



House of Lords  
House of Commons  
Joint Committee on  
Human Rights

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# Legislative Scrutiny: Terrorist Asset- Freezing etc. Bill (Preliminary Report)

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**Third Report of Session 2010-11**

*Report, together with formal minutes, and  
written evidence*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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## Summary

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The Terrorist Asset-Freezing etc. Bill implements the Government's intention to put the terrorist asset-freezing regime on a permanent statutory footing. It is intended to replace the Terrorist Asset-Freezing (Temporary Provisions) Act 2010, which was enacted on an emergency timetable in February 2010 following the decision of the Supreme Court quashing the Orders in Council which provided the legal basis for the previous asset-freezing regime.

On account of the imminence of Report stage on the Bill in the House of Lords, and because of the human rights significance of this Bill, we decided to take the unusual step of publishing a Preliminary Report without the benefit of having seen the Government's response to questions we have recently raised with Ministers. This Preliminary Report aims to identify the most significant human rights issues which are raised by the Bill and to make provisional recommendations about how the Bill could be rendered human rights compatible.

### **The breadth of the power: the legal threshold for an asset freeze**

The extent to which asset-freezes interfere with the human rights of designated persons and their families was recognised by the Supreme Court in the *Ahmed* case. The lower the threshold for the use of the asset-freezing powers, the more individuals are susceptible to interferences with their rights to property and to respect for their private, home and family life, and the easier it is for the Government to interfere with those rights.

On introduction, the Bill provided that a person can be made the subject of an asset-freeze (be "designated" in the language of the Bill) if the Treasury has "reasonable grounds for suspecting" that the person is or has been involved in terrorist activity. In Committee, however, the Government amended the Bill by raising the legal threshold for asset-freezing from reasonable suspicion to reasonable belief. The Bill has also been amended to give the Treasury the power to make an interim asset-freeze, on the basis of reasonable suspicion.

We believe the Government's amendment raising the legal threshold to reasonable belief goes some way to meeting the human rights concern about the breadth of the power and therefore welcome the raising of the legal threshold as a human rights enhancing safeguard.

We have also asked the Government whether the shift from the language of reasonable suspicion to reasonable belief necessarily entails a standard of proof "on the balance of probabilities". If it does not, we recommend that consideration should be given to amending the Bill to include an express reference to the balance of probabilities as the applicable standard of proof.

We also recommend that consideration be given to whether the statutory framework for asset-freezes should follow the example of the control orders framework by requiring that consideration be given to prosecution before an asset-freeze is imposed on an individual who has not been arrested, charged or convicted of any criminal offence.

### **Compatibility with the right of access to court**

We welcome the introduction of a full right of appeal against asset-freezes as a human rights

enhancing safeguard within the current text of the Bill. However, we recommend that the Government provide a more detailed justification of its view that prior judicial authorisation of final asset-freezes is neither required by human rights law nor compatible with maintaining an effective terrorist asset-freezing regime.

### **Compatibility with the right to a fair hearing**

The Bill provides for the use of closed material and special advocates in proceedings challenging asset-freezes, by applying the statutory provisions and rules of court which already exist in and under the asset-freezing provisions in the Counter-Terrorism Act 2008. The compatibility of the use of closed material and special advocates with the right to a fair hearing in both the common law and Article 6(1) ECHR has been the subject of a large number of judicial decisions, both from UK courts and the European Court of Human Rights, and is an issue which has been considered extensively by our predecessor Committee.

The right of access to a court of full jurisdiction is only meaningful if the person who is the subject of the asset-freeze knows enough about the case against them to be able to give effective instructions to those representing their interests in the appeal proceedings. We therefore recommend that consideration be given to amending the legal framework to ensure that it secures the “substantial measure of procedural justice” to which the subject of an asset-freeze is entitled under both Article 6 ECHR and the common law.

We further recommend four specific ways in which the Bill could be amended to achieve this—by imposing a duty to give reasons, and a duty to provide sufficient information to enable effective instructions to be given; by revoking the Civil Procedure Rule which subordinates justice to non-disclosure; and by allowing for communication with special advocates after sight of closed material.

### **Adequacy of mechanisms for parliamentary accountability**

The Bill currently contains two additional safeguards which are not currently in the legal framework for asset-freezing and which are designed to enhance democratic accountability for exercise of the asset-freezing powers. One involves a quarterly Treasury report to Parliament about the exercise of powers and the other requires the Treasury to appoint a person to conduct an annual independent review for the Treasury, which would then lay a report before Parliament.

We recommend that consideration be given to amending the Bill so as to give Parliament the power to appoint the proposed independent reviewer and for the reviewer to report directly to Parliament, in line with earlier recommendations concerning the statutory reviewer of terrorism legislation.

### **Comprehensiveness of the statutory framework**

The Bill does not contain a comprehensive statutory regime governing all terrorist asset-freezes, but leaves in place a confusing patchwork of powers derived from a variety of legal sources. This both threatens to undermine the accessibility and legal certainty of these very intrusive powers and potentially deprives Parliament of the opportunity to subject all asset-freezing powers to effective scrutiny for human rights compatibility.

We therefore recommend that the Government explain why the opportunity is not being taken in this Bill to provide a comprehensive and accessible legal regime for terrorist asset-freezing which would provide Parliament with the opportunity fully to scrutinise those powers for human rights compatibility.





# Bill drawn to the attention of both Houses

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## Terrorist Asset-Freezing etc. Bill

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Date introduced to first House	15 July 2010
Date introduced to second House	
Current Bill Number	HL Bill 20

### Background

1.1 The Terrorist Asset-Freezing etc. Bill was introduced in the House of Lords on 15 July 2010.<sup>1</sup> It received its Second Reading on 27 July<sup>2</sup> and completed its Committee stage on 6 October 2010.<sup>3</sup> The Bill's Report Stage is scheduled for Monday 25 October 2010. Lord Sassoon, the Commercial Secretary to the Treasury, has certified that, in his view, the Bill is compatible with Convention rights.

### The purpose of this Report

1.2 This Preliminary Report aims to identify the most significant human rights issues which are raised by the Bill and to make provisional recommendations about how the Bill could be rendered human rights compatible. The Report is based on only a preliminary consideration of the Bill. Since we were set up in this Parliament, there has not been time to exchange correspondence with the Minister about the human rights issues in the Bill in the usual way. We wrote to the Minister on 13 October asking a number of detailed questions about specific aspects of the Bill, asking for a response by 25 October.<sup>4</sup>

1.3 Because of the immence of Report stage in the Lords, however, and because of the human rights significance of this Bill, we decided to take the unusual step of publishing a Preliminary Report without the benefit of having seen the Government's response to our questions.<sup>5</sup> The human rights issues raised are for the most part issues on which our predecessor Committee frequently reported in its series of Reports on Counter-Terrorism Policy and Human Rights. We thought it would help to inform debate at the Bill's Report Stage if we drew to Parliament's attention the issues in the Bill which in our view raise the most significant human rights questions, made available to Parliament the submissions we have received and gave our preliminary view as to the sorts of amendments to the Bill which might need to be considered in order to make it compatible with human rights.

1.4 We emphasise the preliminary nature of this Report, and the fact that its recommendations are inevitably provisional as they have been arrived at without the benefit of the Government's response to our questions. We may publish a further Report

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1 HL Bill 15.

2 HL Deb 27 July 2010 cols 1250-1286.

3 HL Deb 6 October 2010 cols 120-174 and 190-214.

4 Letter from the Chair to Lord Sassoon dated 13 October 2010, Ev 6, p 64.

5 Cf. Ninth Report of Session 2004-05, *Prevention of Terrorism Bill: Preliminary Report*, HL 61/HC 389.

on the Bill, in the light of the Government's response, to inform debate during the Bill's passage in the Commons.

## Evidence

1.5 In a Press Notice indicating our legislative scrutiny priorities for 2010-11 we identified the Terrorist Asset-Freezing Bill as one of the Bills in the Coalition Government's Legislative Programme likely to raise significant human rights issues and we invited submissions on the human rights issues raised by the Bill.<sup>6</sup> In addition to parliamentary briefings from Liberty, JUSTICE, and the Equality and Human Rights Commission, we received a submission from the Campaign Against Criminalising Communities ("CAMPACC") and a joint submission from two solicitors with experience of asset-freezing litigation, Henry Miller of Birnberg Peirce & Partners, and Anne McMurdie of Public Law Solicitors. Those submissions are published with this Report. We are grateful to all those who have submitted evidence to us.

## Purpose of the Bill

1.6 The Bill is intended to put the terrorist asset-freezing regime on a permanent statutory footing. It will replace the Terrorist Asset-Freezing (Temporary Provisions) Act 2010, which was enacted on an emergency timetable in February 2010 following the decision of the Supreme Court quashing the Orders in Council which provided the legal basis for the previous asset-freezing regime.<sup>7</sup>

1.7 The Lords Constitution Committee reported on the Bill in its Second Report of this Session and we have taken that report into account.<sup>8</sup>

## Explanatory Notes/Human Rights Memorandum

1.8 The Explanatory Notes to the Bill deal with the ECHR issues raised by the Bill in relatively short form at paragraphs 107-120. A more detailed human rights memorandum, however, was also submitted by the Treasury, dated 13 August 2010, setting out more fully the Government's consideration of the human rights issues in the Bill.<sup>9</sup> A further letter dated 4 October 2010 explained the reasoning behind the Government's amendments to the Bill tabled in Committee.<sup>10</sup> Bill team officials also made themselves available to discuss the human rights issues in the Bill with the Committee's staff. We are grateful to the Treasury for the proactive way in which they have provided us with information about the human rights implications of the Bill.

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6 Press Notice No. 2, Session 2010-11, *JCHR Legislative scrutiny priorities for 2010-11* (9 September 2010).

7 *Ahmed and others v HM Treasury* [2010] UKSC 2.

8 House of Lords Select Committee on the Constitution, 2nd Report of Session 2010-11, *Terrorist Asset-Freezing etc. Bill*, HL Paper 25.

9 Ev 1, p 22.

10 Ev 2, p 41

## Government amendments

1.9 Terrorist asset-freezing powers are not included in the Home Office review of counter-terrorism and security powers announced by the Home Secretary on 13 July 2010.<sup>11</sup> The Government indicated, however, that it would consider any implications that the outcome of that review has for the asset-freezing regime.<sup>12</sup> It was envisaged that the review would help to inform the Government as to whether any additional safeguards are needed in relation to the powers to freeze terrorist assets and, if so, what those safeguards should be.<sup>13</sup> The letter accompanying the human rights memorandum stated that “if it is concluded that there is a strong case for further safeguards, it is the Treasury’s intention to bring forward amendments to the Bill at Committee stage in the Lords.”

1.10 Further to the commitment given by Lord Sassoon at the Bill’s Second Reading, to consider further the civil liberties issues raised by the Bill, Government amendments were moved in Committee. We welcome the Government’s willingness to consider the human rights issues raised during debate on the Bill and the Government’s amendments to the Bill designed to improve the balance between national security and human rights in the asset-freezing regime.

## Significant human rights issues

### *(1) The breadth of the power: the legal threshold for an asset-freeze*

1.11 The extent to which asset-freezes interfere with the human rights of designated persons and their families was recognised by the Supreme Court in the *Ahmed* case.<sup>14</sup> The Government accept that asset-freezes do have an impact on human rights, including the right to property (Article 1 Protocol 1 ECHR) and the right to respect for home, private and family life (Article 8 ECHR).<sup>15</sup> They also accept that any interference with the human rights of third parties or designated persons must be proportionate and limited to what is strictly necessary. It is well established in the case-law of the European Court of Human Rights that a power which can be used in a way which interferes with human rights must be sufficiently circumscribed in its definition to safeguard against the risk of an arbitrary use. In human rights law terms, the power must not be “overbroad”.

1.12 The lower the threshold for the use of the asset-freezing powers, the more individuals are susceptible to interferences with their rights to property and to respect for their private, home and family life, and the easier it is for the Government to interfere with those rights. The standard of proof required also affects the degree of procedural protection which can be afforded by any right of access to court. The use of the low threshold of “reasonable suspicion” in the control orders framework, for example, has often been criticised as being the source of much of the unfairness caused by those orders (including by the special advocates in evidence to our predecessor Committee).

11 HC Deb 13 July 2010 col 797.

12 *Draft terrorist asset-freezing bill: summary of responses*, Cm 7888 (HM Treasury, July 2010), paras 1.7-1.9 and 3.15.

13 HC Deb 13 July 2010 col 797 (Home Secretary) and Terms of Reference for the Review (annexed to a letter dated 22 July 2010 from the Home Secretary to the Rt Hon Alan Johnson MP).

14 Above, n. 3, [2010] UKSC 2, at paras 38-9, 60, 192.

15 *Summary of responses*, above n. 7 at para. 2.3.

1.13 On introduction, the Bill provided that a person can be made the subject of an asset-freeze (be “designated” in the language of the Bill) if the Treasury has “reasonable grounds for suspecting” that the person is or has been involved in terrorist activity.<sup>16</sup> In Committee, however, the Government amended the Bill by raising the legal threshold for asset-freezing from reasonable suspicion to reasonable belief.<sup>17</sup> The Bill has also been amended to give the Treasury the power to make an interim asset-freeze, on the basis of reasonable suspicion.<sup>18</sup> An interim asset-freeze cannot last for longer than 30 days<sup>19</sup> and more than one interim asset-freeze cannot be made in respect of the same person in relation to the same evidence.<sup>20</sup>

1.14 The Government believe that raising the legal threshold in this way will allow the UK to maintain an effective terrorist asset-freezing regime, consistent with international standards, while addressing legitimate civil liberties concerns that reasonable suspicion is too low a threshold for freezing assets on an indefinite basis. The reason for retaining the power to freeze assets on the basis of reasonable suspicion for up to 30 days is said to be that it is operationally valuable to have the power to freeze assets in cases where there is an immediate threat but the position is not yet clear, for example where people have been arrested but police have not yet had time to complete their investigations and establish sufficient evidence to charge them with terrorist offences.

**1.15 The Government’s amendment raising the legal threshold to reasonable belief goes some way to meeting the human rights concern about the breadth of the power and we therefore welcome the raising of the legal threshold as a human rights enhancing safeguard.**

1.16 In Committee, however, Lord Lloyd of Berwick commented that in practice there may not be quite as much difference between reasonable suspicion and reasonable belief as is sometimes supposed.<sup>21</sup> He argued that before a permanent asset-freeze is imposed on an individual, what is needed is neither suspicion nor belief but fact. This raises the question of whether the shift from reasonable suspicion to reasonable belief as the legal threshold means a shift to the civil standard of proof on “the balance of probabilities”. **We have asked the Government whether the shift from the language of reasonable suspicion to reasonable belief necessarily entails a standard of proof “on the balance of probabilities”. If not, we recommend that consideration should be given to amending the Bill to include an express reference to the balance of probabilities as the applicable standard of proof.**

1.17 The second condition of the power, concerning the necessity of an asset-freeze, is also very widely defined in the Bill in terms of the Treasury’s subjective consideration that financial restrictions are “necessary for purposes connected with protecting members of the public from terrorism”.<sup>22</sup> **We recommend that the Government should consider further limiting the breadth of the power by tightening the “necessity” condition in**

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16 Clause 2(1) (a) of the Bill as introduced.

17 Clause 2(1)(a) of the Bill as amended in Committee.

18 Clauses 6-8.

19 Clause 8(1).

20 Clause 6(3).

21 HL Deb 6 October 2010 col. 123.

22 Clause 2(1)(b).

**clause 2(1)(b), for example by requiring that the Treasury must “reasonably” consider that financial restrictions are necessary “for the purpose of protecting the public from terrorism”.**

1.18 The United Nations Security Council Resolution 1373 (2001), to which the Bill is said by the Government to be giving effect in the UK, requires states to freeze the assets of persons “who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts”. Lord Phillips in the Supreme Court in *Ahmed* observed that “the natural way of giving effect to this requirement would be by freezing the assets of those convicted of or charged with the offences in question.” In our provisional view, the relationship between asset-freezes on the one hand and the criminal justice system on the other is not clear in the Bill. The Government has not convincingly explained, by reference to evidence, for example, why asset-freezes need to be available in respect of individuals who have not been convicted, charged or even arrested in relation to any terrorism offence.

**1.19 We recommend that consideration be given to whether the statutory framework for asset-freezes should follow the example of the control orders framework by requiring that consideration be given to prosecution prior to an asset-freeze being imposed on an individual who has not yet entered the criminal justice system.**

## **(2) Compatibility with the right of access to court**

1.20 As introduced, the Bill provided for any person affected by the Treasury’s decisions under the Bill to apply to the High Court (or the Court of Session in Scotland) for the decision to be set aside.<sup>23</sup> On such an application, however, the court’s jurisdiction was circumscribed by the Bill: in determining whether the decision should be set aside, the court had to apply the principles applicable on an application for judicial review.<sup>24</sup>

1.21 In Committee, however, the Government amended the Bill so that challenges to both interim and final asset-freezes can be made by way of full appeal to the High Court or Court of Session rather than by way of judicial review.<sup>25</sup> In the Government’s view, while judicial review has proved to be a robust procedure in other national security cases, it would be beneficial to provide explicitly for a full right of appeal, to ensure that the judicial scrutiny process of a asset-freezing decisions is, and is seen to be, properly robust and rigorous.

