Neutral Citation Number: [2008] EWCA Civ 1187

Case No: T1/2008/1080

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Hon. Mr Justice Collins
[2008] EWHC 869 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2008

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE SEDLEY
and
LORD JUSTICE WILSON

- -

Between :

A, K, M, Q & G	**Applicants/ Respondents**
- and -	
H.M. TREASURY	**Respondent/ Appellant**

- -
- -

Mr Rabinder Singh QC & Mr Richard Hermer (instructed by Messrs Tuckers) for G
Mr Tim Owen QC & Mr Dan Squires (instructed by **Birnberg Peirce** in the case of A, K and M and **Public Law Solicitors** in the case of Q**)**
for **A, K, M & Q**
Mr Jonathan Swift, Sir Michael Wood & Mr Andrew O'Connor (instructed by the **Treasury Solicitor**) for the **Appellant**

Hearing dates:16 & 18 June 2008

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Approved Judgment

Sir Anthony Clarke MR:

Introduction

1. This is an appeal by HM Treasury ('HMT') against orders made by Collins J on 24 April 2008. The orders were made on applications in two actions, in both of which HM Treasury is the respondent. By the first order, which was made in proceedings in which G is the applicant, the judge quashed both the Al-Qaida and Taliban (United Nations Measures) Order 2006 ('the AQO') and the Terrorism (United Nations Measures) Order 2006 ('the TO'). By the second order, which was made in proceedings in which A,K,M and Q are the applicants, the judge again quashed the TO. In each case HMT was ordered to pay costs but the orders were stayed pending the hearing of an appeal, which the judge gave HMT permission to bring. The judge further made an order in each case that the applicants should be granted anonymity and that no report of the proceedings should directly or indirectly identify any of them or any member of their families.

2. The judge quashed each Order on the ground that it was *ultra vires* and unlawful. In the case of each Order the central issue in this appeal is whether the judge was correct so to hold. If he was, there is a further question, namely whether he should have quashed the whole Order.

The legal framework

The United Nations Act 1946

3. I take the description of the Orders and their *vires* largely from the judgment. Both Orders were made under powers conferred by section 1 of the United Nations Act 1946 ('the UN Act'), which provides, so far as material:

> "(1) If, under Article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty five (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order …
>
> (4) Every Order in Council made under this Section shall forthwith after it is made be laid … before Parliament."

The judge noted in [3] that, although every Order must be laid before Parliament, there is no procedure which enables Parliament to scrutinise or to amend it, although

no doubt an individual Member could seek to initiate a debate if he or she felt that an Order was unsatisfactory. The AQO and the TO were each laid before Parliament on the day after each was made and came into force on the following day. In these circumstances, although the likelihood of Parliamentary scrutiny seems more theoretical than real, I do not think that it is possible to challenge the lawfulness of the Orders on the ground that they were made *ultra vires* for lack of the possibility of such scrutiny. However, I do not understand the challenge to be advanced on this ground.

The United Nations

4. Article 41 of the Charter of the United Nations ('the UN') provides:

> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations."

As the judge observed at [4], it is necessary to read Article 41 in the context of the purposes of the UN, which, by Article 1.3, include achieving international cooperation in solving international problems and, in particular, include "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". Article 25 provides:

> "The Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Article 24 confers on the Security Council "primary responsibility for the maintenance of international peace and security". Article 39, which introduces Chapter VII, provides that it is for the Security Council to

> "… determine the existence of any threat to the peace, breach of the peace, or act of aggression and … decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security."

Article 42 deals with more positive action if action under Article 41 is or has proved inadequate. Article 103 provides:

> "In the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

5. By Article 25 Security Council Resolutions ('SCR's) create legal obligations binding on all States. We were referred to a large number of SCRs. The TO was made to

give effect to SCRs 1373 (2001) and 1452 (2002). SCR 1373 was adopted on 28 September 2001 and formed part of the Security Council's response to the attacks of 11 September 2001. Paragraph 1 "decides that all States shall:

> "(a) prevent and suppress the financing of terrorist acts;
>
> (b) criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that their funds should be used, or in the knowledge that they are to be used, in order 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 directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
>
> (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."

Paragraph 2(d) requires all States to

> "prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens."

6. It can be seen that the aim of SCR 1373 is preventative and that it is in very wide terms. HMT relies in particular on paragraph 8 of the preamble, in which the Security Council expressly recognised:

> "… the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism."

HMT correctly submits that this regime bites on direct and indirect transactions and ownership, on third party agents and entities and includes not only the commission of

terrorist acts but also attempts to commit, participation in and facilitation of such acts. The importance of compliance with SCR 1373 has since been emphasised in the preambles to SCRs 1390, 1452, 1455, 1526, 1617 and 1735.

7. The TO was also made to give effect to SCR 1452 (2002), which is also part of the regime which led to the AQO. By way of exception, it provides by paragraph 1(a) that financial assets or economic resources which have been determined by the State to be

> "(a) necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources. …"

should not be frozen. This is subject to notification to the UN Committee by the State in question of its intention to authorise access to such assets or resources and to the Committee not objecting within 48 hours. Paragraph 1(b) deals with what are described as "extraordinary expenses", but a dispensation in respect of these requires the Committee's approval.

8. The AQO derives from a number of resolutions. The starting point is SCR 1267 (1999), which was a response to the bombing of United States embassies in Nairobi and Dar es Salaam. Paragraph 4(b) requires the freezing of funds and other financial resources

> "including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need."

9. SCR 1333 (2000) provides by paragraph 8 that all States should freeze funds and other financial assets

> "of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organisation"

in order to ensure that no funds are made available directly or indirectly for the benefit of any person or entity associated with Usama bin Laden, including the Al-Qaida organisation. The Committee is requested to maintain an up to date list of

individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organisation. It is for the States and regional organisations to forward the names of persons or entities that should be designated in the list.

10. SCR 1390 (2002) provides that States must freeze the assets of those on the list maintained by the Committee and must ensure that such persons or entities cannot have made available to them any funds, financial assets or economic resources. SCR 1452 (2002) also applies to these provisions and the need to freeze the assets of those on the list was confirmed in SCR 1526 (2004).

11. Since the making of the AQO on 14 November 2006, the Security Council has issued, among others, SCR 1730 (2006), SCR 1735 (2006) and most recently SCR 1822 (2008). By the fifth preamble of SCR 1730 the Security Council stated that it was

> "Committed to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions."

SCR 1735 deals with the mechanics of listing. Paragraphs 5 and 6 provide that the Security Council:

> "5. Decides that, when proposing names to the Committee for inclusion on the Consolidated List, States shall act in accordance with paragraph 17 of resolution 1526 (2004) and paragraph 4 of resolution 1617 (2005) and provide a statement of case; the statement of case should provide as much detail as possible on the basis(es) for the listing, including: (i) specific information supporting a determination that the individual or entity meets the criteria above; (ii) the nature of the information and (iii) supporting information or documents that can be provided; States should include details of any connection between the proposed designee and any currently listed individual or entity;
>
> 6. Requests designating States, at the time of submission, to identify those parts of the statement of case which may be publicly released for the purposes of notifying the listed individual or entity, and those parts which may be released upon request to interested States;"

Delisting is dealt with in paragraphs 13 and 14, which provide that the Security Council:

> "13. Decides that the Committee shall, continue to develop, adopt, and apply guidelines regarding the de-listing of individuals and entities on the Consolidated List;

> 14. Decides that the Committee, in determining whether to remove names from the Consolidated List, may consider, among other things, (i) whether the individual or entity was placed on the Consolidated List due to a mistake of identity, or (ii) whether the individual or entity no longer meets the criteria set out in relevant resolutions, in particular resolution 1617 (2005); in making the evaluation in (ii) above, the Committee may consider, among other things, whether the individual is deceased, or whether it has been affirmatively shown that the individual or entity has severed all association, as defined in resolution 1617 (2005), with Al-Qaida, Usama bin Laden, the Taliban, and their supporters, including all individuals and entities on the Consolidated List;"

The TO

12. The preamble of the TO is in these terms:

> "Under Article 41 of the Charter of the United Nations, the Security Council of the United Nations has, by resolution 1373(2001), adopted on 28th September 2001 and resolution 1452(2002) adopted on 20th December 2002, called upon Her Majesty's Government in the United Kingdom and all other States to give effect to decisions of that Council in relation to terrorism."

