

Criminal Justice Committee
Wednesday 5 June 2024
23rd Meeting, 2024 (Session 6)

The Sheriff (Removal from Office) Order 2024 (SSI 2024/148)

Overview

1. At this meeting, the Committee will consider the following Scottish Statutory Instrument (SSI), which is subject to annulment by resolution of the Parliament until 2 September 2024. The Committee is invited to consider the instrument and decide what, if any, recommendations to make.
2. More information about the instrument is summarised below:

Title of instrument: [The Sheriff \(Removal from Office\) Order 2024 \(SSI 2024/148\)](#)

Laid under: [Courts Reform \(Scotland\) Act 2014](#)

Laid on: 21 May 2024 (Note: as the laying date was less than 28 days before the instrument is due to come into force, the Scottish Government wrote to the Presiding Officer, as required by law. The letter is annexed as part of this paper).

Procedure: Negative

Deadline for committee consideration: 26 August 2024

Deadline for Chamber consideration: 2 September 2024

Commencement: 7 June 2024

Background to this SSI and its purpose

3. The purpose of this instrument is to remove a sheriff from judicial office following an independent tribunal constituted under section 21 of the 2014 Act reporting to the First Minister that the individual is unfit to hold that office by reason of misbehaviour.
4. The Policy Note accompanying the instrument is included in **Annex A**. This sets out more background to this particular case.
5. In addition, SPICe has produced a short briefing note on the process for the removal of a sheriff from office; see **Annex B**.

Procedure

6. Under the negative procedure, an instrument is laid after it is made, and is subject to annulment by resolution of the Parliament for a period of 40 days beginning on the day it is laid.

7. Once laid, the instrument is referred to:
 - the Delegated Powers and Law Reform (DPLR) Committee, for scrutiny on various technical grounds, and
 - a lead committee, whose remit includes the subject-matter of the instrument, for scrutiny on policy grounds.
8. Any MSP may propose, by motion, that the lead committee recommend annulment of the instrument. If such a motion is lodged, it must be debated at a meeting of the Committee, and the Committee must then report to the Parliament (by the advisory deadline referred to above).
9. If there is no motion recommending annulment, the lead committee is not required to report on the instrument.

Delegated Powers and Law Reform Committee consideration

10. The DPLR Committee considered the instrument on 28 May 2024 and reported on it in its [39th Report, 2024](#). The DPLR Committee agreed to draw the instrument to the attention of the Parliament under reporting ground (j) for failure to comply with the laying requirements in section 28 (2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

Explanation to the Presiding Officer

11. As the instrument was laid less than 28 days before coming into force, the Scottish Government is required by law to provide an explanation. This is set out in **Annex C**. The Committee is required to consider the explanation, and may comment on it in any report.

Advice from the clerk

12. Members will want to note that issues relating to contempt of court and data protection issues arise in relation to this SSI.
13. There are court orders in place in respect of the applicant in the Judicial Review and two additional complainers which prohibit “publication by any means, including social media, of the name and the designation of the petitioner or the complainers known as “C1” and “C2” or any particulars or details calculated or likely to lead to their identification in connection with the present proceedings”. These orders were put in place on the basis that there is a risk that, by reason of the ‘mosaic effect’, members of the public might piece together details leading to the identification of the complainers”.
14. For the purposes of any consideration by the Committee, therefore, regard will need to be had in any discussion to the risk of any comment from Members which could constitute publication of “particulars or details” that might lead, directly or indirectly, to identification. The definition of “publish” in the 1981 Act includes “any speech, writing, [programme included in a cable programme

service] or other communication in whatever form, which is addressed to the public at large or any section of the public”.