1.22 The significance of this amendment is that the court exercises a fuller jurisdiction on appeal than on judicial review. The amendment therefore goes some way to meeting the human rights concern about the scope of the right of access to court in the Bill as introduced. The Government itself accept that asset-freezing orders determine civil rights and obligations within the meaning of Article 6(1) ECHR.<sup>26</sup> Where Article 6(1) applies, the case-law of the European Court of Human Rights makes clear that there must be access to a court with full jurisdiction.

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<sup>23</sup> Clause 22(1) and (2).

<sup>24</sup> Clause 22(3).

<sup>25</sup> Clause 26.

<sup>26</sup> Explanatory Notes, para 117.

1.23 It is true, as the Constitution Committee pointed out in its report, that the High Court has treated its review jurisdiction over control orders as being tantamount to an appellate jurisdiction, because of the gravity of the impact of those orders on the human rights of those subjected to them, and it is likely that the High Court would have approached its jurisdiction over asset-freezes in a similar way. Nevertheless, making this explicit on the face of the statute is to be desired because it leaves no room for misunderstanding about the scope of the court's jurisdiction. **We welcome the introduction of a full right of appeal against asset-freezes as a human rights enhancing safeguard.**

1.24 The provision of a full right of appeal, however, falls short of requiring that asset-freezes should be made in the first place by the courts not the Executive. In Committee, Lord Lloyd of Berwick and Lord Lester of Herne Hill queried why the Bill does not provide for prior judicial authorisation of asset-freezes, rather than an executive power subject to ex-post judicial control.<sup>27</sup> Lord Pannick, on the other hand, considered that the provision of a right of appeal is a strong safeguard that “renders insubstantial the concern that the original decision is taken by the Executive.”<sup>28</sup> **We recommend that the Government provide a more detailed justification of its view that prior judicial authorisation of final asset-freezes is neither required by human rights law nor compatible with maintaining an effective terrorist asset-freezing regime.**

### **(3) Compatibility with the right to a fair hearing**

1.25 The Bill provides for the use of closed material and special advocates in proceedings challenging asset-freezes, by applying the statutory provisions and rules of court which already exist in and under the asset-freezing provisions in the Counter-Terrorism Act 2008.<sup>29</sup> Those provisions are very similar to those which apply to control order proceedings under the Prevention of Terrorism Act 2005.

1.26 The compatibility of the use of closed material and special advocates with the right to a fair hearing in both the common law and Article 6(1) ECHR has been the subject of a large number of judicial decisions, both from UK courts and the European Court of Human Rights, and is an issue which has been considered extensively by our predecessor Committee.<sup>30</sup>

1.27 In the case of *AF*,<sup>31</sup> the House of Lords, applying the decision of the European Court of Human Rights in *A v UK*,<sup>32</sup> ruled that a person subject to a control order must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations to the lawyers representing his interests. The same principle applies to asset-freezes: in the case of *Bank Mellat v HM Treasury* the Court of Appeal applied the decision in *AF*, holding that a party whose assets are frozen “must be

27 HL Deb 6 October 2010 cols 123-4 and 136.

28 HL Deb 6 October 2010 col. 145.

29 Clause 23(4) which applies ss. 66-68 of the Counter-Terrorism Act 2008 to applications for review of asset-freezes by the courts under clause 22 of the Bill.

30 See, most recently, Sixteenth Report of Session 2009-10, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In*, HL 86/HC 111; and Ninth Report of Session 2009-10, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, HL 64/HC 395.

31 *Secretary of State for the Home Department v AF* (No. 3) [2009] UKHL 28, [2009] 3 WLR 74.

32 Application No 3455/05 (20 February 2009).

given sufficient information to enable it actually to refute, in so far as that is possible, the case made out against it.”<sup>33</sup>

1.28 Our predecessor Committee recommended a number of amendments to the legal framework governing the use of closed material and special advocates in the control order context in order to make that framework compatible with the right to a fair hearing.<sup>34</sup> The Government refused to make those amendments and after the decision of the House of Lords in *AF* argued that amendments to the legal framework were unnecessary now that the House of Lords had ruled on how the legal framework had to be interpreted in order to make it compatible.

1.29 The Government’s argument was considered in our predecessor’s report on the last annual renewal of the control order regime in February 2010.<sup>35</sup> It heard evidence from special advocates on their continuing concerns about the fairness of control order proceedings even after the House of Lords decision in *AF*, and in particular about the approach which was being taken to disclosure of material to control orderees which, in the special advocates’ view, was still causing unfairness to those who were the subject of control orders. The Committee concluded that the use of secret evidence and special advocates in the control order regime, as that regime is currently designed in law and operated in practice, could not be made to operate in a way which is compatible with the requirements of basic fairness inherent in both the common law and Article 6 ECHR.

1.30 The present Bill seeks to apply to asset-freezing proceedings essentially the same legislative regime for the use of closed material and special advocates as applies in the control orders context. The only material difference is the inclusion of a provision that the special advocate procedure should not be applied where to do so would be inconsistent with Article 6.<sup>36</sup> That provision is a weaker safeguard than the more specific words which are required to be read into the legal framework by the House of Lords decision in *AF*, and even that decision, in the view of our predecessor, is not sufficient to ensure fairness in practice. The essential source of the unfairness is the absence of any express requirement that the gist of the material relied on is disclosed to the person at the outset to enable them to give effective instructions to those representing their interests.

1.31 The provision of a full right of appeal against asset-freezes does not address any of the concerns about the Bill’s compatibility with the right to a fair hearing. In Committee, Baroness Hamwee sought to address these concerns by removing the sub-clause in the Bill<sup>37</sup> which provides for the use of closed material and special advocates in proceedings challenging asset-freezes.<sup>38</sup> Lord Pannick sought the Government’s assurance that it accepts that the principles enunciated by the House of Lords in the case of *AF* in the context of control orders apply equally in the context of asset-freezes—in other words, that

33 [2010] EWCA Civ 483.

34 See e.g. Ninth Report of 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HL 50/HC 199 at paras 39-73.

35 Ninth Report of 2009-10, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, HL 64/HC 395.

36 Section 67(6) of the Counter-Terrorism Act 2008, applied by clause 23(4) of the Bill.

37 Now clause 28(4) (formerly clause 23(4)).

38 HL Deb 6 October 2010 col 200.

fairness requires that the individual concerned has a right to see at least the essence of the material that is relied on in the case against him.<sup>39</sup>

1.32 The Government resisted both attempts to ensure that the Bill is compatible with the right to a fair hearing.<sup>40</sup> They argued that the special advocate procedure is necessary because without it the amount of procedural protection for the person who is the subject of the asset-freeze will be reduced. They also refused to provide the assurance sought by Lord Pannick on the basis that the Government does not necessarily accept the “read-across” of the decision in *AF* from the control orders context to the asset-freeze context.<sup>41</sup> The Government argue that the Bill’s provision for the use of special advocates and closed material are fair because:

- The starting point is that the individual is given as much information as possible about the grounds of the order, so far as consistent with the legitimate interests of national security;
- The Bill requires the maker of the rules of court to have regard both to the need for a proper review of the decision that is subject to challenge and to the need to ensure that disclosures are not made where to do so would be contrary to the public interest, such as for reasons of national security.
- The special advocate system and the disclosure procedure are designed to ensure procedural justice for individuals by ensuring that the maximum amount of material that can be disclosed to the individual without damaging the public interest should be disclosed.

1.33 The Government also plan to consult on a Green Paper on the use of sensitive information in judicial proceedings, to be published “next year”, and argue that there will be an opportunity to raise these concerns about the fairness of asset-freeze proceedings during that consultation. They argue that there is not sufficient time for the results of this review to be taken into account in this Bill, because of the need for it to have completed its passage by 31 December this year when the current temporary provisions will lapse.

1.34 As explained above, our predecessor Committee reported a number of concerns about the unfairness caused by the current legal regime governing the use of closed material and special advocates. The right of access to a court of full jurisdiction is only meaningful if the person who is the subject of the asset freeze knows enough about the case against them to be able to give effective instructions to those representing their interests in the appeal proceedings. As the recent decision of the European Court of Justice in the case of *Kadi* demonstrates, the right to effective judicial control is intimately connected to the rights of the defence: unless the person who is the subject of the asset-freeze has a proper opportunity to answer the case against them and to put their case, they are deprived of their right to effective judicial protection.<sup>42</sup>

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39 HL Deb 6 October 2010 col 201.

40 HL Deb 6 October 2010 cols 202-205 (The Advocate-General for Scotland, Lord Wallace of Tankerness).

41 HL Deb 6 October 2010 col 151.

42 Case T-85/09, *Yassin Abdullah Kadi v European Commission* (30 September 2010) at paras 171-181 especially: “... given the lack of any proper access to the information and evidence used against him and having regard to the relationship ... between the rights of the defence and the right to effective judicial review, the applicant has been



1.35 We recommend that consideration be given to amending the legal framework to ensure that it secures the “substantial measure of procedural justice” to which the subject of an asset-freeze is entitled under both Article 6 ECHR and the common law. In particular we recommend that consideration be given to amending the Bill in four specific ways.

### *(1) A duty to give reasons*

1.36 The Bill could be amended to impose a duty on the Treasury to include a statement of reasons in its written notice of designation, which would help to make the new right of appeal an effective remedy. The Bill could say that the written notice to the designated person under clause 3(1) of the Bill should contain as full as possible an explanation, consistent with the interests of national security, of why the Treasury consider that the conditions for an asset-freeze are satisfied.

### *(2) A duty to provide sufficient information to enable effective instructions to be given*

1.37 The Bill could be amended so as to give statutory effect in the asset-freezing context to the principle established by the European Court of Human Rights in *A v UK*, and applied by the House of Lords in *AF (No. 3)*, the Court of Appeal in *Bank Mellat* and the European Court of Justice in *Kadi*, that the person affected by a preventive measure such as a control order or an asset-freeze must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.

1.38 This could be done by amending the relevant provision of the Counter-Terrorism Act 2008 so as to require rules of court to secure that the court’s otherwise absolute duty of non-disclosure in asset-freeze proceedings<sup>43</sup> is expressly qualified by the duty to ensure sufficient disclosure to protect the right to a fair hearing.

### *(3) Revoking the subordination of justice to non-disclosure*

1.39 The Bill could be amended to reinstate the supremacy of the right to a fair hearing over the duty not to disclose information in the public interest. This could be done by revoking rule 79.2 of the Civil Procedure Rules. Rule 79(2) expressly elevates non-disclosure over justice by requiring that in control order cases the “overriding objective” of the civil procedure rules (requiring courts to deal with cases justly) be read and given effect in a way which is compatible with the duty to ensure that information is not disclosed contrary to the public interest. Baroness Hale expressly disagreed with the equivalent provision in the control orders context in her judgment in a 2007 control orders case in the House of Lords, *MB*.<sup>44</sup>

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unable to defend his rights with regard to that evidence in satisfactory conditions before the Community judicature, with the result that it must be held that his right to effective judicial review has also been infringed”.

43 s. 67(3)(c) of the Counter-Terrorism Act 2008.

44 *Secretary of State for the Home Dept., ex p. MB* [2007] UKHL 46 at para 59 (Baroness Hale).

#### *(4) Communication with special advocates after sight of closed material*

1.40 The Bill could be amended so as to ensure that special advocates are able to apply to a High Court Judge, without notice to the Treasury, for permission to communicate with the person who is the subject of an asset-freeze after the service of the closed material.

#### *(4) Adequacy of mechanisms for parliamentary accountability*

1.41 A court considering the proportionality of any statutory regime for interfering with human rights will have regard to all of the safeguards against arbitrary or disproportionate use of the powers, including those which are concerned more with political than legal accountability.<sup>45</sup>

1.42 The Bill contains two additional safeguards which are not currently in the legal framework for asset-freezing and which are designed to enhance democratic accountability for exercise of the asset-freezing powers. First, there is a requirement that the Treasury report quarterly to Parliament about the exercise of the powers.<sup>46</sup> Second, the Treasury is required to appoint a person to conduct an annual “independent review” of the operation of the asset-freezing regime, reporting to the Treasury which lays the report before Parliament.<sup>47</sup>

1.43 Safeguards which enhance democratic accountability for the exercise of counter-terrorism powers are clearly to be welcomed from a human rights perspective. Our predecessor made a number of detailed recommendations for improving such safeguards, including that the post of statutory reviewer of terrorism legislation should be appointed by Parliament and report directly to Parliament, on the grounds that a reviewer with a supporting secretariat within Government might suffer from a perceived lack of independence from the Government.<sup>48</sup>

**1.44 We recommend that consideration be given to amending the Bill so as to give Parliament the power to appoint the proposed independent reviewer and for the reviewer to report directly to Parliament, in line with earlier recommendations concerning the statutory reviewer of terrorism legislation.**<sup>49</sup>

#### *(5) Comprehensiveness of the statutory framework*

1.45 The Bill does not contain a comprehensive statutory regime governing all terrorist asset-freezes, but leaves in place a confusing patchwork of powers derived from a variety of legal sources. As the House of Lords Constitution Committee commented in its report on the Bill, this both undermines the accessibility and legal certainty of these very intrusive

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45 See e.g. *Gillan and Quinton v UK*, Application no. 4158/05, para. 84 (considering the extent to which the Independent Reviewer provides an additional safeguard against the arbitrary use of widely drafted counter-terrorism powers to stop and search).

46 Clause 24.

47 Clause 25.

48 See e.g. Sixteenth Report of Session 2009-10, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In*, HL 86/HC 111, chapter 6.

49 *Bringing Human Rights Back In* (above), paras 116-7 and Twentieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill*, HL 108/HC 5549 at paras 13-20.

powers and deprives Parliament of the opportunity to subject all asset-freezing powers to effective scrutiny for human rights compatibility.<sup>50</sup>

1.46 This is particularly unfortunate in view of the strong criticisms of the Supreme Court on that score. Lord Mance, for example, expressed his “concern about the development and continuation over the years of a patchwork of overlapping anti-terrorism measures, some receiving parliamentary scrutiny, others simply the result of executive action” and thought it desirable that the regimes governed by the Orders in Council in issue in that case “should be debated in Parliament alongside the primary legislation which Parliament did enact.”<sup>51</sup>

**1.47 We recommend that the Government explain why the opportunity is not being taken in this Bill to provide a comprehensive and accessible legal regime for terrorist asset-freezing and therefore to provide Parliament with the opportunity to scrutinise those powers for human rights compatibility, the lack of which so troubled the Supreme Court.**

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50 House of Lords Select Committee on the Constitution, 2<sup>nd</sup> Report of Session 2010-11, *Terrorist Asset-Freezing etc. Bill*, HL Paper 25, paras 10-18

51 [2010] UKSC 2, above n. 3, at paras 220 and 223.

# Conclusions and recommendations

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## Significant human rights issues

### (1) The breadth of power: the legal threshold for an asset freeze

1. The Government's amendment raising the legal threshold to reasonable belief goes some way to meeting the human rights concern about the breadth of the power and we therefore welcome the raising of the legal threshold as a human rights enhancing safeguard. (Paragraph 1.15)
2. We have asked the Government whether the shift from the language of reasonable suspicion to reasonable belief necessarily entails a standard of proof "on the balance of probabilities". If not, we recommend that consideration should be given to amending the Bill to include an express reference to the balance of probabilities as the applicable standard of proof. (Paragraph 1.16)
3. We recommend that the Government should consider further limiting the breadth of the power by tightening the "necessity" condition in clause 2(1)(b), for example by requiring that the Treasury must "reasonably" consider that financial restrictions are necessary "for the purpose of protecting the public from terrorism". (Paragraph 1.17)
4. We recommend that consideration be given to whether the statutory framework for asset-freezes should follow the example of the control orders framework by requiring that consideration be given to prosecution prior to an asset-freeze being imposed on an individual who has not yet entered the criminal justice system. (Paragraph 1.19)

### (2) Compatibility with the right of access to court

5. We welcome the introduction of a full right of appeal against asset-freezes as a human rights enhancing safeguard. (Paragraph 1.23)
6. We recommend that the Government provide a more detailed justification of its view that prior judicial authorisation of final asset-freezes is neither required by human rights law nor compatible with maintaining an effective terrorist asset-freezing regime. (Paragraph 1.24)

### (3) Compatibility with the right to a fair hearing

7. We recommend that consideration be given to amending the legal framework to ensure that it secures the "substantial measure of procedural justice" to which the subject of an asset-freeze is entitled under both Article 6 ECHR and the common law. (Paragraph 1.35)

### (4) Adequacy of the mechanism for parliamentary accountability

8. We recommend that consideration be given to amending the Bill so as to give Parliament the power to appoint the proposed independent reviewer and for the

reviewer to report directly to Parliament, in line with earlier recommendations concerning the statutory reviewer of terrorism legislation. (Paragraph 1.44)

#### **(5) Comprehensiveness of the statutory framework**

9. We recommend that the Government explain why the opportunity is not being taken in this Bill to provide a comprehensive and accessible legal regime for terrorist asset-freezing and therefore to provide Parliament with the opportunity to scrutinise those powers for human rights compatibility, the lack of which so troubled the Supreme Court. (Paragraph 1.47)

# Formal Minutes

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**Tuesday 19 October 2010**

Members present:

Dr Hywel Francis, in the Chair

Lord Bowness

Lord Dubs

Lord Lester of Herne Hill

Baroness Morris of Bolton

Dr Julian Huppert

Mr Dominic Raab

Mr Richard Shepherd

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Draft Report, *Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)*, proposed by the Chairman, brought up and read

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.47 read and agreed to.

Summary read and agreed to.