By article 3(1) of the TO, a designated person is one who is identified in Council Decision 2006/379/EC as provided for in article 2.3 of Regulation (EC) No 2580/2001 or one identified in a direction made under article 4 of the TO. Neither the Council Decision nor the Regulation is relevant here because the applicants have all been designated by direction under article 4, which provides:

> "(1) Where any condition in paragraph (2) is satisfied, the Treasury may give a direction that a person identified in the direction is designated for the purpose of this Order.
>
> (2) The conditions are that the Treasury have reasonable grounds for suspecting that the person is or may be –
>
> (a) a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism;
>
> (b) a person identified in the Council Decision;
>
> (c) a person owned or controlled, directly or indirectly, by a designated person; or

(d) a person acting on behalf of or at the direction of a designated person."

As the judge observed in [9], the relevant sub-paragraph in these cases is (a). Article 5 enables HMT either to publicise the direction generally or to limit publication to particular people, normally those who would be expected to have some financial involvement with the designated person and members of his family. In G's case, there has been general publication, whereas in the other cases only particular people have been informed. It is said that some of those who have been informed are unknown to the particular applicant or have never had any financial dealings with him.

13. Article 7, which is quoted in full below, *inter alia* prohibits any person from dealing with funds or economic resources belonging to or held by a designated person. Article 7(6) defines "deal with" to mean:

"(a) in respect of funds –

(i) use, alter, move, allow access to or transfer;

(ii) deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination; or

(iii) make any other change that would enable use, including portfolio management; and

(b) in respect of economic resources, use to obtain funds, goods or services in any way, including (but not limited to) by selling, hiring or mortgaging the resources."

"Economic resources" are defined in article 2(1) to mean:

"assets of every kind, whether tangible or intangible, moveable or immoveable, which are not funds but can be used to obtain funds, goods or services."

Article 8, which is also quoted in full below, by paragraph (1) prohibits anyone from making "funds, economic resources or financial services available, directly or indirectly, to or for the benefit of' a designated person", otherwise than under the authority of a licence granted by HMT under article 11. By articles 7(3) and 8(2) it is a criminal offence to contravene any of the prohibitions in them and, by article 13(1), the offence carries a maximum of 7 years imprisonment on indictment or 12 months on summary conviction. The only defence available requires the defendant to show that he "did not know and had no reasonable cause to suspect" that he was dealing with funds or economic resources belonging to a person referred to in article 7(2) or making funds available to or for the benefit of such a person otherwise than under licence. In these circumstances the judge was right to say in [10] that the offence is one of strict liability and that the potential penalty is severe.

The AQO

14. In [11] the judge described the AQO as even more draconian. It provides by article 3:

> "(1) For the purposes of this Order –
>
> (a) Usama bin Laden,
>
> (b) any person designated by the Sanctions Committee, and
>
> (c) any person identified in a direction,
>
> is a designated person.
>
> (2) In this Part, "direction" (other than in articles 4(2)(d) and 5(3)(c)) means a direction given by the Treasury under article 4(1)."

Article 4(1) permits designation, where, pursuant to article 4(2), HMT has reasonable grounds for suspecting that the person is or may be –

> "(a) Usama bin Laden;
>
> (b) a person designated by the Sanctions Committee;
>
> (c) a person owned or controlled, directly or indirectly, by a designated person; or
>
> (d) a person acting on behalf of or at the direction of a designated person."

15. The distinction between articles 3(1)(a) and (b) and 4(2)(a) and (b) is that the latter applies if there is some issue whether the individual in question is listed. If he is listed and there is no doubt that he is indeed that person, he is automatically designated under article 3(1). G is listed and so is caught by article 3(1). This is of some importance because by article 5(4) an application to the High Court can only be made to set aside a direction given by HMT, whereas article 3(1)(b) does not involve a direction. It follows that G has no express right to apply to the High Court in respect of the freezing of assets or, in any case, the criminal offences imposed under articles 7 and 8, which are almost identical to articles 7 and 8 of the TO.

16. In his skeleton argument Mr Singh QC, who appears for G, drew attention to what he called two important distinctions between the 1267 regime and the AQO on the one hand and the 1373 and the TO on the other hand, namely that:

i) in the former the Security Council has created its own managed scheme for designating terrorists, whereas in the latter it has left enforcement at the discretion of Member States; and

ii) in the former a person is designated if the Security Council has deemed him to be Usama Bin Laden, a member of Al Qa'ida or one of their their "associates", whereas in the latter all that is required is a reasonable ground for suspicion that he "is or may be" involved in terrorist activity.

European Union law

17. Council Regulation EC 881/2002, which replaced EC 467/2001, is potentially relevant. It requires the freezing of assets of those designated by the UN Sanctions Committee and listed in Annex 1 to the Regulations. Commission Regulation (EC) No 14/2007 added G to the list in Annex 1. Article 2 requires the freezing of his assets following the provisions in the UN Resolution but, subject to the need to inform and, in the case of extraordinary expenses, to obtain the approval of the Sanctions Committee, article 2a excludes assets required to cover basic living expenses. Article 9 provides:

> "This Regulation shall apply notwithstanding any rights conferred or obligations imposed by any international agreement signed or any contract entered into or any licence or permit granted by before the entry into force of this Regulation."

That was on 28 May 2002. HMT has not relied upon that Regulation, although it might perhaps have done so on the footing that it had direct effect. The House of Lords has recently referred a question as to its true construction to the European Court of Justice ('the ECJ'): *R (on the application of M) v HMT* [2008] UKHL 26. The suggestion by Mr Kenneth Parker QC at first instance in that case, at [2006] EWHC 2328 (Admin), that HMT may have preferred to rely upon Orders made under the 1946 Act to avoid problems with the Regulation is pure speculation.

18. A challenge was brought to EC Regulations EC 881/2002 and EC 467/2001 in *Case T-315/01, Kadi v Council of the EU and the Commission*. It failed before the Court of First Instance ('the CFI') in a decision to which the judge referred at [29]. The applicant appealed. In [30 and 31] the judge quoted extensively from the opinion of Advocate General Maduro, which was critical of the decision of the CFI. Since the hearing in this court, on 3 September 2008 the Grand Chamber delivered a judgment by which it allowed the applicant's appeal, which it had heard together with an appeal brought by Al Barakaat International Foundation, (joined cases C-402/05P and C-415/05P); and we have received written submissions upon its judgment from all parties. On 19 October 2001 the applicant had been both designated by the Sanctions Committee of the UN Security Council for the purpose of SCR 1333 (2000) and added by an EC Regulation to the list of designated persons in Annex 1 to its Regulation 467/2001 (as it then was). The CFI had held that resolutions of the United Nations carried, for member states, a primacy which disabled the courts of the EU from appraising its regulations reflective of them other than up in the stratosphere by reference to the principles of j*us cogens*. The Grand Chamber held, by contrast, that the courts of the EU were able, and indeed required, to appraise the validity of community regulations reflective of all international agreements, including resolutions of the United Nations, by reference to all rights fundamental to the community. It held that, thus appraised, Regulation 881/2002, insofar as it applied to the applicant, had to be adjudged invalid in that, in particular, it made no provision for his right to challenge the Commission's addition of his name to the list of designated persons in Annex I to the regulation, with the result that his fundamental rights to be heard and to have access to an effective legal remedy had been infringed.