15. Members will want to note that parliamentary privilege does not provide any protection in relation to contempt for any breach of court orders of the type made in this case under s.11 of the Contempt of Court Act 1981, and breach of a s.11 order (as a breach of a civil order) in the course of proceedings would therefore be considered contempt of court. The maximum penalty which can be imposed by a Scottish court for contempt is two years in prison and a fine of any amount.
16. All those participating in this Committee meeting relating to the SSI must therefore understand that they are personally responsible for compliance with the requirements of the court orders, and that they should be proactive in their management of the legal risks.
17. Separate to regard for the court orders, the Committee should also maintain an awareness of application of the UK GDPR to proceedings of the Parliament. Under article 5(1) of the UK GDPR, the Parliament’s processing of personal data must be lawful. Publication of information likely to disclose the identity of one of the complainers (including via the “mosaic effect” referred to – also known as jigsaw identification) in breach of the s.11 order is unlawful and would therefore constitute unlawful processing under the UK GDPR. This brings with it the separate risk of enforcement action by the Information Commissioner’s Office under the UK’s data protection regime.
18. **Members are therefore strongly advised not to comment on the details of the Judicial Review or make any reference to the complainers which could enable them to be identified.**

Committee consideration

19. Taking account of the advice above, Members are invited to consider the instrument and decide whether there are any points they wish to raise. If there are, an option would be to seek further information from the Scottish Government (and/or other stakeholders) through correspondence.
20. If members have no points to raise, the Committee should note the instrument (that is, agree that it has no recommendations to make).
21. However, should a motion recommending annulment be lodged later in the 40-day period, it may be necessary for the Committee to consider the instrument again.

Clerks to the Committee
May 2024

Annex A: Scottish Government Policy Note

The above instrument is made in exercise of the powers conferred by section 25(2) of the Courts Reform (Scotland) Act 2014 ('the 2014 Act'). The instrument is subject to negative procedure.

Purpose of the Instrument

The purpose of this instrument is to remove a sheriff from judicial office following an independent tribunal constituted under section 21 of the 2014 Act reporting to the First Minister that the individual is unfit to hold that office by reason of misbehaviour.

Policy Objectives

This Order provides for the removal of Sheriff John Albert Brown, a sheriff for the Sheriffdom of Grampian, Highland and Islands, from the office of sheriff. An independent tribunal constituted under section 21 of the 2014 Act carried out an investigation and submitted a [report](#) to the First Minister which concluded that the sheriff is unfit for such office by reason of misbehaviour.

Section 25(1) of the 2014 Act provides that if a tribunal reports to the First Minister that an individual is unfit to hold office by reason of inability, neglect or misbehaviour, the First Minister may remove that individual from office by order, once the tribunal's report has been laid before the Scottish Parliament under section 24(2) of the 2014 Act. The report was laid before Parliament on 26 April 2024.

Having considered all the relevant circumstances, including the tribunal's finding that the sheriff's behaviour was wholly contrary to the standards of conduct and probity expected of anyone holding judicial office and that his continuance in office would be likely to impact on public trust in the due administration of justice in our courts and bring it into disrepute, the First Minister has decided to make this Order to remove Sheriff Brown from office.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

The sheriff who is the subject of the Order was invited to make representations to the First Minister in advance of his decision as to whether to remove him from office. The First Minister took these representations into account when deciding whether to make an Order for removal.

No statutory consultation is required under the 2014 Act in respect of removal of individuals from the office of sheriff. We have however consulted informally with the Judicial Office for Scotland.

As the Order contains the personal data of a judicial office holder we have complied with the requirement to consult with the Information Commissioner under Article 36(4) of the UK General Data Protection Regulation (UKGDPR).

Impact Assessment

No formal impact assessments have been prepared. The Order is not related to any policy development. The Order is required to implement a decision by the First Minister following a report from an independent tribunal constituted under section 21 of the 2014 Act who reported that the sheriff is unfit for such office by reason of misbehaviour.

Financial Effects

The First Minister confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, and no financial effects on local government or on business.

Annex B: Note from SPICe, removal of sheriffs

The procedures for the removal of sheriffs can be found in [sections 21-25 of the Courts Reform \(Scotland\) Act 2014](#) (2014 Act) under the heading “fitness for office”.