*Resolved*, That the Report be the Second Report of the Committee to each House.

*Ordered*, That the Chairman make the Report to the House of Commons and that Lord Lester make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report.

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[Adjourned till Tuesday 26 October at 2.00 pm]

## List of Written Evidence

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1	Memorandum from HM Treasury, to the Committee, 10 August 2010	p 22
2	Letter from Lord Sassoon, Commercial Secretary, HM Treasury, to the Committee Chair, 4 October 2010	p 41
3	Written Evidence from the Campaign Against Criminalising Communities (CAMPACC), to the Committee, 8 October 2010	p 42
4	Written Evidence from Mr Henry Miller, Birnberg Peirce & Partners, and Anne McMurdie, Public Law Solicitors, to the Committee, 12 October 2010	p 45
5	Written Evidence from the Equality and Human Rights Commission, to the Committee, 12 October 2010	p 54
6	Letter from the Committee Chair, to Lord Sassoon, Commercial Secretary, HM Treasury, 13 October 2010	p 64

# Written Evidence

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## 1. Memorandum from HM Treasury, to the Committee, 10 August 2010

### Terrorist Asset-Freezing etc. Bill

#### Introduction

1. Asset freezing is an internationally used, and recognised, tool to prevent and disrupt the financing of terrorism. Taking steps to disrupt the financial flows of money is essential to preventing or disrupting terrorist acts. Some of the most devastating terrorist attacks, including those in London in 2005, cost less than £10,000 to carry out. About £150,000 is currently frozen in the UK under the existing terrorist asset freezing regime. Freezing money intended for terrorist purposes can help to prevent individual attacks. Focussing on the movement of money can help detect when it is being used for wider terrorist networks, a crucial element in many investigations, and helps the Government to maintain effective relationships with international counter-terrorism partners. No other counter-terrorist measure can fully meet the UK's international obligations in this area.

2. The Terrorist Asset-Freezing etc. Bill ("the Bill") had its First Reading in the House of Lords on 15 July 2010, and its Second Reading on 27 July. At its Second Reading the Commercial Secretary to the Treasury, Lord Sassoon, noted that the Home Office are re-conducting a review of counter-terrorism tools, which is likely to consider the issue of the appropriate safeguards in this field. The Minister stated that where the review's conclusions are relevant to asset freezing these will be taken into account and consideration be given to bringing forward amendments at Committee stage in the House of Lords.

#### Background

3. The Bill is intended to provide a permanent framework in primary legislation for terrorist asset-freezing following the judgment of the Supreme Court in *Ahmed & Ors v HM Treasury*<sup>1</sup>. In this judgment the Court quashed the Terrorism (United Nations Measures) Order 2006 ("the Terrorism Order 2006") and the Al-Qaida and Taliban (United Nations Measures) Order 2006 ("the AQ Order"), on the ground that they were *ultra vires* the scope of section 1 of the United Nations Act 1946. The Bill will replace the Terrorist Asset-Freezing (Temporary Provisions) Act 2010, which expires on 31 December 2010.

4. The Terrorism Order 2006 and the AQ Order were made by the Treasury to impose financial sanctions on persons and thereby to meet obligations under United Nations Security Council Resolutions ("UNSCRs"). Both Orders were made under section 1 of the United Nations Act 1946, which provided a power to make such Orders in Council as appear "*necessary or expedient for enabling [certain United Nations Security Council resolutions] to be effectively applied*".

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1 [2010] UKSC 2.



5. The Terrorism Order 2006 was made for the purpose of implementing UNSCR 1373 which decided that all States shall:

*(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts...;*

*(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;*

6. The Terrorism Order 2006 gave the Treasury a power to freeze the funds of persons who the Treasury have reasonable grounds to suspect are persons who commit, attempt to commit, participate in or facilitate the commission of acts of terrorism.

7. The AQ Order implemented UNSCR 1267, which requires states to freeze the funds of Usama Bin Laden, members of the Al-Qaida and the Taliban as referred to in a list set out by a UN Committee set up under UNSCR 1267.

8. Before the Supreme Court it was claimed by the Appellants that the Terrorism Order 2006 and the AQ Order were incompatible with the Human Rights Act 1998. Several Supreme Court judges described the severe effect of an asset freeze as it then operated under the Terrorism Order 2006 and the AQ Order both on the designated person and on members of the designated person's family. The Supreme Court, however, decided the case on *vires* grounds and did not rule on ECHR grounds of challenge in respect of the Terrorism Order 2006. The majority of the Court did not express an opinion on ECHR issues (see for example Lord Hope—with whom Lord Walker and Lady Hale agreed—at paragraph 62). Of those who did comment, Lord Brown concluded “*I am unimpressed by the alternative grounds on which the Order is challenged, those of certainty and proportionality. Primary legislation introducing this same asset-freezing regime could not have been declared incompatible on those grounds*” (paragraph 201), and Lord Mance (with whom Lord Phillips agreed) stated “*I agree with the Court of Appeal’s reasoning and conclusion that the relevant provisions of articles 7 and 8 were and are sufficiently certain to be valid*” (paragraph 234) and “*I am at present also unpersuaded that the content of the Orders could be challenged on grounds of lack of proportionality, although I need express no final view about this*” (paragraph 235).

9. In respect of the AQ Order, the absence of a right of appeal against inclusion in the UN list would have resulted in the quashing of the Order on the basis that it breached the ECHR. However, the Treasury was able to rely upon the decision in *Quark Fishing*<sup>2</sup> that no breach of a Convention right can be maintained under section 6 of the Human Rights Act 1998 unless the Convention right is one for which the United Kingdom would be answerable in Strasbourg, and the decision in *Al-Jedda*<sup>3</sup> that the effect of Article 103 of the UN Charter is that obligations under the UN Charter prevail over obligations under all

2 R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2006] 1 AC 529.

3 Al-Jedda v Secretary of State for Defence [2008] 1 AC 332.

other international agreements, including human rights treaties such as the ECHR. The Supreme Court accepted that, as a consequence of *Al-Jedda*, Convention rights fell into the category of obligations under an international agreement over which obligations under the UN Charter must prevail. Again, therefore, the Supreme Court found the AQ Order to be unlawful on *vires* grounds, rather than on any breach of the ECHR. Regulations have now been made under section 2(2) of the European Communities Act 1972 to implement a European Union Regulation reflecting UNSCR 1267<sup>4</sup> and the Bill therefore does not contain any measures specifically in respect of Al Qaida.

10. The Treasury did not rely in the *Ahmed* case upon *Quark Fishing* or *Al-Jedda* in relation to the Terrorism Order 2006. The Treasury considered that while the AQ Order implemented a very specific UN measure (asset freezes in relation to persons named by the UN), the Terrorism Order 2006 (which requires states to freeze the assets of persons who commit or attempt to commit terrorist acts) was not such a specific measure and therefore *Al-Jedda* would not apply.

11. Subsequent to the Supreme Court ruling, Parliament enacted the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 which deems the Terrorism Order 2006 and the Terrorism (United Nations Measures) Order 2009 (“the 2009 Order”) (which was not before the Court but which was vulnerable to being quashed on the same *vires* grounds) to have been validly made under section 1 of the United Nations Act 1946 and for decisions made under them to have legal effect for the period from 10 February 2010 to 31 December 2010.

12. The 2009 Order was not the subject of the challenge before the Supreme Court. The Court noted, however, that the 2009 Order ameliorated to some degree the onerous effect of the Terrorism Order 2006 regime on spouses and other third parties who interact with the designated person. These changes in the 2009 Order include:

- a) the addition of a requirement for designation (in addition to there being a reasonable suspicion of involvement in terrorism) that it is necessary for purposes connected with public protection;
- b) limiting a designation to one year (unless renewed);
- c) changing the prohibition in relation to providing the designated person with economic resources to add a defence that the person providing the resources did not know and had no reason to suspect that the designated person would use the resources to obtain funds;
- d) changing the prohibitions on making funds or economic resources available for the benefit of designated persons so that they only apply if the designated person himself receives a significant financial benefit as a result of the funds or economic resources being made available to some other person (e.g. the payment of a designated person’s rent directly to his landlord by a third party).

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4 The Al-Qaida and Taliban (Asset-Freezing) Regulations 2010 (2010/1197).

13. The Bill will make legislative provision to provide the Treasury with similar powers in broad terms to those in the 2009 Order. A number of further changes are made in the Bill, the most significant being:

- a) redrawing of the prohibitions on dealing with the designated person's funds or economic resources so that the offence is only committed if the person knows or has reasonable cause to suspect that the funds or economic resources are those of a designated person (i.e. reversing the burden of proof so that knowledge is an ingredient of the offence rather than lack of knowledge being a defence);
- b) similar redrawing of the other offences so that knowledge is part of the offence (including for the offence of providing economic resources to a designated person a requirement that the provider knows or suspects that the designated person will use the resources to obtain funds or goods);
- c) provision to make it clear that the payment of social security benefits to persons other than the designated person is not caught by the prohibition on making funds available for the benefit of a designated person;
- d) a requirement for the Treasury to make a quarterly report to Parliament on the operation of the asset-freezing powers in the Bill;
- e) the appointment of an independent reviewer of the operation of the asset-freezing part of the Bill who is to make an annual report which will be laid before Parliament.

14. The Treasury launched a consultation on the draft Bill on 18 March 2010. There were sixteen respondents, including JUSTICE and legal academics at the Universities of Leeds, Glasgow, Oxford and Durham. Several of those responding commented on human rights issues, in particular the use of the 'reasonable suspicion test' (see further paragraphs 34-37 below) most notably Justice. A summary of responses was published by the Treasury on 15 July 2010.

15. The following aspects of the terrorist asset-freezing regime are relevant for the purposes of this memorandum:

### ***Part 1—Chapter 1—Designated Persons***

16. Clause 2 gives the Treasury the power to designate a person (a) if the Treasury have reasonable grounds to suspect that the person is or has been involved in terrorist activity, and (b) it is necessary for public protection to impose the restrictions. The first condition is a redrawing of the provision from the power summarised in paragraph 6 above. For the 2009 Order the Treasury relied upon past and current activity when deciding whether there is reasonable suspicion that a person is a person who commits or attempts to commit or facilitates acts of terrorism. The amended first condition sets this out and brings it into line with other counter-terrorism powers. The Treasury believe that this clarifies but does not materially change the first requirement; the second requirement which must also be met—necessity for public protection—has not been amended.

17. Under clause 4 a designation remains in force for a year (unless revoked) and may be renewed more than once. Clause 3 provides that a designation will be publicised generally

by the Treasury unless the designated person is under 18 or the Treasury consider disclosure should be restricted on one of a number of other grounds.

### **Chapter 2—Prohibitions**

18. Clause 7 makes it an offence to deal with funds or economic resources if the person dealing knows or suspects that the funds are owned, held or controlled by a designated person. Clauses 8 and 10 contain similar prohibitions against making funds, financial services and economic resources available to a designated person. Clauses 9 and 11 contain prohibitions against making funds, financial services and economic resources available to any person for the benefit of a designated person. Clause 14 has a separate offence of circumventing any of the prohibitions set out in clauses 7 to 11. Clause 13 states that the prohibitions in Part 2 will not apply to anything done under the authority of a licence granted by the Treasury.

### **Chapter 3—Information**

19. Clause 15 imposes obligations on financial institutions to report to the Treasury if they are aware that a person is designated or has committed an offence, and if a designated person is a customer there is an obligation to provide information on the funds or resources that the institution holds for the designated person. Clause 16 provides that the Treasury may seek information from the designated person and from persons acting under a licence granted under clause 13. Clause 16 also allows the Treasury to seek information from any person in the United Kingdom. Failure to comply with a request for information is a criminal offence under clause 18.

### **Chapter 4— Supplementary Provisions**

20. Clause 22 provides that any person affected by a decision made by the Treasury may apply to have it set aside. The clause also applies provisions in, or inserted in other legislation by, the Counter-Terrorism Act 2008 which were originally enacted to make provision for the use of ‘closed’ evidence and the appointment of special advocates in relation to challenges to decisions made under the Terrorism Order 2006 and other financial sanctions Orders.

### **Part 2—Terrorist Financing, Money Laundering etc**

21. Part 2 of the Bill contains minor amendments to Schedule 7 to the Counter-Terrorism Act 2008. Schedule 7 gives the Treasury power to give directions to the financial sector imposing a range of requirements or restrictions on their transactions or business relationships with a ‘designated person’. A designated person is the government of, or a person resident or incorporated or carrying on business in, a country of money laundering, terrorist financing or proliferation concern.

22. The powers under Schedule 7 were used for the first time in October 2009 in the Financial Restrictions (Iran) Order 2009<sup>5</sup>, to require the cessation of business with two Iranian entities, on the basis that activity in Iran which facilitates the development or

production of nuclear weapons poses a risk to the national interests of the UK. In exercising the powers, the Treasury have identified some amendments to ensure the powers are as effective as possible.

23. The proposed provisions will amend Schedule 7 as follows:

- Amendment of the definition of ‘credit institution’ and ‘financial institution’ to clarify the position in respect of the applicability of directions to branches of such institutions [clause 42];
- Extension of the categories of persons who may be a ‘designated person’ so that a subsidiary company of a person falling within one of the existing categories may also be designated [clause 43];
- The addition of an offence of circumventing the requirements of a direction [clause 44];
- Changing the supervisory arrangements for credit unions in Northern Ireland from the Department for Enterprise Trade and Investment to the Financial Services Authority [clause 45].

### ***ECHR issues***

24. The provisions of Part 1 of the Bill give rise to a number of ECHR issues which are dealt with in turn. In each clause where ECHR issues are engaged the Treasury have balanced the effects on individuals against the public interest purpose behind the clauses.

25. The proposed amendments to the Counter-Terrorism Act 2008 in Part 2 of the Bill do not raise additional human rights issues beyond those already arising from Schedule 7 to the Counter-Terrorism Act 2008. The effect of the amendments is to increase the number of persons who may be required to comply with the requirements of a direction, or against whom restrictions may be imposed, and whose rights may potentially be affected

### ***Protocol 1, Article 1 (protection of property)***

#### ***Part 1 provisions***

26. Article 1 of the First Protocol (“A1/P1”) provides that every person (natural or legal) is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

27. The practical effect of a direction designating a person is that the person’s funds and economic resources are frozen. Further provisions prohibit making funds, economic resources or financial services available to or for the benefit of a designated person. These provisions can include restrictions on the enjoyment of the property of others (although this is more limited than the Treasury had previously considered it to be, primarily because of the effect of the *M, A & MM* judgment discussed below).

28. The prohibitions on the designated person impose either a deprivation of property or at least a control of the use of their property<sup>6</sup>. The general approach to analysing whether interference is justified is to consider whether (i) the interference is lawful (i.e. the relevant law is sufficiently accessible and certain), (ii) the interference pursues a legitimate aim which is in the general interest, and (iii) a fair balance has been struck between the public interest and interests of the property owner.

### **Basis for designations**

29. The prohibitions are imposed on persons whom the Treasury have reasonable grounds for suspecting are or have been involved in terrorist activity. The Treasury believe that the interference meets the test of pursuing a legitimate aim which is in the public interest on the basis that the provisions serve the purpose of disrupting persons reasonably suspected of involvement in terrorist activity from financing such activity, whether in the UK or abroad. The measures are preventative and have been seen to have a positive disruptive effect on the activity of suspected terrorists.

30. The provisions permit a designation to be made only if it is considered necessary for the purposes of public protection to apply the financial restrictions to that person. The Treasury believe that this makes clear the need for the direction to meet the general interest requirement.

31. Decisions to make freezes are kept under review and last a year. A further decision to freeze may only be made if the criteria in clause 2 remain satisfied, and will involve a consideration of the necessity for the continuation of the freeze against the cumulative effect of the freeze.

32. The European Court of Human Rights stated in the *Bosphorus*<sup>7</sup> case (which concerned the effect of sanctions against Yugoslavia on a third party) that in considering the fair balance test “*the Court recognises that the State enjoys a wide margin of appreciation with regard to the means to be employed and to the question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued*”. This principle was relied upon recently by the High Court in the *Bank Mellat* case<sup>8</sup> when considering a challenge to an Order made under Schedule 7 to the Counter-Terrorism Act 2008 directing all persons operating in the UK financial sector not to enter into or continue to participate in any transaction or business relationship with Bank Mellat and a named Iranian shipping line.

33. The fair balance requirement involves consideration of the effect on both the designated person and third parties (principally members of the designated person’s household). Restrictions can only be imposed where the Treasury has a reasonable suspicion that a person is or has been involved in terrorist activity and the Treasury consider it is necessary for public protection that financial restrictions should be applied.

6 It is the Treasury’s view that the provisions fall within a control of use of property. There is no expropriation of property; provided that a licence is obtained the person remains able to sell or otherwise dispose of property. The Treasury refer also to the decision in *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, which considered the issue of *de facto* deprivation of property and concluded that planning restrictions which had the effect of reducing the possibility of selling a property amounted to an interference rather than a deprivation for the purposes of A1P1.

7 Case of *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (application No. 45036/98) [2006] EHRR 1.

8 *Bank Mellat v Her Majesty’s Treasury* [2010] EWHC 1332 (QB).

The Treasury has the power to issue licences to permit the designated person to deal with his funds and economic resources, and to permit third parties to provide funds and economic resources to the designated person.

34. The use of a ‘reasonable suspicion’ threshold has been criticised as being too low a threshold to be proportionate. Suggestions have been made that a ‘reasonable belief’ test would be more appropriate.