19. The ECJ said:

> "342. In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.
>
> 343. However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism.
>
> 344. In such a case, it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice …"

20. For in effect the same reason, namely the lack of a facility for him to "put his case", the court found that the applicant's property rights under ECHR Article 1, Protocol 1, had also been infringed. The court, however, stayed its ruling for three months in order to enable the Council of the EU, if so advised, to introduce a new regulation which would remedy the infringements which it had identified. Although the issues raised in *Kadi* as to the validity of the regulation do not directly arise in this case, I consider that the stress placed by the ECJ on the fundamental need for some mechanism for a person to be able to challenge action taken against him under an EU instrument in purported furtherance of the consequences of his designation by the Sanctions Committee is of considerable indirect significance; and, in connection of course with the AQO, I will return to the subject at [107] below.

21. Council Regulation EC 2580/2001 purports to implement SCR 1373 (2001), which was of course the genesis of the TO, but by article 2(3) does so by naming those who are covered by it on a list. Since none of the applicants is on the list it follows that none is caught by the Regulation.

The issues before the judge

22. Some time before the hearing, the judge had made a consent order setting out a number of preliminary issues for determination in respect of the TO and the AQO respectively as follows.

A. Under the [TO]

1. Is the Order *ultra vires* the United Nations Act 1946 and/or incompatible with Convention rights enjoyed under Schedule 1 of the Human Rights Act 1998 and/or unlawful by reference to the principle of legality?

2. Is it lawful to apply the Special Advocate procedure to applications under article 5(4) of the Order?

3. Where a party is challenging a designation pursuant to article 5(4), is the burden of proof on the Applicant to demonstrate that the designation should be set aside, or does the burden of proof rest upon the Respondent to demonstrate the existence of threshold conditions for designation?

4. On a hearing of an application under article 5(4), what is the applicable standard of proof?

5. What is the role of the High Court, and the test to be applied by it, when determining an application under article 5(4)?

B. Under the AQO

1. Does the Court have any power to set aside a designation made under Article 3(1)(b) of the Order?

2. If the Court has no such power under article 5(4), does it have any other power to set aside such a designation?

3. As per issues A1-5.

23. The judge said at [2] that in argument the issues were expanded to cover a general attack upon the lawfulness of each Order and upon the freezing orders and more particularly on the criminal offences created by them. In the event that general attack substantially succeeded.

The appeal

24. In this appeal HMT says that the judge should not have struck down the TO and the AQO either in whole or part. It says that, even if the Orders were in part *ultra vires*, there was no sensible basis upon which the judge should have struck them down in their entirety. A number of particular issues arise in this appeal as follows:

i) Is the TO *ultra vires* the UN Act?

ii) If so, must the TO be quashed?

iii) What is the effect of the lack of procedural safeguards?

iv) Criminal offences: are the principles of legal certainty and proportionality satisfied?

v) Is the AQO unlawful?

vi) The challenge to the TO in the Respondents' Notice?

Before considering those issues in detail, it is appropriate to say something about the facts.

The facts

25. Mr Owen QC, who appears for A, K, M and Q, and Mr Singh stress the oppressive nature of the orders and the problems that they have caused to the applicants and their families. I accept that they are indeed oppressive in nature and that they are bound to have caused difficulties for the applicants and their families, although the precise details of those difficulties are not directly relevant to the issues in the appeal.

26. A, K and M are brothers in their thirties. All are married with children but M is separated from his wife. On 2 August 2007 they were each informed in the same terms that they had been designated under article 4 of the TO as follows:

> "[HMT] has reasonable grounds for suspecting that you are, or may be, a person who facilitates the commission of acts of terrorism … In light of the sensitive nature of the information on which this decision was taken we are unable to give you further details."

In reply to a request for details, in a letter dated 12 September 2007 HMT said that in 2004 an Al Qa'ida linked operative alleged that A and M were "East London based Al Qa'ida facilitators with [M] as the leader of the group". No other allegations were made against A but it was further suggested that M and K were involved, with others, in funding Al Qa'ida contacts in the tribal areas of Pakistan. It is the case for A, K and M that they are of good character and well respected in their community. The allegations are denied.

27. In the letters of 2 August A, K and M were required within 14 days to provide full details of their assets, the demand being couched in the widest terms, which included both details of the employment status of their wives and details of their wives' assets. They responded. From 2 August their bank accounts have been frozen and they have not been permitted access to their assets, although they have been granted licences to be paid social security benefits. In the case of A and K such benefits are to be paid only to their wives, who are permitted only to provide food and accommodation and no more than £10 a week in cash. All this had to be fully accounted for to HMT. The impact upon them is fully recounted in their statements.

28. Q is 31 years of age and is a dentist. He is married with four children. He received a similar letter dated 24 August 2007 which made the same allegation and refused to give particulars in identical terms. Q's solicitors asked for more information and HMT said that it would take instructions but no further information has been provided. Q has had similar problems to those experienced by the other applicants arising out of the parts of the TO which froze his assets and required information about them. He says that designation has caused him severe stress with the consequence that he has not worked since and his marriage has come to an end.

29. G received an almost identical letter dated 13 December 2006 and a similar direction was made against him under the TO. The evidence shows that it has had a similar devastating impact upon him to that described by the other applicants. A few days later he received a letter from the Foreign and Commonwealth Office saying that "the 1267 Committee" of the United Nations had added him to its consolidated list and that this meant that he was subject to a freezing of his funds, assets and economic resources. He was informed that "these measures are binding on all UN Member States with immediate effect and have been implemented in UK law". He was told that he could petition the UN to seek delisting but, at any rate at that time, was not told that it was the UK itself that had sought his listing in the first place. It was not until March 2007 that he was told that his UN listing meant that he was deemed to be a designated person under the AQO.

30. It is not I think in dispute that G has been subject to the AQO solely because he has been listed by the UN Sanctions Committee. He has had no contact with the Committee and does not know who made the decision or on what grounds or evidence. In making the reference to the ECJ in the case of *M* referred to above, at [17], the appellate committee described the Regulation which put the UN regime behind the AQO into effect, at any rate on HMT's construction of it, as giving rise to a disproportionate and excessive result.

31. It is not of course possible for this court to assess the detailed allegations of fact made by the applicants but there is no doubt that orders under the TO are capable of causing considerable problems for them. However, I should note that court has recently received an application on behalf of G to adduce particular evidence of difficulties faced by his family which are said to be connected with the orders made against him. I am pleased to learn that HMT is looking into the matter. We have considered the evidence but it is not directly relevant to the issues raised in this appeal, which is concerned with a number of issues of principle set out above. As already stated, all the applicants were designated under the TO but only G was also designated under the AQO. In these circumstances it is convenient to consider first the issues which arise under the TO. I will consider them in the order set out above.

i) Is the TO ultra vires the UN Act?

32. The power in section 1 is exercisable in relation to measures not involving the use of force which the Security Council calls upon the Government to apply in order to give effect to any decision of the Security Council, which would of course include an SCR. In such a case

> "His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order …"

33. Given the terms of section 1 quoted above, it is not and could not be in dispute that the Security Council had called upon the Government to apply the measures set out in SCRs 1373 and 1452. The question is therefore a narrow one, namely whether it was open to the Crown to conclude that it was necessary or expedient to introduce the

terms of the TO in order to enable the provisions of those SCRs to be effectively applied.

