid court that can deal with some very weighty issues. It has dealt with a considerable range of matters, including challenges to the Investigatory Powers Act, as well as individuals' concerns about whether their rights have been infringed either by the intelligence services or by the actions of an investigation that used investigatory powers.

We have to operate in a slightly different arena here. On some occasions we have to be in “neither confirm, nor deny” territory, to ensure that we can investigate whether someone has been under surveillance and, if so, whether it has been proportionate and necessary in accordance with the law, without tipping them off after the fact that they have definitely been under such surveillance. That is quite important, because otherwise lots of people could use the process for mischievous or indeed malevolent purposes.

The tribunal is a very important structure. I have every confidence that it is well advised and respected by the legal community in this country and that it protects the rights of citizens. Once again, I commend the draft rules to the Committee.

Question put and agreed to.

2.42 pm

Committee rose.