35. The Treasury believe that the ‘reasonable suspicion’ test is justifiable. There are cases where freezes have been made on persons at an early stage of a police investigation into a major terrorist plot where the available evidence at the time would not support a higher threshold, but the disruptive effect of the freezes has subsequently been shown to be significant. One example of this is the decision on 11 August 2006 to freeze the assets of 19 of the 24 persons arrested by the police the previous day in relation to Operation OVERT (the plot to detonate explosives on transatlantic airliners). In this case the majority of persons frozen were subsequently charged and then convicted of terrorist offences. Nine persons convicted of terrorist offences and serving sentences in prison are still subject to asset freezes. Two persons convicted and who have served their sentences, and all those not convicted of an offence, have had their freezes revoked. The ability to make a freeze pre-emptively, often in tandem or shortly after police arrests (which are also made on a ‘reasonable suspicion’ basis), has been valuable in responding to an emerging terrorist threat.

36. Freezes have also been made on the basis of intelligence material, where the information available cannot easily be tested or demonstrated to a higher threshold but the threat is nevertheless immediate.

37. Some members of the Supreme Court, while they ruled that ‘reasonable suspicion’ was not unavoidably necessary for giving effect to UNSCR 1373, accepted that such a test may be expedient for the purpose of giving effect to it. Lord Hope (with whom Lord Walker and Lady Hale agreed) at paragraph 58 stated that ‘reasonable suspicion’ may have been expedient but that such a judgment should have been left to Parliament. Lord Rodger (with whom Lady Hale agreed) at paragraph 201 stated that ‘reasonable suspicion’ could have been used for a short time under section 1 of the United Nations Act 1946, but that it should have been replaced as soon as practicable by primary legislation. In addition Lord Rodger touched upon the particular difficulties involved in the use of national security material at paragraph 173 when he stated—

*It seems to me that the expediency of the United Kingdom adopting that test really depends on a whole range of practical matters with which the members of this Court are largely unfamiliar. Inevitably, much of the information about terrorist activities that is available to national authorities will come from other countries and, often, in the form of intelligence provided by overseas security services. In the case of the United Kingdom, the Treasury – and indeed the British security services – may well be in no position to make an independent assessment of the material. Similarly, it may well be that, in a significant number of cases, because of its variable quality and fragmentary nature, the available information does not permit the Treasury to go further than to say that they have reasonable grounds for suspecting that the person concerned is committing or facilitating terrorist acts. If so, then it may be better to base designation*

*on reasonable grounds for suspicion rather than on some higher standard which could not be readily achieved and which, if applied faithfully, would mean that the Treasury failed to freeze a significant number of assets which were actually under the control of people who committed etc terrorist acts*

### **Provision of licences**

38. The Treasury issues licences immediately on designation to ensure that designated persons' access to living expenses and to legal services are not interrupted. Treasury licensing decisions are informed by a terrorist financing risk assessment, from the security and intelligence agencies and police, and an analysis of the human rights impacts. This enables the Treasury to apply the regime in a proportionate way, ensuring that the Treasury grant licences where it can be done without giving rise to terrorist finance risks, including through the use of appropriate licence conditions. The Treasury has also issued a number of general licences which apply to all persons subject to an asset freeze. These include general licences for legal aid payments to solicitors representing designated persons, and for the provision of insurance policies for designated persons. General licences enhance the proportionality and efficiency of the regime by removing the need to apply for individual licences in these areas.

39. A designated person may request a change to their licence terms, or new licences, at any time. The Treasury reviews any such requests, taking into account any terrorist financing risks and the requirement to ensure that the regime is applied proportionately in each case. The designated person has an explicit right to challenge a decision to grant a licence (including the terms of a licence) or refuse a request for a licence.

### **State benefits**

40. Historically, the Treasury considered that benefits paid to the household of a designated person ("household benefits") were caught by the relevant prohibitions, in particular EC Regulation 881/2002 which implements the UN Al-Qaida and Taliban obligation. Article 2(1)(b) of that Regulation states:

*No funds, other financial assets or economic resources shall be made available directly or indirectly, to or for the benefit of, a [designated person]*

Similar wording is in the EC Regulation<sup>9</sup> in relation to terrorism, enforcement of which was provided by the Terrorism Orders 2006 and 2009 and will be provided by this Bill.

41. Accordingly, the Treasury was of the view that the payment of state benefits to spouses or partners of a designated person living in the same household would fall within the prohibition and therefore could only be made under the authority of a licence. It was also the Treasury's policy ordinarily to require that the recipient of the benefits accounted for the expenditure of the funds. This interpretation was challenged in court proceedings brought by three spouses of designated persons. The House of Lords referred this point to the European Court of Justice.

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<sup>9</sup> Council Regulation 2580/2001.



42. The European Court of Justice (ECJ) in case C-340/08 *M* ruled on 29 April 2010 that economic or financial resources are only made available for the benefit of a designated person where as a result the designated person would gain access to economic or financial resources of a kind that they could use to support terrorist activities. Household benefits paid to the spouse or partner of a designated person, which are carefully calibrated to the needs of the household, did not fall within the scope of funds that are made available for the benefit of a designated person for the purposes of the EC Regulation. The ECJ further commented that the measure freezing economic resources had to be understood as applying only to assets that can be turned into funds, goods or resources capable of being used to support terrorist activities.

43. In light of the ECJ case and in view of the Government's commitment to ensuring that the asset freezing regime is fair and proportionate without weakening controls on terrorist finance, the Government has made it clear in the Bill that the payments of state benefits to the spouses or partners of designated persons are not intended to be caught by the asset freezing regime. This significantly ameliorates the previous impact of the prohibitions on the A1P1 rights of the families of designated persons.

44. The direct making available of funds to a designated person, whether by a family member or any other person, is not affected by the ruling of the ECJ and will still be caught by the prohibitions unless the payment is licensed. Similarly, where a family member knows or suspects that the provision of economic resources to a designated person would be likely to result in the resources being used to obtain funds, goods or services capable of being used to support terrorist activities, then provision of the resources would need to be licensed by the Treasury. Where funds, or economic resources, are not being given to the designated person directly, but are being made available for the designated person's benefit, a licence is only required if the designated person is receiving a significant financial benefit as a result. The Treasury can provide guidance in any particular case as to whether or not a licence is required. The Treasury believe that this more limited interference with third parties' property rights, coupled with the procedural safeguards, ensure that a fair balance test is met. The Treasury accepts that the inclusion of such conditions raises Article 8 issues, which are discussed below.

45. A1P1 also requires that any interference with possessions is subject to the conditions provided for by law and the general principles of international law. As discussed above, the Treasury believe that the clauses enabling the interference to take place are clear and foreseeable and that there are safeguards to prevent the unfair use of the power.

46. The reference to general principles of international law is understood to be only applicable where property rights of non-UK nationals are affected<sup>10</sup>. International law protects non-nationals against arbitrary expropriation of property and provides for compensation to be payable. The prohibitions which lead to a possible A1P1 interference could apply to any person in the UK, whether or not a UK national. However, non-UK nationals will be in the same position as UK nationals in terms of being able to request licences and access to the Court. The provisions do not therefore appear to offend against general international law.

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10 *Lithgow v United Kingdom* (1986) 8EHRR 329

47. Taking into account the powerful public interest in combating terrorism, the ability to ameliorate the prohibitions through the grant of licences and the procedural safeguards in the Bill, the Treasury believe that the fair balance test is met in respect of interference with property rights.

### **Part 2 provisions**

48. The Treasury do not believe that a requirement to apply enhanced due diligence or ongoing monitoring, or to report on transactions, is likely to constitute an infringement of the right to peaceful enjoyment of possessions. However, it is considered that any direction limiting or requiring the cessation of a person's business or transactions with persons in a third country would, prima facie, constitute an interference with the peaceful enjoyment of possessions and thus engage Article 1 of Protocol 1.

49. As stated, Article 1 of Protocol 1 is a qualified right, and may be interfered with by way of controls on the use of property where this is in the general interest. Article 1 also requires that any deprivation of possessions be subject to the conditions provided for by law. In this respect there will be a clear basis, in primary legislation, for the use of the power, the consequent prohibitions are clear, and section 63 of the Counter-Terrorism Act 2008 provides a means of challenging the use of the power.

50. To the extent that a restriction may constitute a control or deprivation of property, such interference will be justified in the public interest. Restrictions can only be imposed where the Financial Action Task Force ("FATF") has decided that a country's anti-money laundering and counter-terrorist financing controls are sufficiently deficient that counter-measures should be imposed, where the Treasury reasonably believe that there is a risk of money laundering and terrorist financing activity in a country and that this poses a significant risk to the national interest of the United Kingdom, or where the Treasury reasonably believe that the development or production of nuclear, radiological, biological or chemical weapons in the country poses a significant risk to the national interests of the United Kingdom. Schedule 7 provides that the requirements imposed by a direction must be proportionate having regard to FATF advice, or the risk to the national interests of the UK. The interference with the individual's right has to be balanced against the potential for damaging consequences if such activity is not disrupted.

51. Schedule 7 provides for a targeted use of the power: restrictions may be imposed on a particular person, persons falling within a described category, or all persons in the specified sector in the UK or imposed in respect of a particular person, a category of persons, or all persons in the target country. The Treasury also has scope to tailor the requirements of a direction to the risks in a specific case – for example by imposing restrictions only in relation to certain types of business.

52. Paragraph 9 gives the Treasury power to grant licences to exempt acts from the provisions of a direction requiring the limiting or cessation of business, so as to disapply the prohibitions to the extent appropriate to each case. This enables the Treasury to adjust the effect of the financial restrictions to reflect the risks in a particular case and to take into account the particular circumstances and legitimate needs of persons subject to the directions.

53. Persons affected by a direction have a right to apply to the court for a review of a direction, and directions expire after a year.

54. The Treasury's powers conferred by Schedule 7 were challenged by Bank Mellat in the case referred to at paragraph 32. The challenge was on both procedural grounds (that the Treasury was obliged by domestic law and the requirements of A1 P1 and Article 6(1) ECHR to give the Bank the chance to make representations before making an Order), and substantive grounds (either because the statutory conditions for a direction were not met or because the direction was incompatible with the bank's rights under A1P1).

55. In respect of the substantive grounds, the issue of lawfulness turned primarily on whether the requirements imposed by the Order were proportionate having regard to the nature of the risk posed to the national interest of the UK. The Judge agreed with the Treasury's conclusion (that the risk of very great harm to the UK's vital national interest justified the imposition of a severe inhibition on the business of the Bank) and dismissed this ground and the challenge. The Bank has been granted leave to appeal in relation to this judgment.

56. In the Treasury's view, the provisions in the Schedule as amended by the Bill strike an appropriate balance between the requirements of the general or public interest, and the requirements of the protection of the individual's rights and are compatible with Article 1 of Protocol 1.

## **Article 8 (respect for privacy and family life)**

### **Part 1 provisions**

57. The clauses include a number of provisions which interfere with a person's right to respect for private and family life. Any interference by a public authority must be justified as being in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

58. The collection of personal information is an interference with the right to respect for private life. The disclosure of information—such as the fact of a direction—by a public body will also involve an interference with the right to respect for private life.

59. Any interference must be in accordance with the law. The Treasury believe that the provisions in the clauses providing for the interferences discussed below are clear and foreseeable. The clauses include clear rights to challenge decisions involving interferences and the Treasury believe that these provisions offer a adequate and effective safeguards against arbitrary interference.

### **Notifications**

60. The first interference is the public notification of a decision to designate a person in clause 3 which obliges the Treasury to take steps to publicise a designation unless one of a

number of conditions is met. This engages the Article 8 rights of the designated person and arguably also the Article 8 rights of members of the household.

61. The Treasury believe that such notification is necessary to give full effect to the financial restrictions which flow from a designation being made. This is particularly the case in ensuring that financial institutions are aware of a designation and can promptly take steps to identify any assets controlled by the designated person and to ensure that the assets are not made available to that person (except under the authority of a licence). Wide publication of the direction offers the best opportunity of ensuring that the prohibitions are not broken. Given the threshold for making a designation—reasonable grounds to suspect an involvement in terrorist activity and consideration that the direction is necessary for purposes of public protection—the Treasury believe that the interference is proportionate to the objectives of public protection and national security at which it is aimed. EC asset freezes, under Regulations 881/2002 (AQ) and 2580/2001 (terrorism) are published in the Official Journal and included in the Regulations.

62. Clause 3 provides for the publicising of designations to be restricted where the designated person is under 18, or where the Treasury consider that disclosure should be restricted in the interests of justice or national security or for reasons connected with the prevention or detection of serious crime. The Terrorism Order 2006 included provision for the Treasury either to publicise a direction generally or to restrict publicising it to those it considered appropriate, but did not set out the grounds for a ‘restricted’ designation. These grounds were included in the 2009 Order as it was felt helpful to set out the factors considered by the Treasury when deciding whether a designation should be publicised generally. The general publicising of a designation has not been specifically considered by the Court. It has however indirectly been considered by the Supreme Court in a separate judgment in the *Ahmed*<sup>11</sup> case. In this case the Treasury decided that it should not generally publicise the designations of three persons for reasons of national security, but instead alerted financial institutions and notified a number of these persons’ associates. The three persons challenged the directions and were granted anonymity orders. These orders were challenged by media organisations in the Supreme Court, which considered written statements on the possible public safety consequences of publicly identifying these persons as the appellants and as subject to designations.

63. The Supreme Court set aside the anonymity orders. It noted that the evidence which had been put forward as to the possible effect which being named in the court case could have on M’s article 8 rights was “very general and, for that reason, not particularly compelling”. The Court had lifted the anonymity order in relation to G (Mr Al Ghabra) and noted the “apparent lack of reaction” to his being publicly named.

### ***Licensing and reporting***

64. As described above, the Treasury has power to license actions which would otherwise contravene one of the prohibitions in Part 1. This would cover for example a designated person dealing with their funds, as well as the provision by a third party of funds or (in certain circumstances) economic resources to a designated person, or for their benefit. As set out above, the Treasury accepts that the payment of state benefits to the spouse or

partner of a designated person does not breach the prohibitions, and so no licence is required. The licensing of access to funds, financial services and economic resources is a key tool to ensure that asset freezes are applied proportionately. Licences may include conditions such as a requirement for information to be provided to account for the use of the funds licensed, in order to ensure that funds are not being diverted for terrorist purposes. Clause 16(4) gives the Treasury a specific power to request information concerning funds or economic resources dealt with or made available under a licence.

65. The nature and detail of the reporting required will be assessed on a case by case basis, taking into account the risk assessment of the police and security and intelligence agencies. Reporting requirements may require the designated person to provide a detailed account of the expenditure of the sums licensed, including relevant documentation such as bank account statements and receipts for expenditure.

66. Licence conditions such as reporting requirements are necessary to ensure that the Treasury is able to monitor a designated person's compliance with the licence terms, and that the purpose of the asset freeze is not being undermined.

67. The Treasury will of course be bound by the principle that a public body should not disclose confidential information unless there is a pressing need for disclosure for public safety. Accordingly, information received in compliance with licence conditions (or in compliance with clause 15 or requests made under the powers in clause 16 discussed below) will only be disclosed to other agencies where necessary for this purpose. In addition, clause 19 gives the Treasury a general power to disclose information to specific persons or for specific purposes. Both the list of persons and the 'purposes' are tightly drawn.

### **Information gathering**

68. Chapter 3 of Part 1 of the Bill includes a number of powers to obtain information. The requirement to provide information pursuant to a request made under one of these provisions may engage Article 8. Provisions in clause 16(1) and (2) permit the Treasury to request the designated person to provide details of all funds or economic resources they hold or to provide information about expenditure by or on their behalf or for their benefit. The acquisition of information about a designated person's funds and economic resources is necessary to ensure that the financial restrictions are given full effect, for example by ensuring that all those who hold funds for the designated person are aware of the direction. The power to request details of expenditure can be necessary to ensure compliance with the prohibitions and is expressly stated to be only exercisable where the Treasury believe it is necessary for monitoring compliance with or detecting evasion of the Bill.

69. Clause 16(5) provides a broad power to request any person in the UK to provide information reasonably required for monitoring compliance with or detecting evasion of the Bill and establishing the funds and economic resources owned by or provided to a designated person. There are clear public safety issues in ensuring compliance with the Bill and in identifying the assets of the designated person.

70. Clause 15 provides that financial institutions must provide certain financial information if during the course of business they know or suspect that a person is a

designated person or has committed an offence. Where they identify that a designated person is a customer, the institution must tell the Treasury what funds they hold for the designated person. The Treasury has a website which provides details of designations and financial institutions subscribing to the notification facility on the website will automatically be informed of any designations. This information is invaluable in identifying the financial assets of a designated person so as to ensure that the designation is as effective as possible. The Treasury have not included a provision from earlier Terrorism Orders which required institutions to ascertain whether a designated person has been a customer of the institution in the previous five years.

71. The Treasury consider that the requirements to provide information discussed above will be in accordance with the law, as the powers to require disclosure of information are set out in primary legislation and are formulated to enable a person to foresee the circumstances in which the power can be exercised. The powers are all targeted at ensuring the effectiveness of a designation and with compliance with the Bill and are necessary to meet these two objectives. The interference is proportionate given the public safety reasons for obtaining the information, and because the powers are limited to information required for these reasons.