34. Mr Swift naturally argues that it was. He correctly submits that the world was and is facing the threat of terrorism which can have devastating effects upon life and property. As stated above, SCR 1373 was introduced only 17 days after 9/11. He further correctly submits that the purpose of the resolution (and thus the Order) was to introduce preventative measures in order to identify and freeze the assets of possible terrorists. In these circumstances he submits that the TO should be given a broad and not a narrow construction.

35. Neither Mr Owen nor Mr Singh seeks to underplay the risk of terrorism or submits that the purpose of both the resolution and the TO was other than to seek to prevent terrorism. Their submission is that the terms of the TO are unnecessarily draconian and oppressive. In particular, under this head they submit that it does not reflect the terms of resolution 1373. I have already set out the terms of paragraph 1 of that resolution. Mr Owen and Mr Singh submit that the terms of the resolution are much more tightly drawn than those of the TO.

36. As appears above, by article 4(2) of the TO, the condition that must be satisfied is that HMT must have

> "reasonable grounds for suspecting that the person is *or may be* –
>
> (a) a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism."

The italics are mine. Although that formulation is plainly based on the terms of paragraphs 1(c) and (d) of the resolution, which I have already quoted, it is different.

37. The critical parts of those paragraphs are 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, …"

The difference is that the obligations in those paragraphs are limited to dealing with "persons who commit or attempt to commit terrorist acts" and the like, whereas under the TO the category of designated person is extended (a) to any person whom it is

suspected on reasonable grounds is such a person and (b) to those who *may be* such a person.

38. The applicants say that, in making the TO, the Crown has exceeded the power conferred on the United Kingdom by the conjunction of the UN Act and SCR 1373 in two respects. The first is that the conditions in the TO arise where HMT has *reasonable grounds for suspecting* that the person is a terrorist, which it is said are not present in the resolution, and the second is the addition of the words *may be*. I take them in turn.

"Reasonable grounds for suspecting"

39. It is true that those words do not appear in the Resolution. However, Mr Swift submits that their inclusion is permissible given that the power in the UN Act is expressed in wide terms. The question is whether the provision, including those words, "appears … necessary or expedient for enabling those measures to be effectively applied" are wide enough to support the TO as drafted. He notes that the measures do not have to be necessary, so that it is sufficient if they are expedient. He thus submits that the statute gives the Crown a wide discretion to decide what particular provisions fall within the permitted scope of the power. For my part, I would accept the submission that the words "necessary or expedient" are disjunctive and that the Crown is indeed given a wide discretion. Moreover, I would further accept his submission that the court should not lightly declare a provision made pursuant to such a wide power to be *ultra vires*.

40. As this court put it in *Home Secretary v MB* [2007] QB 415 at [59], in a passage not disapproved by the House of Lords, the test of reasonable suspicion is familiar in the context of article 5(1)(c) of the European Convention on Human Rights ('ECHR'):

> ""Having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence": *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157, para 32."

41. The judge said at [40] that he could see the force of the argument that a reasonable grounds for suspicion test would be within the power conferred by the statute. His language suggests to me that, if it had been necessary to decide this point, he would have decided it in favour of HMT. He noted that in *Kadi* both the Advocate General and the CFI refer to the test formulated in that way without demur.

42. I would accept the submissions of HMT on this point. SCR 1373 is silent on the standard of proof to be satisfied on the question whether a particular person "commits, or attempts to commit, terrorist acts …" before a State must freeze his assets within paragraph 1(c) or prohibit certain activities within paragraph 1(d). In my opinion a State could properly conclude that it was expedient to provide that reasonable grounds for suspicion was an appropriate test. As indicated above such a test has been accepted by the ECtHR in relation to a similar problem arising out of the risk of terrorism. In these circumstances I would accept such a test as lawful provided that the person concerned has a proper opportunity to challenge the decision made against him. I return to this point below.

43. In reaching that conclusion I have had full regard to the principles stated by the judge in [21-25] of his judgment. He first referred, at [21], to the earlier cases of *R v Halliday* [1917] AC 287 and *Chester v Bateson* [1920] 1 KB 829. Then at [22] he quoted this statement by Lord Browne-Wilkinson in *R v Secretary of State ex p Pierson* [1998] AC 539 at 575D:

> "From these authorities I think the following proposition is established. A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

44. At [22] the judge referred to a later statement on the same page by Lord Browne-Wilkinson that it was not open to a court to quash an Order on the ground that it was harsh. Like the judge, I agree that that is so, provided that the principle identified above is satisfied. More recently, the same point has been put by Lord Hoffmann in a well-known passage (quoted by the judge at [24]) in *R v Home Secretary ex p Simms* [2000] 2 AC 115 at 131E:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of the unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

45. The judge noted in [25] that general words have been allowed to override fundamental human rights. It is true that there have been such examples. All depends upon the true construction of the particular statute, which must of course be considered in its context and having regard to its statutory purpose. In this respect I agree with the judge's conclusion at the end of [25], after referring to *Bishopgate v Maxwell* [1992] BCLC 475 and *R v Lord Chancellor ex p Lightfoot* [2000] QB 597:

> "All that can, I think, be derived from those authorities is that it is proper to look to see whether the context in which the relevant legislation is made provides a clear indication that,

> even in the absence of express words, fundamental rights are overridden."

The general principle remains.

46. The conclusion that the "reasonable grounds for suspecting" test is within the ambit of the general power expressed in the UN Act does not, in my opinion, fall foul of any of these general principles, provided (as I stated earlier) that the relevant person's right to challenge it is preserved: see below.

"May be"

47. Mr Swift submits that, if that is true of "reasonable grounds for suspecting", the same must be true of "may be". He submits that it was open to HMT to think it expedient in order to further the measures in SCR 1373 to provide for the making of an order if it has reasonable grounds to suspect that a particular person is "or may be" a person who commits terrorist acts or the like. He again stresses the preventative nature of the regime introduced by the Security Council and the importance of avoiding terrorism.

48. For my part, I would not accept those submissions. I can see that the widest possible power might be desirable from the Government's point of view. I can also see that the public might take the same view. However, the principles which I have just stated are of fundamental importance. The judge said at [39] that, in his view, if Parliament was not to be involved, it was necessary for the Order in Council to go no further than to apply what the SCR required. I agree. In the case of "reasonable grounds for suspicion" it did not, in my opinion go further than SCR 1373 required, whereas, by adding "may be", it did.

49. There is no warrant in the language of the SCR for the addition of "may be" in the TO. There is scope for argument as to how much difference this will make but I would accept the argument advanced on behalf of the applicants that it makes the test very wide indeed. In response to the submission that it was "expedient" within the meaning of section 1 of the UN act to express the test in such wide terms, the judge expressed his conclusion thus at [40]:

> "Mr Crow submits that it is expedient, which has a wider meaning. In *R(Gillan) v Commissioner of Metropolitan Police* [2006] 2 AC 307, the distinction between necessary and expedient was considered in the context of powers of random search conferred by s.44 of the Terrorism Act 2000. Lord Bingham at paragraph 14 said that Parliament had used the word deliberately recognising that the powers were desirable in the interest of combating terrorism. But Lord Bingham drew attention to the close regulation of the exercise of the statutory power. There is no such regulation here and I do not accept that the extension to those who are suspected of possible involvement is properly within the scope of what is authorised by s.1 of the 1946 Act."

I agree.

50. For these reasons I would dismiss the appeal against this part of the judge's judgment.

ii) Must the TO be quashed?

51. The judge quashed the whole TO. The question arises at this point whether the effect of the conclusion set out above, namely that the TO is *ultra vires* because of the inclusion of the words "or may be", is that the whole TO must be quashed. In my opinion it is not. Such a conclusion would to my mind be contrary to common sense. The obvious solution seems to me to order that the words "or may be" be excised from article 4(2) of the TO.