The main elements of the procedure are as follows:

1. The setting up of a tribunal to investigate whether a sheriff is unfit to hold office “by reason of inability, neglect of duty or misbehaviour” (section 21(1) of the 2014 Act). If the Lord President requests the First Minister to do this, the First Minister must set up such a tribunal.
2. Whether a sheriff has been involved in “misbehaviour” is a question of law and fact. [The Guidance on Judicial Ethics in Scotland](#) contains further details on issues of propriety (the issue is also discussed in the tribunal report mentioned below).
3. The tribunal is to consist of the individuals noted at section 21(4) of the 2014 Act
4. Potential suspension of the sheriff from office during the tribunal’s investigation (section 22 of the 2014 Act).
5. Rules on evidence/the tribunal’s power to request evidence (section 23 of the 2014 Act). This includes a provision which allows the Court of Session to lay down procedures (tribunal rules) to be followed by the tribunal (section 23(5) of the 2014 Act)
6. The tribunal rules can be found in the [Act of Sederunt \(Fitness for Judicial Office Tribunal Rules\) 2015](#). They include details of the process which the tribunal has to follow.
7. The tribunal then reports in writing with reasons on its decision and submits this to the First Minister. The First Minister must lay the report before the Scottish Parliament (section 24 of the 2014 Act).
8. Under section 25(1) of the 2014 Act, the First Minister may remove an individual from the office of sheriff by order:

“(a)if a tribunal constituted under section 21 reports to the First Minister that the individual is unfit to hold that office by reason of inability, neglect of duty or misbehaviour, and

(b)only after the First Minister has laid the report before the Scottish Parliament under section 24(2).

The order is subject to the negative procedure.

9. It is potentially possible to bring [an action for judicial review](#) in relation to a tribunal report .

Annex C: Explanation to the Presiding Officer of why the instrument was laid in breach of the statutory laying requirements

21 May 2024

Dear Presiding Officer

THE SHERIFF (REMOVAL FROM OFFICE) ORDER 2024

The Sheriff (Removal from Office) Order 2024 has today been made by the First Minister under section 25(2) of the Courts Reform (Scotland) Act 2014, and is also to be laid in the Scottish Parliament today.

This instrument is subject to negative procedure, and is due to come into force on 7 June 2024.

Under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, instruments subject to this procedure must be laid before the Scottish Parliament at least 28 days before they are to come into force. The laying of this instrument does not comply with this requirement, and I am writing to explain why this approach has been taken in this case, in accordance with section 31(3) of that Act.

The instrument is being made following a report from an independent tribunal constituted under section 21 of the Courts Reform (Scotland) Act 2014 to report into Sheriff John Albert Brown's fitness for office. The tribunal unanimously reported that the sheriff was unfit to hold judicial office by reason of misbehaviour. On 26 April 2024, the First Minister laid that report before the Scottish Parliament, in accordance with section 24(2) of that Act. Under section 25(1) of that Act, the First Minister may remove that individual from office by order if a tribunal has reported to the First Minister that an individual is unfit to hold office by reason of inability, neglect or misbehaviour, and that report has been laid before Parliament. Following a period of two weeks in which the sheriff was invited to make representations to the First Minister, and due consideration of those representations, the First Minister has made the order to have the sheriff removed from office.

The Scottish Government considers that the order to remove the sheriff from judicial office should come into effect as soon as reasonably possible. Given the nature and gravity of the tribunal's findings, we consider that there is an imperative to remove the office holder in order to maintain public trust and confidence in the due administration of justice in our courts. This matter has taken some time, with a new tribunal having to be appointed following a successful judicial review, questions asked by MSPs and public awareness and media comment on the fact that the sheriff has remained suspended on full pay throughout. Now that the tribunal's report has been laid before the Scottish Parliament, and in light of its findings that the sheriff is unfit to hold that office, we consider that the sheriff should not continue to hold that office, or continue to be paid the associated salary for any longer than absolutely necessary. We have also taken account of the fact that the sheriff may elect to resign from office shortly in light of the tribunal's findings. It is nonetheless considered appropriate taking account of the report to have the sheriff formally removed in light of the considerations of public confidence noted above.

It is therefore considered that the order should be made as a matter of urgency. Rather than seeking to bring the Order into force immediately, the date of Friday 7 June 2024 has been chosen as the earliest date by which this could reasonably be achieved while ensuring that there is an opportunity for Parliament to consider. The Government is keenly aware of the importance of the 28-day rule to ensure due scrutiny of statutory instruments can take place, but considers that taking into account all the circumstances in this case there are good grounds to breach that rule in this case in order to ensure swift action is taken.

I am copying this letter to the convenor of the Civil Justice Committee and convenor of Delegated Powers and Law Reform Committee.

Jennifer Sinclair
Judicial Policy Team Leader