72. A discrete Article 8 issue also arises under clause 23(2) of the Bill, which applies the provision in the Counter-Terrorism Act 2008 which disappplies the prohibition on the use of intercept material in evidence in respect of 'asset freezing decisions' as defined by that Act, to permit such material to be used in challenges to decisions under the Bill. The requirement for any interference to be in accordance with the law is satisfied by virtue of the provisions being set out in primary legislation. The aim of the provisions enabling the use of intercept evidence is to enhance the robustness of the asset-freezing regime. There is a clear public safety need, given the preventative purposes of designations, that requires the Treasury to be able to use all available evidence in order to explain and support the decisions made.

### **Part 2 provisions**

73. Information provided in accordance with a requirement for systematic reporting under paragraph 6 of Schedule 7 to the Counter-Terrorism Act 2008 may engage the right to respect for private life. In addition, applicants for licences granting exemptions from a direction limiting or ceasing business will be required to provide some personal information, and details of the transactions or business relationships for which exemption is requested, which may engage the right.

74. To the extent that there is any interference with the right to respect for private life, the Treasury consider that such interference will be in accordance with the law, and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, or for the prevention of disorder or crime (the justification will depend to some extent on the basis for giving a direction under Schedule 7).

- (1) The power to give directions is accessible as a measure in primary legislation and is formulated with sufficient precision to enable a person to foresee the circumstances in which the power can be exercised. As set out above, the amendments will

include a provision allowing a person affected by a direction to challenge the direction.

- (2) A direction can only be given either where the FATF has decided that a country's anti-money laundering and counter-terrorist financing controls are sufficiently deficient that counter-measures should be imposed, where the Treasury reasonably believe that there is a risk of money laundering and terrorist financing activity in a country and that this poses a significant risk to the national interest of the United Kingdom, or where the Treasury reasonably believe that the development or production of nuclear, radiological, biological or chemical weapons in the country poses a significant risk to the national interests of the United Kingdom. Schedule 7 provides that the requirements imposed by a direction must be proportionate having regard to FATF advice, or the risk to the national interests of the UK. Any interference with a person's right has to be balanced against the potentially damaging consequences of allowing the terrorist financing, money laundering or weapons proliferation activities to continue. Requiring the systematic reporting of transactions or business relationships with persons in the country concerned will provide a source of intelligence and information about those activities, enabling targeted efforts to disrupt them. Requiring information from applicants for licences helps to ensure that exemptions from the prohibitions are only granted in appropriate circumstances.

75. The limited circumstances in which a direction may be given, coupled with the expiry of a direction after one year and provision for challenge before the courts, mean that the powers in Schedule 7 are proportionate to the threat they are intended to counter. The Treasury consider that, given the circumstances in which a direction would be made, outlined in paragraph 1 of Schedule 7, the Treasury would in issuing a direction be pursuing a legitimate aim.

76. Accordingly, in the Treasury's view, the Schedule as amended by the Bill is compatible with Article 8.

## **Article 6—Right to a fair trial**

### **Part 1 provisions**

77. Article 6(1) entitles an individual to a fair and public hearing in the determination of his civil rights or obligations or any criminal charge against him. In the context of whether preventative actions which imposed severe restrictions on private life were criminal or civil, the House of Lords, considering the more draconian provisions of control orders, held that such orders were not criminal proceedings under article 6<sup>12</sup>. The Treasury believe that the provisions in this Bill are civil rather than criminal for the purposes of article 6. A designation made under clause 2 is likely to be a decision which impacts upon civil rights and obligations (notably the interference with rights to free enjoyment of property). Whilst not expressly set out as a qualified right, the courts, both domestically and in Strasbourg, have acknowledged some need for qualification. Challenges to decisions under

12 Secretary of State for the Home Department v MB [2007] UKHL46

the Bill would not constitute criminal hearings and therefore the express minimum standards in Article 6(3) do not apply.

78. The nature of the right to challenge as set out in clause 22, which requires the Court to apply the principles applicable on an application for judicial review, have been criticised as insufficient. However, clause 23 states that the provisions of sections 66 to 68 of the Counter-Terrorism Act 2008 apply to such proceedings. Provision is made for rules of court (now provided for in Part 79 of the CPR), including for disclosure, witness evidence and the appointment of special advocates which set up a framework similar to those of control orders. The Court has demonstrated in a national security context that it has taken a robust view of the examination of decision-making in a national security context (see, for example, the decision of the Court of Appeal in *Secretary of State for the Home Department v MB*<sup>13</sup>). It is anticipated that a Court will adopt this flexible approach and apply a rigorous standard of scrutiny in all cases where it considers this appropriate.

79. The issue of the compatibility of the use of closed material and special advocates with Article 6(1) has been considered a number of times in the UK and in Strasbourg. The leading UK case remains *Secretary of State for the Home Department v MB*<sup>14</sup> in which the majority view accepted that in cases involving special advocates “it is quite possible for the court to provide the controlled person with a sufficient measure of procedural protection even though the whole evidential basis for the basic allegation, which has been explained to him, is not disclosed”.

80. The use of special advocates was considered further by the House of Lords in *Secretary of State for the Home Department v AF (No 3)*<sup>15</sup> following the decision of the Grand Chamber of the European Court of Human Rights at Strasbourg in *A v United Kingdom*<sup>16</sup> in the context of the indefinite detention of terrorist suspects. In *AF* the House referred to the Grand Chamber’s decision that those individuals had to be given sufficient information about the allegations against them to be able to give effective instructions to the special advocate in respect of them, and applying that judgment in the context of the control orders before it in the *AF* case, found that “provided that requirement was satisfied, there could be a fair trial notwithstanding that he was not provided with the detail or sources of the evidence forming the basis of the allegations” (para 59).

81. The application of *AF* was considered by the Court of Appeal in an appeal relating to disclosure in the *Bank Mellat*<sup>17</sup> case. The Court of Appeal accepted that where it is said that the contents of potentially relevant documents in the possession of one party should not be disclosed to the other party, a balance has to be made between the rights of the latter party in the litigation and the wider interest, but that there are “*irreducible minimum rights which article 6(1) ... requires to be accorded to any party involved in litigation to which the article applies*” (paragraph 20) and that “*the requirements of article 6(1) are such that the information to be provided by the Treasury must not merely be sufficient to enable the Bank*

13 *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140. The Treasury note that this decision predates the Strasbourg decision in *A* referred to below, and do not suggest that the reasoning in *MB* would be directly applicable. The point is that the Court has in the past adopted rigorous approaches in national security cases and can be anticipated to do so again.

14 [2007] UKHL 46.

15 [2009] UKHL 28.

16 (Application No 3455/05), ruling 20 February 2009.

17 *Bank Mellat v Her Majesty’s Treasury* [2010] EWCA Civ 483.



*to deny what was said against it. The Bank must be given sufficient information to enable it actually to refute, in so far as that is possible, the case made against it.*” (paragraph 21). In this case disclosure was made to the satisfaction of the Court and the matter proceeded to a substantive judgment.

### **Part 2 provisions**

82. Mr Justice Mitting ruled in the Bank Mellat case that a dispute arose for the purposes of Article 6(1) only when an Order under Schedule 7 to the Counter Terrorism Act 2008 was made; alternatively that the procedure for determining the Bank’s Article 6(1) rights was ‘hybrid’ and involved an executive decision affirmed by Parliament and subject to challenge before a Court. The Judge held that the procedure under Part 79 of the Civil Procedure Rules was adequate to give effect to the Bank’s Article 6(1) rights and that if exceptionally the impact of an Order was such as to cause irreparable damage to the Bank unless its challenge to the Order was determined more quickly than the procedure in Part 79 permitted, it could apply for judicial review, which was not excluded because of the mere presence of Part 79.

83. Persons affected by a direction under Schedule 7 may challenge the direction in the High Court in accordance with section 63 of the Counter-Terrorism Act 2008. The principles and procedure to which such a challenge are subject are considered above in paragraphs 78 to 81.

84. Clause 44 introduces a new prohibition on circumventing the requirements of a direction, and provides for the imposition by supervisory authorities of civil penalties for breaches of this prohibition. This is subject to a right of appeal to an independent tribunal, thus satisfying the requirements of Article 6.

85. The Treasury therefore believe that the provisions in the Bill are compatible with Article 6.

### **Article 7—No punishment without law—Part 1 provisions**

86. A number of submissions were made in the Ahmed case that provisions in the Terrorism Order 2006 were not sufficiently certain. Although these were not specifically identified as encroaching on ECHR Article 7, the principle that an offence must be clearly defined in law is enshrined in Article 7. The provisions identified by the appellants as not being sufficiently certain concerned the phrases “acting on behalf of or at the direction of”, “make available” and “for the benefit of”.

87. The majority of the Supreme Court did not comment on this issue, but the three judges who did concluded that the terms of the prohibitions were sufficiently certain. When drafting legislative provisions of general application it is inevitable that the words used will be capable of giving rise to “difficult” cases. However, the Strasbourg case law does not suggest that this is sufficient to render the provision void for uncertainty<sup>18</sup>. The Treasury believe that the provisions are sufficiently certain and that there is no breach of Article 7. In addition, the Treasury believe that some of the criticisms levelled at the 2006 Order would not apply to the revised provisions in the 2009 Order and the Bill.

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18 See *Kafkaris v Cyprus* (Application No21906/04 12 February 2008, at paras 140-141).

### ***Article 5—Right to liberty—Part 1 provisions***

88. It has been suggested that the Bill engages Article 5 ECHR if the designated person (or their family) is in practice unable to leave a certain area due to the designation. Asset freezing is not intended to control the movement of designated persons, only their access to and use of funds. There will be restrictions on the use by the designated person of their funds, but the restrictions are ameliorated by licences. The Treasury would not ordinarily refuse a licence that involved the expenditure of the designated person's funds to allow him and/or his family to travel. The Treasury do not believe that any temporary restrictions would amount to a deprivation of liberty.

### ***Article 14—Discrimination—Part 1 provisions***

89. It has also been suggested that the provisions may engage Article 14 in conjunction with Article 8 on the basis of discrimination on grounds of religion, or indirect discrimination on grounds of nationality or race.

90. The European Court of Human Rights has held that a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, 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 State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment<sup>19</sup>. The Treasury consider that if Article 14 is engaged, any difference in treatment will be objectively and reasonably justified given the overall purpose of the scheme and the threshold requirements before the Treasury can exercise their powers under the scheme.

*10 August 2010*

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<sup>19</sup> *Burden v. United Kingdom v. 47 EHRR at para. 55.*

## 2. Letter from Lord Sassoon, Commercial Secretary, HM Treasury, to the Committee Chair, 4 October 2010

### *Government Amendments to the Terrorist Asset-Freezing Etc. Bill*

At second reading in the Lords, I committed to consider further the civil liberties issues raised by the Terrorist Asset-Freezing etc. Bill. Over the summer, Treasury officials have consulted widely with other Whitehall Departments and with civil liberties organisations. Based on these consultations, on the concerns expressed by a number of learned Lords during the second reading debate and on points raised by respondents to the public consultation on the Bill, I have decided to bring forward amendments to:

- Raise the legal test for asset freezing from reasonable suspicion to reasonable belief, retaining reasonable suspicion only for a maximum initial period of 30 days; and
- Strengthen the challenge to Treasury designation decisions from judicial review to appeal procedure.

I set out my reasons for these amendments below. However, I should like to draw your attention to the fact that, while the Government has tabled a large number of amendments for consideration at Committee, the majority are consequential to these two significant amendments. For your ease of reference, once the Marshalled List has been released I will deposit a note in the Library that groups the amendments between those that are significant and those that are consequential.

I will also be tabling additional amendments today. These make consequential amendments to Northern Ireland court rules similar to amendments already tabled for court rules in England and Wales. They also give the Lord Chancellor a power to make initial court rules for Northern Ireland in relation to appeals, which is similar to the provision for England and Wales that I tabled on 1 October.

### *Raising the legal test*

The substantive Government amendment to Clause 2 raises the legal test for asset freezing from reasonable suspicion to reasonable belief (retaining reasonable suspicion only for a maximum of 30 days).

I believe that raising the legal threshold in this way will allow the UK to maintain an effective terrorist asset freezing regime, consistent with international standards, while addressing what I consider to be the legitimate civil liberties concerns that reasonable suspicion is too low a threshold for freezing assets on an indefinite basis.

The reason for retaining suspicion for a maximum 30-day period is to allow freezes to be imposed in cases where there is an immediate threat but the position is not clear, for example where people have been arrested and there is an operational need to freeze assets but the police have not yet had sufficient time to complete their investigations and establish sufficient evidence to charge them for terrorist offences. The 2006 Operation Overt transatlantic plane bomb plot is a good example of where being able to freeze assets alongside arrests proved operationally valuable.

### ***The role of the Courts***

Under Clauses 22 and 23, I propose amending the Bill so that challenges to asset freezing designations can be heard by the courts on the basis of an appeal procedure, rather than the judicial review procedure.

While judicial review has proved to be a robust procedure in other national security cases, I believe that moving to an appeal procedure for decisions to impose, vary or renew asset freezes would be beneficial in ensuring that the judicial scrutiny process of asset freezing decisions is, and is seen to be, properly robust and rigorous.

Combined, I believe that these amendments will improve the balance between national security and civil liberties in the asset freezing regime. They are justifiable in their own terms and I hope you will welcome them.

I am placing a copy of this letter in the Library.

*4 October 2010*

## **3. Written Evidence from the Campaign Against Criminalising Communities (CAMPACC), to the Committee, 8 October 2010**

### ***Submission to the Joint Committee for Human Rights on the Terrorist Asset-Freezing etc. Bill***

#### ***1. CAMPACC: who we are***

The Campaign Against Criminalising Communities (CAMPACC) was formed in March 2001 in response to the banning of 21 organisations under the powers of proscription contained in section 3 of the Terrorism Act 2000. CAMPACC seeks to highlight the effect of 'anti-terrorism' legislation in intimidating and criminalising communities, rather than protecting the public. The Campaign has brought together individuals and groups from communities which find themselves targeted by anti-terrorism legislation, lawyers, other human rights activists and increasingly members of the public who are concerned about the civil liberties implications of the 'war on terror'. From those experiences, we have highlighted the human consequences and political roles of 'anti-terror' powers. Previously we sent the JCHR a detailed critique of the Control Order regime; this was included as Annex 4 in your February 2006 report, *Counter-Terrorism Policy and Human Rights*.

We welcome the opportunity to provide the Committee with this short submission and would be pleased to appear before the Committee to provide further evidence if required. It is our view that the question of whether it is appropriate to continue with the freezing regime should be referred to the Counter Terrorism Review. The current complex system of overlapping laws in relation to financing (such as those contained in the *Terrorism Act 2000; the Anti-Terrorism, Crime and Security Act 2001*) should rightly be considered as a whole in order to determine their necessity and their impact on human rights.

## 2. Findings of *Ahmed and Others v HM Treasury*

We urge the Committee to give due consideration to the reasoning of the majority decision in the case of *Ahmed*. The Supreme Court found the orders made regarding the freezing of terrorist assets violated basic fundamental rights and freedoms—without the authority of Parliament.

In summary, it is our submission that the current Bill simply embeds significant violations of human rights, including:

- The right to a fair trial
- The right to freedom of movement
- The right to privacy and family life
- The right to the protection of property

These violations amount to punishment without trial.

## 3. Low threshold for application

The Government's amendments to the Bill require only that there be 'reasonable grounds for suspecting' that a person has been involved in terrorism to impose an interim 30 day order. A final order must then only be made by Treasury on the basis of a 'reasonable belief' that the person has been involved in terrorism. The Supreme Court pointed out that the UN requires member states to freeze the funds only of those who 'commit or attempt to commit' acts of terrorism. The Bill therefore goes considerably beyond the policy intention of the UN.

HM Treasury have argued that the tests of 'reasonable suspicion' and 'reasonable belief' are necessary to give effect to the preventative policy aim of the legislation. We submit that a more proportionate preventative aim may be achieved by judicial, rather than executive sanctions, against those who have been found by a court to have committed or attempted acts of terrorism.

Further, the legislation would not specifically target terrorist financing because the special powers do not require that a person be reasonably suspected of *terrorist financing* before they are designated.

The threshold of 'reasonable belief' is not an appropriate substitute for scrutinising evidence through the courts. This Bill will subject people who have not been charged with any offence to extra-judicial punishment inconsistent with a liberal democracy. The preemptive paradigm as expressed in this Bill is incompatible with the rule of law, human rights and procedural fairness standards.

## 4. The right to a fair trial

The Bill entrenches the current system of secret evidence, closed hearings and special advocates, whom the Attorney General appoints to act on behalf of the affected person. Yet the requirement of non-disclosure to the affected person of the critical evidence on

which the freezing order was made, entrenched secret intelligence whose validity and relevance cannot be tested by the accused.

The Bill is in breach of the right to a fair trial and undermines the presumption of innocence. The abrogation of this right stems from the very nature of designation orders being made by the executive on a mere suspicion or belief of ‘involvement in terrorism’. To ensure due process, the affected person must be given the right to make full legal representations in their defence, and the right for the matter to be adjudicated by the judiciary. Further, the right to full merits review should be provided for, not simply the limited recourse to judicial review.

### ***5. Impacts on people designated: the right to freedom of movement, privacy and family life, and protection of property***

The Supreme Court found that the ‘draconian nature’ of the asset-freezing orders could ‘hardly be overstated’. Lord Hope stated that ‘..designated persons are effectively prisoners of the state’ and, ‘their freedom of movement is severely restricted without access to funds or other economic resources and the effect on both them and their families can be devastating.’<sup>1</sup>

We have spoken with individuals who have family members subject to asset-freezing orders. They have experienced the asset-freezing regime as a cruel, disproportionate form of administrative punishment. The regime inflicts a debilitating suffering not only on the person designated but also on their families and friends.