52. Such an approach would be consistent with authority. The problem was considered in detail by the House of Lords in *DPP v Hutchinson* [1990] 2 AC 783, where the principal speech was given by Lord Bridge, with whom the other members of the appellate committee agreed. It was there held that the general test was that of severability, which Lord Bridge said at page 804D was often referred to inelegantly as the blue pencil test. He described the test (or tests) at page 804E to G. He first referred to separate clauses, one of which exceeded the law-maker's power. He added that the test was in truth a double test, namely a test of textual severability and a test of substantial severability, which he described in this way:

> "A legislative instrument is textually severable if a clause, a sentence, a phrase or a single word may be disregarded, as exceeding the law-maker's power, and what remains is still grammatical and coherent. A legislative instrument is substantially severable if the substance of what remains after severance is essentially unchanged in its legislative purpose, operation and effect."

53. Lord Bridge subsequently considered whether the test was more flexible than would be required by rigid adherence to a test of severability. He concluded that it was: see eg page 811. It is not, however, necessary for us to consider how flexible the test is in this case because in my view the severability test is satisfied here. Removal of the words "or may be" satisfies the textual severability test because what remains is still grammatical and coherent. It satisfies the substantial severability test because what remains after severance is essentially unchanged in its legislative purpose, operation and effect. I would therefore excise the words "or may be" from article 4(2) of the TO.

54. The question remains what relief the applicants are entitled to as a result. As stated above, all the directions made against them by HMT included the same statement, namely that HMT "has reasonable grounds for suspecting that you are, or may be, a person who facilitates the commission of acts of terrorism …". In these circumstances, since HMT made the directions expressly by reference to "or may be" I would quash the directions as made.

iii) What is the effect of the lack of procedural safeguards in the TO?

55. The only express procedural safeguard in the TO is that contained in article 5(4), which provides:

> "The High Court … may set aside a direction on the application of –
>
> (a) the person identified in the direction, or
>
> (b) any other person affected by the direction."

56. The judge held in [41] and [47] of his judgment that that safeguard was not sufficient to protect the legitimate interests of the applicants. In essence the judge's view was that, in the absence of provision to admit intercept material and of express rules providing for the use of special advocates on applications under article 5(4) of the TO, it was not open to the Crown to conclude that the Order was an "expedient" provision to give effect to the measures adopted by the Security Council in SCR 1373.

57. I am bound to say that the thinking underlying the applicants' case has considerable force. As Mr Owen observes, the provisions of the TO are in marked contrast to the regimes devised by Parliament with regard, for example, to control orders: see eg sections 2(4), 4(1), 8(2), 8(4) of and Schedule 1 to the Prevention of Terrorism Act 2005 ('the PTA'). Those provisions have themselves given rise to significant issues as to how the fundamental rights of suspected individuals can be safeguarded: see for example *SSHD v MB and AF*, [2007] UKHL 46, [2008] 1 AC 440. In that case the House of Lords held that, although expressly provided for by the PTA, the mere fact that controlled persons were provided with the assistance of special advocates did not of itself ensure that they had a fair trial under article 6 of the ECHR of the question whether the Secretary of State had reasonable grounds to suspect that the relevant individual was or had been involved in terrorism-related activity, which was the relevant test under the PTA. The House of Lords remitted the question whether AF had had a fair trial of that question to the High Court. Since then there have been a number of hearings in the High Court of different cases in which judges have not all arrived at the same conclusion in principle. This court (of the constitution of which Sedley LJ and I are members) has recently heard argument in a number of cases in which the whole question of what amounts to a fair trial has been much debated. Judgment has very recently been handed down: see [2008] EWCA Civ 1148. The problems discussed in that case arose in the context of the PTA, in which there are detailed provisions for the use of special advocates. That is not the position here. Mr Owen submits that the scheme of the TO, which has no such provisions at all, is fatally flawed.

58. There is so far no statutory power to appoint a special advocate in proceedings arising out of a TO. However, as I see it, there is no reason in principle why a special advocate should not be appointed in a particular case. The authorities show that in an appropriate case the court would have power to authorise or request the use of a special advocate: see in particular the decision of the House of Lords in *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, where it was held that the court had power to do so even where it was not sanctioned by Parliament. Whether it should do so or not would depend on the particular circumstances of the case. It has very recently been held by the Divisional Court in *Malik v Manchester Crown Court* [2008] EWCA Admin 1362 that the court has power to ask the Attorney General to appoint a special advocate, but that it should only do so in an exceptional case and as a last resort: per Dyson LJ, giving the judgment of the court at [93-102], especially at

[99]. In these circumstances the court would have power to procure the appointment of a special advocate through the Attorney General.

59. It appears that the Government had it in mind to make statutory provision for special advocates from the outset. On 10 October 2006, which was the date on which the TO was made, Mr Ed Balls, the Economic Secretary to the Treasury, made a written statement to the House of Commons in relation to the TO which included this:

> "… the Treasury has agreed, on the advice of law enforcement agencies, to use closed source evidence in asset freezing cases where there are strong operational reasons to impose a freeze, but insufficient open source evidence available. The use of closed source material will be subject to proper judicial safeguards. The Government intend to put in place a special advocate procedure to ensure that appeals and reviews in these cases can be heard on a fair and consistent basis."

60. The judge set out that material at [47]. He said that that was 18 months ago but there was still no such procedure in force. He added:

> "It is not for the court to devise a procedure particularly as it cannot deal with the constraints imposed by RIPA and there are resource considerations in the use of special advocates. *Roberts* case related to cases in which use of such material would be exceptional; cases under the Orders will regularly involve such material."

While I have considerable sympathy for the judge's view, and I certainly agree that it would have been very much better to make appropriate statutory provision in the first place, I do not think that that is a sufficient basis upon which to hold that the TO was unlawful. The court has power to order a special advocate. In most cases, such an advocate should be able to ensure that the individual will receive a fair hearing and in other cases the direction would have to be discharged: see the reasoning of the majority in the House of Lords in *MB and AF*. In either such case, the interests of the individual will be protected. Subject to the problems to which I now turn, I would not therefore hold that the TO was unlawful on this ground.

61. Mr Owen further relies upon the problems thrown up by the Regulation of Investigatory Powers Act 2000 ('RIPA'). The problem arises or potentially arises because, where there has been an intercept warrant issued by the Secretary of State authorising a relevant intercept, section 17 of RIPA contains a number of critical provisions as follows:

> "(1) Subject to section 18, no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings … which (in any manner) –
>
> (a) discloses, in circumstances from which its origin in anything falling within subsection (2) may be inferred, any of

> the contents of an intercepted communication or any related communications data; or
>
> (b) tends (apart from any such disclosure) to suggest that anything falling within subsection (2) has or may have occurred or be going to occur.
>
> (2) The following fall within this subsection –
>
> …
>
> (c) the issue of an interception warrant or of a warrant under the Interception of Communications Act 1985;
>
> (d) the making of an application by any person for an interception warrant or for a warrant under that Act;
>
> …"

62. Section 18 sets out the exceptions to section 17. It provides that section 17(1) shall not apply to a number of different types of proceedings including, by paragraphs (da), (e) and (f), control order proceedings, proceedings before the Special Immigration Appeals Commission ('SIAC'), proceedings before the Proscribed Organisations Appeals Commission ('POAC') and, in each case, proceedings arising out of such proceedings. Section 18 also provides:

> "(7) Nothing in section 17(1) shall prohibit any such disclosure of any information that continues to be available for disclosure as is confined to –
>
> (a) a disclosure to a person conducting a criminal prosecution for the purpose only of enabling that person to determine what is required of him by his duty to secure the fairness of the prosecution; …
>
> (b) a disclosure to a relevant judge in a case in which that judge had ordered the disclosure to be made to him alone;
>
> (c) a disclosure to the panel of an inquiry held under the Inquiries Act 2005 in the course of which the panel has ordered the disclosure to be made to the panel alone.
>
> (8) A relevant judge shall not order disclosure under subsection (7)(b) except where he is satisfied that the exceptional circumstances of the case make the disclosure essential in the interests of justice."

63. One might have thought that proceedings challenging a direction under article 4 of the TO would have been included in the exceptions in section 18 of RIPA in order to bring them into line with control order, SIAC and POAC proceedings. We were told that it has indeed been the Government's intention to introduce legislation to that effect since the introduction of the TO. Unfortunately there have been considerable

delays and a Bill, the Counter-Terrorism Bill, which, if enacted, it is said would have that effect, is only now making its way through Parliament. It is thought that it will both become law and come into effect very shortly, perhaps even next month (November 2008).

64. The Bill is a lengthy one dealing with a range of topics. Part V covers "asset freezing proceedings". In connection with applications to set aside directions under the TO, rules may be made relating to mode of proof and evidence (by clause 57(3)) and relating to closed material and special advocates (clauses 58 and 59). Provisions to permit the admission of intercept evidence are initially to be made by the Lord Chancellor after consultation with the Lord Chief Justice (clause 62). Procedural rules are then to be laid before Parliament and will cease to have effect after 40 days if not approved by a resolution of each House.

65. It is a great pity that there has been so much delay and that steps were not taken to this end a considerable time ago. However, we must take the law as as it is at present. It is tempting in these circumstances to hold that the TO is unlawful on the ground that better safeguards could have been provided for those in the position of the applicants. However, on reflection, I do not think that the lawfulness of the TO can be affected by the fact that it is proposed to improve the position or by the fact that other better mechanisms could have been put in place from the outset. The highest that it can be put is that, when any question of proportionality arises, it may be relevant to have in mind other possible mechanisms.

66. In these circumstances I note in passing that Mr Owen draws attention to the provisions of the Terrorism Act 2000, which in Part III created a criminal regime dealing with the funding of terrorism. He has also drawn attention to the Anti-Terrorism, Crime and Security Act 2001 ('ATCSA 2001'), which was enacted shortly after SCR 1373 was adopted on 28 September 2001. Although it does not expressly refer to SCR 1373, one of its express purposes was "to provide for the freezing of assets" in response to the threat of terrorism. There is no evidence of which we are aware that this Act has been used so far.

67. Mr Owen observes that, by contrast with the TO, these statutes were enacted by Parliament and were thus exposed to Parliamentary scrutiny. Moreover, in the case of ATCSA 2001, there are provisions for monitoring by Parliament of freezing orders made under that Act. In addition the sentences for breach are less severe than under the TO and there is a compensation scheme for those who have suffered loss as a result of being exposed to a freezing order. Mr Owen also refers us to the position in Australia, where Regulations similar to the TO initially came into force but were soon replaced by the Suppression of the Financing of Terrorism Act 2002, which was of course scrutinised by Parliament.

68. To my mind, interesting as those facts are, I must return to the question whether the provisions of RIPA lead to the conclusion that the TO is unlawful. It is this point which I have found most difficult. Mr Owen stresses that in all these cases, as is likely in very many cases, HMT relies on closed material which it is not willing to disclose to the applicant. He submits that this puts the applicant in an impossible position because section 17 prevents anyone, including HMT, from saying whether or not there is any relevant intercept material obtained pursuant to a licence granted by the Secretary of State. The most they can say is that they cannot admit or deny the

fact. Mr Owen further submits that, where there has been such an intercept, it may contain exculpatory material which HMT cannot produce or even admit to exist. He submits that in these circumstances there cannot possibly be a fair hearing of the case of a particular individual.

69. Mr Owen submits that in these circumstances the judge was justified in reaching the conclusion he did in [41] as follows:

> "There is another cogent reason for saying that it is not expedient. It is rightly accepted by Mr Crow that the TO in terms and the AQO through judicial review allows consideration of whether the person affected is on the facts properly within the test to be applied. This means that all material must be available to the court, whether closed or open. I have some experience both as an ex-chairman of SIAC and in considering Control Orders cases of the evidence upon which reliance is placed by the Security Services and so available to the Treasury. This will usually – in my experience invariably – include intercept material. Section 17 of the Regulation of Investigatory Powers Act 2000 (RIPA) excludes such evidence from any legal proceedings. Exceptions to this exclusionary rule are contained in s.18, but they do not extend to applications or judicial review claims against orders made under the TO or the AQO. Thus the court is disabled from considering such material. This means that a fair and just consideration of the question whether the individual applicant is one who should be subjected to an order is likely to be impossible in most cases. Fairness works for the Crown as it does for the applicant. Thus the Treasury will be unable to rely on inculpatory intercept material just as the applicant will be unable to rely on exculpatory intercept material. This cannot be in the interests of justice or indeed of ensuring that the right people are made subject to these orders. Thus it is in my view impossible to say that the use of an Order in Council is expedient unless it can provide an exception to s.17 of RIPA. It cannot nor does it purport to do so."

70. Mr Swift challenges those conclusions. First, he relies on evidence in the third witness statement of Mr Patrick Guthrie of HMT to the effect that it is wrong to say that directions are made exclusively on the basis of closed material. Mr Guthrie's evidence is that, before Ed Balls' statement referred to above, decisions under article 4 of the TO and the AQO were made on the basis of open source information and that 17 such directions were given which were not revoked. He has also produced a schedule which shows that, in the period October 2006 to March 2008, statements to Parliament have shown (or will show) that the total number of directions under the two Orders was 45, of which 11 included closed source information. One such person was delisted, leaving 44 individuals subject to HMT directions of which 10 were based on closed source information. Mr Guthrie adds that almost all of those who were subject to directions based on open source material have also been charged and

either await trial or have been convicted of terrorist offences. In many such cases the direction was made at the same time as or very shortly after arrest or charge.

71. That information was not available to the judge but shows that it would not be correct to say that directions are invariably made at least partly on the basis of closed source material. To be fair to the judge, he did not say that they were but it is an inference which might be drawn from the first part of his [41] quoted above. The fact remains that, as the judge correctly stated, closed material will commonly be relied upon. Much of this will no doubt be intercept material caught by section 17 of RIPA, whereas some may not.

72. In these circumstances Mr Swift submits that it is not possible to say that the TO is unlawful and must be quashed. He says that this follows from the fact that a significant number of directions are based on open material. I would accept that submission. It seems to me that, if the TO is flawed on the basis that, where closed source material is relied upon, the rights of the individual are not protected, the appropriate course is to set aside the particular direction and not to quash the TO as a whole.

73. One possibility would be to set aside all directions which are based on closed source material on the ground that it is not possible to know whether it is based on intercept material within the prohibition in section 17 of RIPA, which I will call 'section 17 material'. I have however reached the conclusion that it would not be appropriate to take that course but that each case should be considered on its merits. Mr Swift submits that there are three categories of case to consider: first, where there is no relevant intercept material; second, where there is relevant intercept material which is wholly inculpatory; and third, where there is relevant intercept material some or all of which is exculpatory. I think I am right in saying that Mr Swift's second category is made up of two types of case, where there is section 17 material and where there is not. For my part, I would divide the cases into four: first, where there is only open source material; second, where there is closed source material of whatever kind but no section 17 material; third, where there is section 17 material which is wholly inculpatory; and fourth, where there is section 17 material some or all of which is exculpatory.