The restriction to a person’s funds has subjected those on freezing orders to a life of extreme state intervention into daily life. The current Order regime and the Bill allow designated individuals to have access to funds to meet ‘basic expenses’. A person is not entitled to access their own funds, but can obtain only basic expenses, and only if they have a Treasury license to do so. Basic expenses are not defined, and there is no definitive list or guidance provided to designated people. Instead the Treasury has insisted on a ‘case-by-case’ determination of what constitutes a basic expense. Consequently, people have sought constant permission from the Treasury to allay fears that they may be breaching the conditions of their license. The licensing system is an unjustifiable intrusion into people’s lives—creating uncertainty, anxiety and another level of administrative punishment.

For some people on freezing orders, there is increased dependence on family members for food and basic supplies. For example, according to one individual whom we consulted, a freezing order had devastating impacts—severe emotional psychological consequences on her entire family. Alisa’s Uncle has been subject to a freezing order.<sup>2</sup> The family is terrified about providing anything other than a minimal amount of food and household items to their Uncle.

The Bill maintains a highly oppressive regime by making it an offence to provide a ‘significant financial benefit’ to a designated person. This vague concept remains undefined and provides no guidance to families. In practice, families have been frightened to provide any amount of money or even support in kind such as the use of vehicles.

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1 Ahmed and Others v HM Treasury [2010] UKSC 2 at para 11.

2 An alias has been used, identities altered and family experiences referred to in composite to protect anonymity.

The Bill allows that public benefits may be paid to non-designated family members. However, the prohibition remains that a family member cannot provide any part of that payment amounting to a 'significant financial benefit' to the designated person. For example, it is unclear whether a spouse who routinely pays the entirety of the rent/mortgage on the home, in the designated person's name, contributes a 'significant financial benefit'. Freezing Orders have created a non-pressive level of anxiety and uncertainty for entire families that they may be committing an offence.

Alisa's extended family has been subject to on-going harassment by intelligence services for several years. This has included multiple dawn raids on family members which have not resulted in charge or formal questioning; stop-and-search of vehicles of family members without explanation; and intimidating family members by requesting that they not communicate to the public the nature of the authorities' interactions with them, nor to identify the agency involved. The harassment of Alisa's family has by no means been experienced by them as a one-off event.

#### **6. Punishment without trial to be extended?**

In sum, the current powers of asset-freezing inflict punishment without trial, violating the basic rules of due process. Why is this happening? Not an isolated example, the above case points to a systemic practice designed to intimidate and punish. We have received anecdotal evidence that such impacts—harassment, poverty and mental trauma—are commonplace among those who have been designated.

Individuals and families are given no reasons for why they are under order. Nor do they have any viable prospect to challenge the orders. This contributes to a sustained emotional and physical state of siege, where the system provides every indication that the orders could continue indefinitely without real accountability. The families we consulted have justifiably lost any hope for pursuing justice in the UK legal system.

Moreover, in practice freezing orders in effect prohibit controlled persons from communicating with the public or the press about their persecution. This effect typifies dictatorships. It contributes nothing to the supposed aim of preventing terrorism. By silencing its victims, the state conceals its systematic punishment without trial under the pretext of 'anti-terror' powers. The extra asset-freezing powers in the Bill would extend current injustices and so should be rejected. Instead the current regime should be held accountable for its injustices.

*8 October 2010*

#### **4. Written Evidence from Mr Henry Miller, Birnberg Peirce & Partners, and Anne McMurdie, Public Law Solicitors, to the Committee, 12 October 2010**

##### ***Call for Evidence—Terrorist Asset Freezing Bill***

1. We have expertise in the legal issues associated with terrorist asset freezing. Birnberg Peirce & Partners and Public Law Solicitors have been instructed in all the principal litigation which has considered the operation of the terrorist asset freezing; including *Ahmed & others v HM Treasury* [2010] UKSC2, *R (on the application of Youssef) v HM*

*Treasury [2010] UKSC2; R (on the application of the M) v HM Treasury [2008] UKHL 26; [2010] C/340/08*. Birnberg Peirce and Public Law Solicitors are currently instructed by individuals who are designated pursuant to the Terrorism (United Nations Measures) Order 2009, and who are listed by the United Nations Al Qa'ida and Taliban Financial Sanctions Committee (Pursuant to UNSCR 1267/1999).

2. We recognise that it is unusual for individual lawyers, rather than representative bodies, to respond to calls for evidence. However there is no representative group to provide a response on behalf of the individuals subject to the asset freezing regimes, and the individuals themselves are not able to respond. We have expertise in both the legal issues and the impact on those subject to the regime and hope these submissions will assist the committee in considering the proposed legislation.

### Introduction

3. On 28 September 2001, as part of its response to 9/11, the UN Security Council decided that action was required to be taken against those who committed or attempted to commit terrorist acts or facilitated their commission. It adopted United Nations Security Council Resolution (UNSCR) 1373(2001). The preamble to this Resolution recognised the need for states to complement international co-operation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism. In paragraph 1 it was declared that the Security Council had decided that all States shall:

- a) Prevent and suppress the financing of terrorist acts;
- b) Criminalize the wilful provision or collection ... of funds by their nationals or in their territories with the intention that the funds should be used ... to carry out terrorist acts;
- c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled ... by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities...; [and]
- d) Prohibit their nationals or any persons and entities within their territories from making funds, financial assets or economic resources or financial or other related services available ... for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled ... by such persons and of persons and entities acting on behalf of or at the direction of such persons.

4. Paragraph 2 declared that the Security Council had decided that all States shall, among various other measures—

- a) “(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- b) (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice.... “



5. The UK Government implemented these provisions by introducing an Order in Council: the *Terrorism (United Nations Measures) Order 2001* (“T Order 2001”). These provisions, although still partly still in force, have been superseded by the T Order 2006 and T Order 2009. Both subsequent measures were also introduced as well by Order in Council. In oral submissions to the Supreme Court on 26th January 2010, HM Treasury indicated that 25 persons remain designated pursuant to the 2001 Order, with 13 pursuant to 2006 Order and a further 21 pursuant to the 2009 Order.

6. In *Ahmed & Others [2010] UKSC 2* the Supreme Court quashed the Terrorism Order 2006. Only the 2006 Order was before the Court, however, the Court also indicated that had the 2009 Order been before it, it would have quashed this measure as well. The Court’s reasoning would apply equally to the 2001 Order.

7. In quashing the T Order 2006, the Supreme Court was keen to highlight that “[n]obody should form the impression that in quashing the TO ... the Court displaces the will of Parliament. On the contrary, the Court’s judgment vindicates the primacy of Parliament, as opposed to the Executive, in determining in what circumstances fundamental rights may legitimately be restricted [para [157] per Lord Phillips].”

8. The Court made clear that given the oppressive nature of the Order, if such legislation were required it had to be passed by an Act of Parliament and not the Executive. As the Court stressed, Parliament is sovereign and can interfere as it wishes with individual rights, but it must do so in clear and unambiguous language and be prepared to accept the political consequences. Lord Hope thus held:

“The consequences of the Orders that were made in this case are so drastic and so oppressive that we must be just as alert to see that the coercive action that the Treasury have taken really is within the powers that the 1946 Act has given them. Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty” [para 6].

9. Following the quashing of the T Order emergency measures were introduced in the Terrorist Asset Freezing (Temporary Provisions) Act 2010 to maintain the asset freezing regime enacted by the T Orders 2001, 2006 and 2009 until 31 December 2010.

10. The Government is now proposing to introduce the new Act to bring into force an asset freezing regime in almost identical terms to the current temporary provisions.

### ***The operation of T Order regimes***

The principle features of the proposed asset freezing regime in the Bill (which are almost identical to the regime which has been in place since 2001) are:

- a) The measures are potentially indefinite.
- b) The designation is notified to the world at large
- c) There is no necessary connection between designation and suspicion of involvement in terrorist fundraising or financing.

- d) Once designated, it is a criminal offence, for any person to make funds (of any amount and with no de minimis level) and economic resources available to the designated person and for the person so designated to deal with any funds whatsoever. This includes all payments to the designated person of welfare benefits and wages.
- e) Designated persons are granted licences by the Treasury to enable them (and their families) to receive payments for their daily living expenses. The operation of the licences is such that designated persons must account for all their expenditure, including the provision of receipts for daily transactions such as their household shopping. Literally every penny they spend must be reported to the Treasury and a receipt provided. Those receipts are then checked by the Treasury to make such every penny is accounted for. Failure to comply with licence conditions is a criminal offence.
- f) Information relied on by the Treasury in making the decision to designate cannot be withheld from the designated individual using Special Advocate procedures and the designated person may never fully know the case against them.
- g) There is no requirement to consider prosecution prior to making the designation.

12. The operation of these regimes, in the words of Sedley LJ (Court of Appeal) effectively creates “Prisoners of the State”. Lord Hope described these measures as “drastic” and “oppressive”. All economic activity, however small, is monitored by the Treasury. Lord Brown’s judgment was that:

“the draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated. Construe and apply them how one will ... they are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing.”

13. The result of designation is that individuals are not permitted to any cash at all without a licence from the Treasury, so some are then permitted access to £10 others are not permitted any cash at all. And every month the designated person must provide the Treasury with a receipt for everything spent down to a pint of milk or bar of chocolate.

### ***Is the legislation necessary to implement UNSCR 1373/01?***

14. The rationale behind introducing the measures is that it is necessary to do so for the UK to comply with its international treaty obligations in relation to UNSCR 1373/2001.

15. UNSCR 1373/01, unlike other UNSCR’s, is a general exhortation calling UN member states to put in place measures to prevent financing and preparation of any acts of terrorism (as detailed at paragraph 1 above). Provided the UK has legislation dealing with the provisions identified by UNSCR 1373/01 it does not need further legislation to meet its obligations. There already exists a significant range of statutory measures to deal with the funding of terrorism, such that arguably the UK is already compliant with 1373/01. It would also be pertinent to consider how other countries have responded to UNSCR 1373/01. The Supreme Court in *Ahmed* considered legislation in Canada, Australia and New Zealand. Consideration could be given to the way other countries, and in particular

other EU countries, have responded to UNSCR 1373 to examine whether they considered they needed further legislation.

16. UK measures already dealing with funding of terrorism and which remain in force and unaffected by the judgment in *Ahmed & others* are:

- **The Terrorism Act 2000, ss14- 19**, criminalises the use of funds or other property for purposes connected to terrorism. An offence under this provision is punishable with up to 14 years in prison.
- **The Anti-Terrorism, Crime and Security Act 2001** (“the ATCSA 2001”); ATCSA 2001 Part 2 makes provision for “freezing orders” to be imposed on terrorists and others. ATCSA 2001 permits “freezing orders” to be made if the Treasury reasonably believes that “action constituting a threat to the life or property of one or more nationals has been or is likely to be taken by a person or persons” (s. 4(2)), and the person or persons referred to are resident outside the UK (s. 4(3)). Pursuant to s. 5, the effect of making a freezing order is that anyone in the UK is prohibited from making funds available to a person whom the Treasury reasonably believes has taken, or is likely to take, action referred to in s. 4, or anyone whom the Treasury reasonably believes has provided or is likely to provide assistance directly or indirectly to such a person. Such a freezing order lasts for two years (s.8) and the Treasury has a statutory obligation to keep the order under review (s.7). All the individuals designated pursuant to the TO 2006 and considered in the *Ahmed* litigation could, if the Treasury’s suspicions about them were correct, have been subject to ATCSA freezing orders. No explanation was given as to why this power was not used.
- **The ATCSA 2001, part 1—Forfeiture of Terrorist Cash**; Part 1 confers powers on police officers to freeze and ultimately seize cash which “(a) is intended to be used to be used for the purposes of terrorism; (b) consists of resources of an organization which is a proscribed organization, or (c) is, or represents, property obtained through terrorism.” These powers are exercisable in relation to any cash whether or not any proceedings have been brought for an offence in connection with the cash. An officer may seize this money where he or she has reasonable grounds to suspect that the money is terrorist cash, however, this is only during the period of investigation. Should an officer wish to apply for forfeiture of the cash, they must satisfy a court on the balance of probabilities that the money is terrorist cash.
- **The Prevention of Terrorism Act 2005 (“Control Orders”)**; The Secretary of State may make a control order against an individual if he—(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.

Control orders provide wide-ranging and flexible powers which can include restrictions on where someone lives, restrictions in respect of their work or business, control over their association and communication with others and control over their movements; and requirements in relation to premises searches, provision of information and reporting.

- **Proceeds of Crime Act 1998**— this procedure operates in a similar way to that of the ATCSA forfeiture provisions, in that an officer may seize and ultimately apply for forfeiture of property from the proceeds of crime or which is intended to be used for unlawful conduct. The power arises in relation to any property including cash, whether or not any proceedings have been brought for an offence in connection with the property. The court must be satisfied on the balance of probabilities before final forfeiture is ordered.

### *Indefinite duration of asset freeze*

17. Clause 4 of the Bill provides that the designation can be renewed annually for an indefinite period. This means that an individual can be subject to asset freezing measure and to the associated intrusive supervision indefinitely, without ever being guilty of any criminal offence without the need to make ultimate finding about to the criminal standard about whether the subject of the sanction actually ever was or is involved in terrorism. It is notable that many of those subject to the provisions of the T Orders were never charged with any criminal offence and in some cases were never interviewed by police in relation to the suspicions against them.

18. The Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism [A/HRC/12/22] 2 September 2009 examined the human rights implications of the asset freezing measures adopted by States to give effect to UNSCRs. The report states:

“The practice of listing and de-listing individuals and groups as terrorist and associated entities may seriously impact on a number of internationally protected human rights, as increasingly recognized by a number of regional and national courts.” [para 40]

19. In relation to concerns about the duration and indefinite nature of the asset freeze which some states have introduced the report notes:

“Because individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent which, in turn, may amount to criminal punishment due to the severity of the sanction. This threatens to go well beyond the purpose of the United Nations to combat the terrorist threat posed by an individual case. In addition, there is no uniformity in relation to evidentiary standards and procedures. This poses serious human rights issues, as all punitive decisions should be either judicial or subject to judicial review.” [para 42]

20. In the recent judgment of the General Court in *Kadi –v– European Commission* [T-85/09] 30 September 2010, dealing with the lawfulness of the asset freeze imposed by European Council Regulation 881/2002 to give effect in European Law to UNSCR 1267 the Court expressed concerns about the duration of asset freezing measures, and, where such measures had such a marked and long lasting effect, whether the measure could still be classified as precautionary rather than as confiscatory. The Court’s view was that:

“Such measures are particularly draconian for those who are subject to them. All the applicant’s funds and other assets have been indefinitely frozen for nearly 10 years now and he cannot gain access to them without first obtaining an exemption from

the Sanctions Committee. At paragraph 358 of its judgment in *Kadi*, the Court of Justice had already noted that the measure freezing his funds entailed a restriction of the exercise of the applicant's right to property that had to be classified as considerable, having regard to the general application of the measure and the fact that it had been applied to him since 20 October 2001. In *Ahmed and Others* (paragraphs 60 and 192), the UK Supreme Court took the view that it was no exaggeration to say that persons designated in this way are effectively 'prisoners' of the State: their freedom of movement is severely restricted without access to their funds and the effect of the freeze on both them and their families can be devastating.

It might even be asked whether—given that now nearly 10 years have passed since the applicant's funds were originally frozen—it is not now time to call into question the finding of this Court, at paragraph 248 of its judgment in *Kadi*, and reiterated in substance by the Court of Justice at paragraph 358 of its own judgment in *Kadi*, according to which the freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. The same is true of the statement of the Security Council, repeated on a number of occasions, in particular in Resolution 1822 (2008), that the measures in question 'are preventative in nature and are not reliant upon criminal standards set out under national law'. In the scale of a human life, 10 years in fact represent a substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one." [paras 149-150]

21. The indefinite nature of the asset freeze calls into question whether the measures are genuinely preventative, rather than punitive, and whether they might amount to a de facto confiscation, in circumstances where there is no requirement to prove to the criminal standard that the assets in question were to be used for terrorist purposes, nor that there was any wrong-going by the subject of the asset freeze.

### **Publication of designation to the world at large**

22. Clause 3 of the Bill proposes that when someone is designated the Treasury must take steps to publicise this generally. This is a new and significantly different provision from that contained in the T Order 2006. Previously on designation the Treasury had a power to decide whether to notify the world at large about a designation or whether only to notify certain people. This allowed the Treasury to take a calibrated and proportionate approach to notification, dependent on the circumstances of each individual and what was necessary in their case. Publication that someone has been designated on the basis that they are suspected of involvement in terrorism will have a seriously detrimental impact on their reputation, their privacy and family life. Those who access that publicly available information will not necessarily be aware that nothing has been proven against the named individual nor that the individual might strenuously deny the allegation. The damage and stigma of publication is likely to be significant.

23. Under the T Order 2006 in a number of cases the Treasury only notified financial institutions and relevant Government departments (e.g. those paying benefits) that someone was designated, as these were the only steps necessary to implement and monitor

the asset freeze and no further publication was necessary to achieve the stated aim of preventing terrorist financing. Wider publication of someone's designation was not necessary and was therefore not proportionate or justifiable.