74. I have already considered the first class of case, where there is only open source material. As I see it, that gives rise to no problem. I have also already considered the second, where it may be possible to provide a sufficient gist and/or where it may be appropriate for the court to procure the appointment of a special advocate. I have already expressed my view that the individual's rights will be protected in such a case because he will either receive a fair hearing of his application under article 5(4) or, if the judge determines that he cannot, the direction will have to be set aside. As I see it, the position will be closely analogous to that in the control order cases discussed in *MB and AF*.

75. As to the third class of case, where there is wholly inculpatory section 17 material. HMT will not, by reason of section 17, be entitled to rely upon that material on an application under article 5(4). On such an application the position will, as it seems to me, be the same as in the control order cases. Thus, as this court observed in [60] of *MB*, whether there are reasonable grounds for suspicion is an objective question of fact, which it is for the court to review on an application under article 5(4) of the TO,

just as it is under the relevant provision of the PTA in a control order case. It is evident that on such an application, as the law stands at present, HMT cannot rely upon section 17 material. If there is other closed material upon which HMT wishes to rely, it will no doubt be appropriate for a special advocate to be instructed who can consider it and protect the interests of the individual. I am not persuaded that in every such case a special advocate would not be able to protect those interests. It follows that these are matters which should be approached on a case by case basis and not by striking down the TO.

76. The fourth class of case is where there is some exculpatory material. If the individual is to be treated fairly, there must be a procedure which ensures that the exculpatory material is made available to the judge or the allegation to which the exculpatory material relates is abandoned. Mr Swift I think accepts that to be the case. If he does not, I would in any event hold it to be the correct position. Mr Swift submits that there are five possible approaches to this class of case as follows:

i) a gist of the intercept evidence could be disclosed so as not to offend the prohibition in section 17(1) of RIPA; and/or

ii) HMT's case could be put in such a way as to avoid the drawing of inferences that are known, by reason of the exculpatory material, to be misleading; and/or

iii) HMT could discard that part of its case against the applicant in order to ensure that the intercept material was no longer relevant to any issue in the application; and/or

iv) suitable admissions could be made; and/or

v) in the extreme case, the defence to the application could be abandoned.

Mr Swift further recognises that HMT would not simply have the option of considering these alternatives but, in accordance with its obligation of candour, would be obliged to consider them. See in this connection per Dyson LJ in *Malik* at [101].

77. Mr Swift further submits that there is scope in a case of this kind for use to be made of section 18(7)(b) of RIPA. In this regard I would accept the submission that there is scope for a judge, perhaps on the application of a special advocate or of an individual, to order that disclosure be made to him alone. It is plain from section 18(7)(c) that section 18(7) is not limited to criminal cases. I would therefore reject Mr Owen's submission to the contrary. I see no reason why a "relevant judge" in section 18(7)(b) should not include a judge hearing an application under article 5(4) of the TO. Although it is true that section 18(8) limits the power under section 18(7)(b) to cases where the judge is satisfied that the exceptional circumstances of the case make the disclosure essential in the interests of justice, it appears to me that, where he learns that there may be section 17 material, a judge is likely to be readily so satisfied in order to satisfy himself that there is no exculpatory material.

78. The precise steps required will depend upon the facts of the particular case. Whether it will be possible (or indeed permissible) to disclose the gist of section 17 material and what, if any, other precautions can be taken to protect the interests of the individual cannot, as I see it, be decided in advance. However, I am not persuaded

that those interests cannot be suitably protected by procedures to be worked out on a case by case basis. In these circumstances, while I fully understand his concerns, I have reached the conclusion that the judge has gone too far in [41] of his judgment. My answer to the question "what is the effect of the lack of procedural safeguards?" is that the courts must be relied upon to ensure that there are sufficient procedural safeguards to protect applicants under article 5(4), that it should be possible to do so and that, if it proves impossible in a particular case, the direction must be set aside. In these circumstances, it would be wrong to hold that it was not open to HMT to conclude that it was expedient to make the order and it would be wrong to quash the TO itself. The problems must be resolved, not by taking that dramatic step, but on a case by case basis.

iv) Criminal offences: are the principles of legal certainty and proportionality satisfied?

79. As I said in [13] above, articles 7 and 8 create criminal offences. At [38] the judge said that, since the TO interfered with the applicants' fundamental rights, it must involve the least possible interference with such rights. Between [42] and [46] the judge considered the submission that the criminal offences created by articles 7 and 8 went far beyond what was reasonably required and offended against the principle of legal certainty. It was also submitted that they were disproportionate.

80. In considering that submission the judge directed himself as to the relevant principles at [43] and [44]. He noted that in *Norris v USA* [2008] UKHL 16, the House of Lords has recently considered the principle of legal certainty in the context of criminal offences. He quoted this extract from the composite report of the appellate committee, which seems to me to be of some relevance in this case:

> "53. In *R v Rimmington* [2006] 1 AC 459, para 33 Lord Bingham of Cornhill said that there were two "guiding principles" relevant in that case, namely:
>
> > "no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done."
>
> As he went on to say in the next paragraph, those principles are "entirely consistent with article 7(1) of the European Convention". At paragraph 35, he discussed a number of decisions of the Strasbourg Court on the topic, which established that, while "absolute certainty is unattainable, and might entail excessive rigidity", and "some degree of vagueness is inevitable" particularly in common law systems, "the law-making function of the courts must remain within reasonable limits".

> 54. In *R v Jones (Margaret)* [2007] 1 AC 136, Lord Bingham took the matter a little further when he identified, at paragraph 29
>
> > "what has become an important democratic principle in this country: that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties. One would need very compelling reasons for departing from that principle."
>
> Lord Hoffmann said much the same at paragraph 60."

I agree with the judge that those observations are pertinent in considering whether the offences created under the TO offend against the principle of legal certainty.

81. In [44] the judge further noted that in *R v Jones* Lord Bingham said at [28] that there now exists no power in the courts to create new criminal offences and that statute is now the sole source of new criminal offences. He quoted this passage from the speech of Lord Hoffmann in the same case, in the context of incorporating new crimes in international law, at [62]:

> "New domestic offences should in my opinion be debated in Parliament, defined in a statute and come into force on a prescribed date. They should not creep into existence as a result of an international consensus to which only the executive of this country is a party."

82. Striking though it is, that proposition is not directly relevant here because, as the judge himself recognised, section 1 of the UN Act gives express power to provide for the trial and punishment of persons offending against any Order. The judge, however added, in my opinion correctly, at [45]:

> "But the principle of maximum certainty (as identified by Professor Ashworth in his Principles of Criminal Law at p 24 et seq) requires that a citizen must be able to have an adequate indication of the legal rules applicable. That follows from the decision of the ECtHR in *Sunday Times v UK* (1979) EHRR 245 at paragraph 49. On p 76, Professor Ashworth states:
>
> > "[A] person's ability to know of the existence and extent of a rule is fundamental: respect for a citizen as a rational autonomous individual and as a person with social and political duties requires fair warning of the criminal law's provisions and no undue difficulty in ascertaining them."

83. Mr Owen submits that, quite apart from the common law principle of certainty, given that the TO interferes with the applicants' right to respect for their private and family

life, within article 8(1) of the ECHR, (and indeed with their right to the peaceful enjoyment of their possessions pursuant to article 1 of the First Protocol) HMT must establish that the criminal offences created by articles 7 and 8 of the TO, which interfere with the right under article 8(1), are "such as [are] in accordance with the law and [are] necessary in a democratic society in the interests of national security …" within article 8(2). Put another way, that interference must be proportionate to be lawful.

84. Mr Owen further draws our attention to the principle that, for an interference with Convention rights to be "in accordance with law", the interference must have some basis in domestic law, the law must be adequately accessible and the law must be formulated with sufficient precision such that an individual is able "to regulate his conduct" pursuant to it. To do so "he must be able - if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which any given action may entail". For these propositions Mr Owen relies upon *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at [49].