24. The new measure provides that in all cases a designation will be made public unless once of a number of limited exceptions applies, none of which permit consideration of the rights of the individual nor what is proportionate in that case. There is no obvious need for the Treasury to now be given wider powers to publicise a designation where the experience of the T Order is that the aims of the scheme can be met without it. Publication of an unproven allegation of involvement in terrorism to the world at large will have serious and possibly irremediable effects on those designated and their families. This could lead to someone losing their job, their reputation and standing, their professional status, to harassment and vilification. These consequences are akin to the effect, and intention, of criminal punishment, and may only be justified where necessary and proportionate to achieve the aims of the asset freezing scheme. A more limited publication scheme means that, where someone is ultimately found not to meet the criteria for listing or is shown not to be involved in terrorism, their designation can be revoked and they can resume their life without having unnecessary damage to their private, professional or family life.

25. It is likely that if the provisions are enacted as currently proposed they will be susceptible to legal challenge as violating Art 8 ECHR.

#### ***Requirement to consider prosecution***

26. The draft legislation does not require that consideration be given in advance of designation as to whether it is possible to prosecute the proposed designee under criminal provisions. In Control Orders (pursuant to s8 Prevention of Terrorism Act 2005), consideration must be given as to whether there can be a prosecution. The decision not to prosecute may be justified on the basis that evidence cannot be disclosed openly to the designated person for reasons of national security e.g. information is collected from telephone intercepts or from informants whose identities they do not wish to disclose for operational reasons).

27. There is no obvious reason why, as with Control Orders, consideration should not be given to prosecution prior to designation. When Control Orders were introduced Parliament recognised that applying such intrusive measures against persons in circumstances where information justifying the measures would be withheld from the controlled person, should be a measure of last resort. Any move away from prosecuting individuals (where, of course, they are told the case against them and are properly able to defend themselves and face the proper consequence if they are not) should only occur where absolutely necessary.

#### ***Necessity of link between designating individuals and allegations of fundraising***

28. The proposed legislation is justified on the basis that it is required to give effect to those parts of UN SCR 1373/01 that seek to prevent the funding of terrorism. However, there is currently no requirement that designation be applied to those who are alleged to be involved in financing terrorism. Indeed, the only requirement the Treasury has to satisfy before applying these measures is that they reasonably believe that someone is, or has been,

involved in terrorism and that such measures are necessary to protect the public from a risk of terrorism. There is no necessary connection between financing terrorism and designating a person under the T Order and individuals can be designated where they are suspected of activity with no financial connection.

29. Once someone is designated all their funds are frozen, from whatever source. There is currently no necessary link between the funds frozen and the suspicion or risk that they might be intended for terrorist purposes.

30. To give effect to UN SCR 1373/01, and to use it as the justification for the legislation, there should be a legislative connection between designating individuals and freezing funds, and terrorist financing. Otherwise, the measures give the State power to monitor and regulate the lives of individuals where there is no indication that their funds or assets might be used for terrorist purposes. That could not have been the purpose envisaged by the Security Council.

### *Asset freezing measures as another form of control order*

31. The measures as they appeared in the T Order 2006 and as they are currently proposed, go much further than freezing the assets of terrorists. The proposed legislation applies a system of control directly to individuals suspected of terrorism. As Lord Brown noted in *Ahmed*, the regime is essentially another kind of control order in that it severely restricts almost every aspect of daily life for those designated and their families. The measures not only freeze all the current assets of a designated individual but all their future assets and income. Designated persons are not permitted to receive any funds whatsoever (even those derived from entitlement to welfare benefits) without permission and regulation from the Treasury. They cannot access cash (or only very small amounts pursuant to a licence). All their financial and economic activity, however mundane or domestic, and however small, is subject to supervision and control.

32. To date much of the operation of the regime has also proven to be highly uncertain and very difficult to apply in practice. Individuals are permitted by licences to spend their benefits only on “basic expenses.” Numerous problems have arisen to determine whether, for example, a pair of trainers are a “basic expense” or whether an Oyster Card is an “economic resource”. A great deal of correspondence between the lawyers representing those designated and the Treasury has been required to determine these kinds of daily issues. If the regime is essentially re-enacted, the same problems with no doubt arise.

33. Consideration might also be given to the costs of administering the regime, in particular the costs of publicly funded lawyers and Treasury employees dealing with all of the day-to-day problems that the regime throws up and Treasury employees scrutinising each month how individuals with very small incomes spend every penny of that income (as far as we are aware the majority of those subject to financial sanctions receive state benefits). This has nothing to do with preventing the funding of terrorism and arises because of the way in which the regime is structured, focusing as it does not on assets that it is suspected are to be used for terrorism but on every aspect of an individual’s finances.

34. Given the significant legal and practical difficulties that have been generated by the control order regime and the extensive litigation which has resulted, careful thought is

required as to whether it is desirable to have yet another regime in circumstances where, as described above, other legislation already meets the obligations of UNSCR 1373.

*12 October 2010*

## **5. Written Evidence from the Equality and Human Rights Commission, to the Committee, 12 October 2010**

### **Equality and Human Rights Commission submission to the Joint Committee on Human Rights**

#### ***Legislative scrutiny priorities for 2010-11***

##### ***Terrorist Asset-Freezing etc Bill***

The Commission considers the Terrorist Asset-Freezing etc Bill, in its current form, is likely to fail to comply with the provisions of the Human Rights Act 1998. As such, the Commission considers there is a significant risk that the regime, if passed into legislation, could be subject to a successful challenge in the courts.

In particular, the Commission is concerned that the threshold for designating a person (Clause 2)—that of reasonable grounds for suspecting a person is or has been involved in terrorist activity, is too widely drawn and in excess of that required by the United Nations (UN).

Although the Commission welcomes the inclusion of an appeal regime against designation (Clause 22), we consider the current proposals are unlikely to provide sufficient safeguards to enable the regime to be compliant with the European Convention on Human Rights (ECHR).

The Commission recommends a review of the entire terrorist asset freezing regime, with a view to the introduction of one overall piece of legislation that is compliant with human rights standards.

#### ***Clause 2: Treasury's power to designate persons***

Clause 2 provides that the Treasury may designate a person if there are reasonable grounds for suspecting that the person is or has been involved in terrorist activity and it is necessary for the purpose of protecting the public from terrorism to apply financial restrictions.

#### ***Commission's position***

The Commission recognises the duty on governments to protect public safety and accepts that circumstances might arise where specific measures are required to address the threat to the public.

However, the Commission is concerned that the threshold for designating a person, that of reasonable grounds for suspecting a person is or has been involved in terrorist activity, is too widely drawn and lower than that required by the UN.



In particular, the Commission considers the low threshold of proof for actions by the executive, and the lack of adequate safeguards; including limited provision for judicial review, mean the measures risk being found in breach of the ECHR.

Given the serious interference with people's personal lives designation can cause, it is for the Government to show that the powers they seek are strictly necessary, and proportionate to the harm addressed.

### **Evidence**

The test of reasonable suspicion that a person is or has been involved in terrorist activity is significantly lower than the standard required by UN resolution 1373, which only requires the freezing of funds of those who commit or attempt to commit acts of terrorism.

The impact of the terrorist asset freezing regime is significant, both on the individual concerned, and their family, including partners and children. They have no access to financial resources apart from that allowed by the executive. This can severely restrict freedom of movement, ties with other family members and friends, social life and employment opportunities.

In the Ahmed judgement, Lord Hope stated that:

“It is no exaggeration to say ... that designated persons are effectively prisoners of the State .... Their freedom of movement is severely restricted with out access to funds or other economic resources and the effect on both them and their families can be devastating”; and that the orders “strike at the very heart of the individual’s basic right to live his own life as he chooses”.<sup>1</sup>

### **Solution**

In principle, terrorist asset freezing should only occur where a person has been convicted, or arrested then charged, with a terrorist offence. Only in exceptional circumstances should an order be available on the basis of reasonable suspicion, as an interim measure, to be reviewed, and for a fixed period, with a view to arrest or charge occurring.

The Commission recommends moving to a test of having been convicted of terrorism or attempted terrorism and related offences. Provision could be put in place for interim asset freezing for those arrested and charged pending conviction.

The Commission considers this would more closely reflect the UN criteria, and be more proportionate and more likely to be compliant with the Human Rights Act 1998.

The Commission would also suggest that an initial order to designate should be made by a judicial hearing, inter parties, rather than a by a decision by the executive, with a provision for making ex parte applications to a judge in urgent cases.

### **Clause 22 and 23: Review of decisions by the court**

Clause 22 provides for the inclusion of an appeal regime against designation.

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<sup>1</sup> Ahmed at 60

Clause 23 allows for the use of closed proceedings and special advocates in the review proceedings.

### **Commission's position**

The Commission welcomes the inclusion of an appeal regime against designation. However, the Commission considers the appeal regime and the safeguards in its current form inadequate, and unlikely to provide sufficient safeguards to enable the regime to be compliant with ECHR rights.

The Commission is concerned that there is no appeal procedure for those designated by virtue of being on the European Union (EU) Council list. The Commission considers the lack of such an appeal procedure is likely to breach Article 6 of the Convention<sup>2</sup>. The Commission recommends the judicial procedure also applies to those designated by virtue of the EU list.

Clause 23 allows for the use of closed proceedings and special advocates in the review proceedings. There are substantial concerns with the fairness of this procedure and the ability of applicants to effectively participate in the proceedings.

### **Evidence**

The power to designate is made initially by the Treasury, rather than by a court, with only limited provision for review. However this is only a limited form of review and provided on the basis of the principles of judicial review—i.e. whether a decision was reasonable, rather than a full review of the merits of the decision.

As the Supreme Court identified in *Ahmed*, seizure of terrorist assets engages human rights, in particular the right to property under article 1 of the first protocol of the European Convention, the right to private and family life under Article 8 and the right to a fair trial and access to the court under Article 6.

The use of special advocates in relation to control orders has been subject to concern, and litigation. The case of *AF*<sup>3</sup> confirmed the jurisprudence of the European Court of Human Rights that the substantive fair trial procedural guarantees under Article 6 of the Convention required that the person subject to a control order must have sufficient information about the allegations against them to be able to effectively instruct their special advocate.

Despite this judgement, the Joint Committee on Human Rights (JCHR) considered that the process “gives rise to a serious inequality of arms” and “creates the risk of serious miscarriages of justice”<sup>4</sup> In particular, the JCHR drew attention to continuing difficulties despite the ruling in *AF*, including late disclosure of closed material to the special advocate, limitations on the ability of the special advocate to communicate with the control officer,

2 See *Kadi, Kadi & Al Barakaat (joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi & Al Barakaat International Foundation v Council & Commission* in which the ECJ considered lack of a proper review procedure rendered the listing in breach of fundamental rights of fair trial and effective judicial review.

3 *Secretary of State for the Home Department v AF* [2009]2 WLR 423

4 Human Rights Joint Committee - Ninth Report Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010

limitations on the special advocates access to independent and expert evidence and limitations on the special advocates ability to effectively test the governments objections to disclosure of closed material.

### **Solution**

The Commission would recommend that the initial designation of a person should be by way of an inter parties application to the court, rather than a function of the executive.

The Commission notes that in respect of individuals subject to asset freezing due to designation on the EU list no such appeal applies. In effect, this means that once a person has been designated by the EU they have no means to appeal and have reviewed such designation.

In principle this cannot be correct, and we consider that application for the terrorist asset freezing regime to such individuals without access to effective review is likely to breach Article 6 of the ECHR.

We recommend that designation of such individuals be subject to a similar judicial process as other non EU list individuals.

The Commission is aware that this Bill is only one of a number of statutory regimes in relation to terrorist assets. The Commission is also aware that there are outstanding cases and judgments in relation to the human rights compliance of the UN and EU listing regimes<sup>5</sup>.

However, the Commission recommends a review of the entire terrorist asset freezing regime, with a view to the introduction of one overall piece of legislation, compliant with human rights standards.

### **DNA database and fingerprints**

The Government has proposed to introduce new legislation to restrict the scope of the DNA database and to give added protection to innocent people whose samples have been stored by adopting the protections of the Scottish model for the DNA database. The proposals are most likely to feature in the forthcoming Freedom (Great Repeal) Bill.

The Commission welcomes this development in principle. It is more likely to lead to a system that is compatible with Article 8 of the European Convention on Human Rights following the judgment in *S and Marper v UK* [2008].

However, the Commission would wish to see retained the provision under the Crime and Security Act 2010 that, if brought into force, would require all DNA samples to be destroyed once a profile has been obtained and in any event no later than 6 months.

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<sup>5</sup> *Kadi supra*, and *A, K, M, Q & G v HM Treasury* [2008] EWHC Civ 1187, now awaiting Supreme Court hearing, in relation to the UNSC regime,

In Scotland, unless someone is convicted of a crime, DNA samples and profiles can only be retained from those arrested for violent and sexual offences, and only then for 3 years with the prospect of 2 yearly renewals on police application to court.

This is far more proportionate than the existing law in England and Wales, which allows for indefinite retention following arrest for any offence. It is also more proportionate than amendments passed earlier this year (although not yet in force) under the Crime and Security Act 2010, which allows for retention for 6 years for adults.

The Commission does not think that the current law or the framework for destroying DNA profiles under the Crime and Security Act 2010, fully address the European Court of Human Rights' (ECtHR) judgment and that the UK may still be in breach of Article 8.

The Commission has previously expressed concerns about the lack of independent review of decisions to retain DNA profiles in England and Wales, as has the Council of Europe's Committee of Ministers, which has responsibility for ensuring implementation of ECtHR judgments. The Crime and Security Act 2010 did not address this issue despite these concerns being raised prior to it being passed.

The House of Lords Constitution Committee expressed concern that the national DNA database was not subject to a single statute and recommended that the Government introduce legislation to reassess the length of time information was kept and to provide a regulatory framework for the database.<sup>6</sup> The extent to which the Freedom Bill will address these concerns is yet to be determined.

### ***Review of counter-terrorism and security powers***

The Commission anticipates the findings and recommendations of the review of counter-terrorism and security powers will feed into the proposed Freedom (Great Repeal) Bill. The Commission will provide the JCHR with a response to the Bill when it has been published. Until such time, the Commission would like to share a summary of its response to this review.

The Commission welcomes the aims of the Government's review of counter-terrorism and security powers to ensure that such powers are necessary, effective and proportionate and meet the UK's international and domestic human rights obligations.

However, the Commission recommends there should be a fuller review of counter-terrorism powers and legislation, to assess their compliance with equality and human rights standards and legislation, and their impact on good relations. Such a review could consider whether there is a need for consolidation of the current laws within a single counter-terrorism statute.

### ***Control Orders***

While the Commission recognises the security needs to monitor certain individuals, the Commission questions whether the control order regime should continue and

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<sup>6</sup> Constitution Committee second report: Surveillance: Citizens and the State, House of Lords 21 January 2009 pp 212.

recommends that serious consideration is given to alternatives, including the use of intercept evidence to enable prosecutions, and the use of surveillance.

Many of the concerns around control orders might be met if intercept evidence were available, enabling either better disclosure of the case against a controlee to occur, or preferably the usual course of the criminal law to take place with prosecution of those where there is evidence of committed terrorist acts. If this were to occur, then it is likely there would be a reduced need for control orders.

The Commission awaits the outcome of the inquiry into intercept evidence, and calls on the Government to further consider this issue.

Another alternative to control orders is keeping individuals under enhanced surveillance. The Commission refers to the comments of the Joint Committee regarding the respective cost of surveillance to the control order regime.

It may be that keeping individuals under intense surveillance would meet the security requirements currently met by control orders. Such surveillance, if lawfully executed, would not require formal court proceedings or control orders, providing of course it was necessary and proportionate within Article 8 of the Convention.

The Commission requests that the review considers current and past control orders and security needs, and gives intense consideration as to whether these could be met by enhanced surveillance, without the need for the control order regime.

#### ***Section 44 Stop and Search Powers***

The Commission welcomes the announcement by the Home Secretary that guidance would be issued to police removing the provisions for stop and search of an individual under s.44, and requiring s.44 stops of vehicles to be subject to reasonable suspicion.

As a basic tenet of civil liberties, and human rights law, the power to stop and search an individual should be based on reasonable suspicion. Any departure from this principle must be based on the need to address an immediate terrorist threat to a particular event or location and should be narrowly proscribed, in terms of duration, geographical extent, and based on specific information to that threat, location and timing.

The Commission's research into the effect of counter-terrorism powers however reflects concerns beyond the operation only of s.44 to wider concerns as to how general stop and search powers are used, and their effects on the individual and communities concerned.

The interim findings of the research appear to indicate that for most Muslims the most common experience of policing and policy relating to counter-terrorism when walking in streets of their neighbourhoods related to being stopped and searched by the police. Most Muslims in the discussion groups either had direct experience of being stopped and searched, had close friends and family that had been or had witnessed the police carrying out stops in their local area.

Key objections related to the negative feeling that arose from perceptions that individuals were being stopped because of their religion or race. This occurred particularly where

individuals had been stopped several times in the course of the previous 12 months. The public visibility of stops in the street contributed to this negative feeling.

These concerns are further supported by the Commission's research into the disproportionate use of stop and search against ethnic minority communities.<sup>7</sup> The report found that a black person was at least six times more likely to be stopped and searched by the police in England and Wales as a white person, and an Asian around twice as likely to be stopped and searched as a white person.

The Commission is concerned regarding the disproportionate use of stop and search powers generally, and is considering enforcement action against particular forces under the Race Equality Duty.

The Commission is also concerned regarding the use of stop and search powers at ports and airports under Schedule 7 of the Terrorism Act 2000. Under this Act, stops, searches, questioning and detaining of a person for up to 9 hours can occur without reasonable suspicion.

Amongst community and civil society organisations, there is concern also about the lack of knowledge and understanding of the rights individuals have when they are stopped at airports. Other concerns focus on the lack of adequate data on the numbers stopped and profile of those who were being stopped.

The Commission, in its submission to the Department of Transport on the Interim Code of Practice for the use of body scanners at airports, has previously raised its concerns regarding the use of such powers at airports, and their disproportionate impact on certain communities.<sup>8</sup>

The UN Human Rights Committee also expressed its concern regarding the use of stop and search, and in particular the use of racial profiling in the exercise of stop and search powers and its adverse impact on race relations. The Committee recommended review of the use of stop and search powers to ensure they were exercised in a non-discriminatory manner<sup>9</sup>.

The Commission is also concerned regarding the Government's proposals to "lessen the burden" of stop and search recording. Recording of both stop and search, and stop and account, is crucial to ensuring proper use and accountability by the police of these powers.

The Commission calls on the Government to ensure that any changes to stop and search and stop and account recording continues proper and full recording of this information. The Commission further urges that training and other steps to ensure appropriate and proportionate use of stop and search is carried out.

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7 Stop and Think; Equality and Human Rights Commission, 2010

8 <http://www.equalityhumanrights.com/legal-and-policy/consultation-responses/department-for-transport-consultation-code-of-practice-for-the-acceptable-use-of-advanced-imaging-technology-in-an-aviation-security-environment/>

9 CCPR concluding observations *supra*

### *Detention before charge*

The Commission welcomes the statement given by the Home Secretary in the Government's recent renewal of the 28 day pre-trial detention provision, in particular her indication that she felt a period of 14 days pre-trial detention would be more appropriate.

The Commission would support a reduction to 14 days, and would recommend that this should remain subject to annual renewal by Parliament, and assessment by the Crown Prosecution Services as to whether it continues to be necessary in light of the nature of the terrorist threat.

The Commission believes that long periods of pre-charge detention raise serious matters of principle and practice. As a matter of principle, extended periods of pre-charge detention are contrary to human rights and British constitutional history and values. Starting with the Magna Carta to the present laws, the individual has been granted and enjoys the following fundamental rights:

- i. Liberty
- ii. Protection against unlawful imprisonment
- iii. Presumption of innocence
- iv. The right to be told promptly of the reasons for arrest and charge
- v. Non-discrimination and equality

The Commission previously obtained counsel's advice on the legality of proposals to increase the maximum period of detention to 42 days. We were advised such proposals were likely to be unlawful in that they would breach Articles 5, 6, 14 and potentially 3 of the ECHR.<sup>10</sup>

While counsel's advice was obtained in relation to the proposal for 42 days, the principles apply to any extended period of pre charge detention.

Finally, the Commission also considers that the use in criminal proceedings of evidence gathered during extended periods of pre-charge detention may well engage Article 6 of the Convention (which safeguards the right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time and the presumption of innocence).

Clearly the longer the extended period of pre-trial detention, the more likely it is that the measures will be necessary and proportionate, and the associated guarantees are sufficient to ensure compliance with the Convention.

If terrorism matters were dealt with within the usual criminal process in usual circumstances there would be a maximum period of pre-trial detention of 4 days. This is similar to elsewhere including in the US (2 days) Canada (1 day) and Germany, (2 days), while Spain allows detention of up to 5 days, and France 6 days. It would also be in

10 <http://www.equalityhumanrights.com/legal-and-policy/parliamentary-briefings/crime-security-policing-and-counter-terrorism-bill-briefings/counter-terrorism-bill-including-proposals-to-allow-detention-for-up-to-42-days/>

accordance with the recommendations of Lord Lloyd in his 1996 inquiry into terrorist legislation.

### ***Extension of the use of Deportations with Assurances***

The prohibition against torture and inhuman or degrading treatment is absolute. Given the real and practical problems the UK has had in establishing Memorandum of Understandings (MOUs) with a small number of States, the Commission is concerned regarding the possibility of attempts to expand the scheme.

Internationally, the UN Committee Against Torture has condemned the use of diplomatic assurances. In a recent case of *Agiza v Sweden*<sup>11</sup> and most recently the UK Court of Appeal has held that the MOU with Libya did not reduce the risks of torture to levels, which would not infringe article 3 of the European Convention on Human Rights (equivalent of article 7 of the International Covenant on Civil and Political Rights).<sup>12</sup>

The Commission is particularly concerned regarding the adequacy of the human rights record, and commitments of States where MOUs are likely to be sought; the ability and adequacy of any monitoring regime subsequent to an individual's return, and the ability of the UK to ensure that States, and those within a State that are responsible for holding an individual in detention abide by the terms of the MOU.

By way of example, the Commission refers to the evidence given in the recent case reviewing transfer of detainees to the National Directorate of Security in Afghanistan under an MOU.<sup>13</sup> The Commission reiterates the requirement that any MOU must reduce the risks of torture to such a level that will not infringe Article 3 - the Courts undoubtedly will subject any future MOUs to scrutiny to ensure this.

### ***Use of RIPA by local authorities and access to communications data generally***

The Commission welcomes the current proposals for reform of the use of powers under the Regulation of Investigatory Powers Act (RIPA) 2000 by local authorities. In particular, the Commission considers that restricting the use of RIPA powers to serious offences is more likely to render such use proportionate.

Similarly, requiring prior judicial authorisation by a magistrate, will provide greater independence and oversight, and improve article 8(2) compliance. However, the Commission considers there is a need for wider reform of RIPA, and privacy protections in general.

A key objective of such a review would be to simplify the legislation, which is a complex and unwieldy legislative regime and has been described as 'puzzling' and 'perplexing'.<sup>14</sup>

The Commission has previously expressed its concern over this issue in its response to the Home Office consultation on the Regulation of Investigatory Powers Act 2000 (RIPA) and the associated Codes of Practice.

11 CAT/C/34/D/233/2003, 20 May 2005

12 *AS (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289

13 *The Queen (on the application of Maya Evans) v. Secretary of State for Defence* [2010] EWHC 1445 (Admin)

14 Lord Bingham in *Attorney General's Reference (No 5 of 2002)* [2004] UKHL 40 para 9



In that response the Commission noted:

- The basis for lawful surveillance activity' should emphasise that the necessity for each and every use of a RIPA surveillance power must be clearly and unambiguously established, and its scope strictly confined to the requirements of the investigatory aim it pursues. It would be helpful to set out clearly the requirements that must be satisfied before any interference with the right to privacy can be justified. That is, firstly it must be in accordance with the law, secondly it must pursue a n identified legitimate aim,<sup>15</sup> and thirdly it must be necessary and proportionate.
- The Commission notes the Chief Surveillance Commissioner has previously stated that there has been a "serious misunderstanding of the concept of proportionality".
- The Commission notes the comments of Baroness Neville Jones<sup>16</sup> that RIPA powers for local authorities should be restricted to serious offences. Such restriction is more likely to render the use of RIPA powers proportionate within Article 8(2).
- The Commission considers the greater the independence of the bodies or officials that authorise and review the use of covert methods, the greater the likelihood that the regulatory regime will satisfy the requirements of Article 8(2).
- Judicial control affords the best guarantee of independence, impartiality and a proper procedure, and the Commission would welcome proposals to place authorisation by magistrates.

The Commission has commissioned research into the protection of information privacy in the UK. The research will be published this autumn and will identify areas where privacy protection could be further enhanced, and recommend consideration of further wider reforms in this area.

The Commission notes in this context that research on perceptions of human rights conducted by Ipsos Mori found that 63% of respondents were concerned about "respect for private and family life" and 43% of respondents listed it in their top five of Convention rights.<sup>17</sup>

The Commission also notes the concerns of the UN Special Rapporteur on the promotion and protection of human rights on issues of privacy and counter terrorism.<sup>18</sup> The Special Rapporteur in his report to the United Nations Human Rights Council highlighted the erosions of the right to privacy in the fight against terrorism and made recommendations to governments in order to improve the right to privacy in the fight against terrorism.

The Commission's research on the impact of counter-terrorism measures revealed concerns around the collection, dissemination and storage of data. In relation to stops at ports and airports, some who have been stopped felt that the questions they were asked relating to their religious and political beliefs as well as the activities in communities was

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15 Most of Art 8(2) is reflected in RIPA s.28(3) and s.29(3), except for interference allowed for 'the protection of morals, or for the protection of the rights and freedoms of others'.

16 House of Lords debate on RIPA order 2010; Hansard 23 February 2010

17 Public perceptions of human rights, Ipsos Mori, June 2009,

18 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/13/37 28 December 2009.

being used to build up profiles of them and to gather intelligence in general about the community.

### ***Measures to deal with organisations that promote hatred or violence***

The Commission has a duty to work towards the elimination of prejudice against, hatred of and hostility towards members of groups protected by the equality legislation.

The Commission is concerned about the piecemeal manner in which the law on incitement to hatred is developing with differing tests. The Commission believes the Government should undertake a review of the incitement to hatred laws to ensure that it adequately and proportionately achieves the aim of limiting all forms of hate speech, in accordance with protection of the right to freedom of expression and assembly.

At the time of the passing of the Criminal Justice and Immigration Act 2008, the Commission expressed its disappointment that the government did not consider it necessary to extend legislation specifically to prohibit incitement to hatred on grounds of trans-status.

The then government pointed to a lack of evidence to support its decision. However, we believe the government failed to appreciate that hate speech about homosexuality does not usually separate orientation from gender identity.

The Commission recognises the very real harms that organisations or individuals that promote hatred or violence can cause. The Commission also recognises their rights to freedom of speech and assembly under the European Convention on Human Rights, and their importance as the cornerstone of a democratic society.

While qualified, any limitations to these rights must be necessary and proportionate. Interference with these rights can only be justified by “imperative necessities” and exceptions must be interpreted narrowly.<sup>19</sup>

The Commission notes the wide ranging counter-terrorism legislation that has already been passed in relation to this issue. This includes proscription and glorification of terrorism under the Terrorism Act 2000 and its amendment under the Terrorism Act 2006, as well as offences in relation to incitement of terrorism abroad and disseminating terrorist publications. There are also laws ensuring that public protests are peaceful.

*12 October 2010*

## **6. Letter from the Chair of the Joint Committee on Human Rights, to Lord Sassoon, Commercial Secretary, HM Treasury, 13 October 2010**

### **Terrorist Asset-Freezing etc. Bill**

The Joint Committee on Human Rights is considering the compatibility of the Terrorist Asset-Freezing Bill with the requirements of human rights law. I am grateful for the detailed human rights memorandum your Department sent to the Committee on 13

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<sup>19</sup> Gubi v Austria A 302 (1994); 20 EHRR; Informationsverein Lentia v Austria A 276 (1993); 17 EHRR 93

August 2010, setting out in detail the Government's consideration of the human rights issues relating to the Bill, and for your further letter dated 4 October explaining the reasoning behind the Government's amendments to the Bill in Committee. I am also grateful to your officials in the Bill team who recently made themselves available to meet with the Committee's Legal Adviser to discuss some of the significant human rights issues raised by the Bill.

The Committee welcomes the Government's willingness to consider the human rights issues raised during the Bill's Second Reading debate and the Government amendments to the Bill designed to improve the balance between national security and human rights in the asset-freezing regime. However, the Committee is still considering the human rights compatibility of certain aspects of the Bill and I would be grateful if you could provide me with the answers to the following questions.

### ***(1) The scale of the problem***

**Q1. How many designated persons are there currently? Please provide a breakdown of the figures according to, for example, whether the designation followed conviction, whether it followed arrest, whether the designated person is in the UK or abroad.**

**Q2. How many fresh designations have been made in each of the last two years?**

### ***(2) The breadth of the power***

The Committee welcomes the raising of the legal threshold, from reasonable suspicion to reasonable belief, as a human rights enhancing measure. However, I would appreciate some clarification of the implications of this change for the standard of proof to be applied when deciding whether to exercise the power.

**Q3. Does the requirement of "reasonable belief" in clause 2(1)(a) of the Bill mean that the Treasury must be satisfied that the relevant facts exist "on the balance of probabilities", that is, to the civil standard of proof?**

The second condition of the power, concerning the necessity of an asset-freeze, is also widely defined in terms of the Treasury's subjective consideration that financial restrictions are necessary "for purposes connected with protecting members of the public from terrorism". This is subjective and vague language which therefore widens the scope of the power.

**Q4. Will the Government consider further limiting the breadth of the power by tightening the "necessity" condition in clause 2(1)(b), for example by requiring that the Treasury must "reasonably" consider that financial restrictions are necessary "for the purpose of protecting the public from terrorism"?**

### ***(3) The right of access to court***

The Committee welcomes as a human rights enhancing measure the replacement of a right to seek judicial review by a full right of appeal against asset-freezes. I note, however, that this right of access to court still falls short of a requirement of prior judicial authorisation of asset-freezes.

**Q5. Please explain in full the Government’s justification for not requiring prior judicial authorisation of measures as draconian as final asset-freezes.**

**Q6. Please explain the rationale for not including in the right of appeal decisions to refuse, vary or revoke licences under clause 17 of the Bill.**

### ***(3) The right to a fair hearing***

In Committee I note that when asked whether the Government accepts that the principles enunciated by the House of Lords in the case of *AF* apply to asset-freeze proceedings you replied that the Government does not necessarily accept the “read-across” from the control order context to the asset-freezing context.

**Q7. Does the Government accept, in light of the decisions in *Bank Mellat* and *Kadi*, that the designated person must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations?**

**Q8. If so, will the Government ensure that the rules of court which apply to asset-freeze proceedings expressly incorporate a duty on the Treasury to disclose to the designated person, at the outset of those proceedings, sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations?**

In Committee Lord Wallace emphasised that the “starting point” must be that the individual who is the subject of an asset-freeze must be given as much information as possible, subject only to the legitimate public interest concern such as the protection of national security. Lord Wallace also said that the special advocate system and the disclosure procedure is “designed to ensure that the maximum amount of material that can be disclosed to the individual without damaging the public interest should be disclosed.”

As presently designed, however, the starting point of the legal framework is non-disclosure not fairness. The Civil Procedure Rules, for example, expressly subordinate the “overriding objective” of those rules (requiring cases to deal with cases justly) to the duty to ensure that information is not disclosed contrary to the public interest (CPR r. 79.2). The rules also impose an absolute prohibition on the open disclosure of material where the court considers that disclosure would be contrary to the public interest.

**Q9. Will the Government consider amending the legal framework to ensure that fairness, not non-disclosure, is the starting point, by, for example:**

- Requiring the Treasury to include in the written notice of designation under clause 3(1)(a) of the Bill as much information about the reasons for designation as it is possible to give consistent with the public interest in non-disclosure;
- Revoking the CPR’s subjection of the duty to deal with cases justly to the duty not to disclose information contrary to the public interest;
- Ensuring that references in the rules of court to the duty not to disclose information are qualified by reference to the right to a fair hearing; and

- Providing in the rules of court for communication between special advocates and the designated person after sight of the closed material, with the permission of the judge, obtainable without notice to the Treasury?

***(4) Parliamentary accountability***

**Q10. Why should the independent reviewer of the operation of the asset-freezing regime not be appointed by Parliament and report directly to Parliament rather than the Treasury?**

***(5) Comprehensiveness of the statutory framework***

**Q11. Why has the opportunity not been taken in this Bill to provide a comprehensive and accessible legal regime for terrorist asset-freezing, which would enable Parliament to scrutinise the whole legal framework to ensure its compatibility with human rights.**

I would be grateful if you could reply by 25 October 2010 and if an electronic copy of your reply, in Word, could be emailed to [jchr@parliament.uk](mailto:jchr@parliament.uk).

***13 October 2010***

## List of Reports from the Committee during the current Parliament

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First Report	Work of the Committee in 2009-10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535

## List of Reports from the Committee during the last Session of Parliament

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### Session 2009-10

First Report	Any of our business? Human rights and the UK private sector	HL Paper 5/HC 64
Second Report	Work of the Committee in 2008-09	HL Paper 20/HC 185
Third Report	Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report	HL Paper 184/HC 184
Fourth Report	Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill	HL Paper 33/HC 249
Fifth Report	Legislative Scrutiny: Digital Economy Bill	HL Paper 44/HC 327
Sixth Report	Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008-09	HL Paper 45/ HC 328
Seventh Report	Allegation of Contempt: Mr Trevor Phillips	HL Paper 56/HC 371
Eighth Report	Legislative Scrutiny: Children, Schools and Families Bill; Other Bills	HL Paper 57/HC 369
Ninth Report	Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010	HL Paper 64/HC 395
Tenth Report	Children's Rights: Government Response to the Committee's Twenty-fifth Report of Session 2008-09	HL Paper 65/HC 400
Eleventh Report	Any of our business? Government Response to the Committee's First Report of Session 2009-10	HL Paper 66/HC 401
Twelfth Report	Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill	HL Paper 67/HC 402
Thirteenth Report	Equality and Human Rights Commission	HL Paper 72/HC 183
Fourteenth Report	Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill	HL Paper 73/HC 425

Fifteenth Report	Enhancing Parliament's Role in Relation to Human Rights Judgments	HL Paper 85/HC 455
Sixteenth Report	Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In	HL Paper 86/HC 111