85. I would accept those general principles. I turn therefore to articles 7 and 8, which I set out in full as follows:

> **"Freezing funds and economic resources of designated persons**
>
> 7(1) A person (including the designated person) must not deal with funds or economic resources belonging to, owned or held by a person referred to in paragraph (2) unless he does so under the authority of a licence granted under article 11.
>
> (2) The prohibition in paragraph (1) applies in respect of –
>
> (a) any person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism;
>
> (b) any designated person;
>
> (c) any person owned or controlled, directly or indirectly, by a person referred to in sub-paragraph (a) or (b); and
>
> (d) any person acting on behalf or at the direction of a person referred to in sub-paragraph (a) or (b).
>
> (3) A person who contravenes the prohibition in paragraph (1) is guilty of an offence.
>
> (4) In proceedings for an offence under this article, it is a defence for a person to show that he did not know and had no reasonable cause to suspect that he was dealing with funds or economic resources belonging to, owned or held by a person referred to in paragraph (2).
>
> (5) This article is subject to article 5(2).
>
> (6) In this article, "deal with" means -

(a) in respect of funds -

(i) use, alter, move, allow access to or transfer;

(ii) deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination; or

(iii) make any other change that would enable use, including portfolio management; and

(b) in respect of economic resources, use to obtain funds, goods or services in any way, including (but not limited to) by selling, hiring or mortgaging the resources.

Making funds, economic resources or financial services available to designated persons etc.

8(1) A person must not make funds, economic resources or financial services available, directly or indirectly, to or for the benefit of a person referred to in article 7(2) unless he does so under the authority of a licence granted under article 11.

(2) A person who contravenes the prohibition in paragraph (1) is guilty of an offence.

(3) In proceedings for an offence under this article, it is a defence for a person to show that he did not know and had no reasonable cause to suspect that he was making funds, economic resources or financial services available, directly or indirectly, to or for the benefit of a person referred to in article 7(2).

(4) This article is subject to articles 4(3) and 5(2)."

It is convenient to consider article 7 first because it seems to me that somewhat different considerations may apply to the two articles.

Article 7

86. The first question is whether the offence created by article 7(3) satisfies the test of certainty identified above. I should note at once that it was agreed during the oral argument that the heading to article 7 is not correct because, as article 7(1) makes clear, the prohibition applies to all the people identified by article 7(2) and thus, in particular to people who commit etc acts of terrorism even though they are not designated. Mr Owen submits that article 7 does not satisfy the test of certainty. In essence he submits that, both read alone and in conjunction with article 8, article 7 imposes on persons in respect of whom the prohibition applies (ie those referred to in paragraph (2)) and their families a series of provisions which impinge on almost every aspect of their daily lives in circumstances in which it is entirely unclear what they can and cannot lawfully do.

87. While it is necessary to have regard to the provisions of article 7 as a whole, it is also necessary to consider the language in which the prohibition is framed. I consider first the person in respect of whom the prohibition applies. I would not accept the submission that the definition of "economic resources" in article 2 is too vague or uncertain for that person to understand what is prohibited. It will be recalled that "economic resources" are defined as:

> "assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services."

In short "economic resources" are all assets which can be used to obtain funds, goods or services, which seems to me to cover either everything or almost everything, other than a fund, which could be regarded as an asset.

88. Article 7(1) prohibits dealing with "funds or economic resources", which means funds and, in effect, all other assets for, as I have indicated, it is quite difficult to think of an excluded asset. As I see it, in this regard the position is much the same as in the case of the ordinary freezing injunction, where the standard form includes an order that the defendant (or as the case may be) "must not in any way dispose of or deal with his assets" up to a specific value, which will in many cases be greater than the value of his assets. The standard form further provides that the freezing order applies to all his assets, whether or not they are in his own name and whether they are solely or jointly owned, and that the assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. It is further stated that the defendant is to be regarded as having such power if a third party holds or controls an asset in accordance with his direct or indirect instructions.

89. As in the case of a freezing injunction, the purpose of article 7 is to freeze all the person's assets, including both funds and other assets. In my opinion, at any rate as far as concerns the person in respect of whom the prohibition applies, there is no lack of certainty in the prohibition in article 7(1). He of course knows that he has been designated (article 7(2)(b)) or is committing etc acts of terrorism (article 7(2(a)) and he knows what he must not do, namely deal with his assets.

90. The next question is whether the definition of "deal with" in article 7(6) is sufficiently certain. Mr Owen submits that it is not and a number of examples were discussed in argument. However, in my opinion the definition is sufficiently certain. I see no significant ambiguity in either sub-paragraph (a) or (b) of paragraph (6). The concept of "dealing with" or "deal with" is familiar in the context of freezing injunctions. No significant problem has been found with it. Although this does not of course mean that there may not be cases in which there is some scope for argument, I would not regard the example of the person's wife borrowing his car to go down to the shops as dealing with the car. If the judge held that sub-paragraphs (a) and (b) of paragraph 6 are insufficiently certain to enable a person to know or the court to determine what amounts to "dealing with", I respectfully disagree.

91. The only remaining question is whether the defence provided for in article 7(4) is sufficiently certain. The person in respect of whom the prohibition applies could not of course have such a defence if he was alleged to be dealing with his own assets.

92. In these circumstances I conclude that there is no lack of certainty in the case of the person in respect of whom the prohibition applies and who might be alleged to be in breach of article 7(1) and thus to have committed an offence under article 7(3). What then of other persons, say the person's wife? She will know if she has dealt with any funds or other resources. She will ordinarily know whether the funds or other resources belong to her husband. If he is designated, she is likely to know that fact. If he is not designated but is committing etc acts of terrorism, she may or may not know that fact or have reasonable cause to suspect it. But if, in either case, she does not know that fact and has no reasonable cause to suspect it, she has a defence.

93. What then of the defence in other cases? It works in precisely the same way. The third party charged with dealing with funds or resources belonging to a person in respect of whom a prohibition applies has a defence if he did not know and had no reasonable cause to suspect either that the prohibition applied in respect of that person or – and this might be much more of a live issue than in proceedings against the person's wife – that the funds or resources with which the third party dealt belonged to that person.

94. In all the circumstances I have reached the clear conclusion that the terms of article 7 are sufficiently certain to satisfy the test of certainty. Also, they satisfy article 8(2) of the Convention and are proportionate. They are necessary in a democratic society in the interests of national security and are in accordance with law, which is formulated in such a way as to be sufficiently precise as to enable those potentially affected to regulate their conduct accordingly. In these circumstances I would hold that, whatever view I take of article 8, article 7 is lawful.

95. I would only add this. The judge expressed his concerns in these terms in [42]:

> "It is submitted that the orders are unlawful in establishing criminal offences which go far beyond what is reasonably required and offend against the principle of legal certainty. The very wide definition of economic resources makes it impossible for members of the family of the designated person in particular to know whether they are committing an offence or a licence is needed. Article 8(1) of the TO applies to any asset which could in theory be used to obtain funds. The solicitor for the applicants A, K and M was concerned to ascertain on their families' behalf what could and could not be provided without the need for a licence and I gather that those in the Treasury who have to deal with those matters have had to consider whether licences should be granted on more than 50 occasions. A specific query arose, and it is a good illustration of the absurdity which can result, in relation to the loan of a car to an applicant to enable him to go to the supermarket to get the family's groceries. After some delay, the Treasury (in my view wrongly) decided that a licence was needed. The car was an economic resource and could be used to obtain or deliver goods or services. This was only resolved by the Treasury after seeking ministerial consideration. Similar concerns have been raised in relation to an Oyster card to enable the applicant to travel and any borrowing of items for any purpose. Since the

> possible penalty on conviction is severe, the concerns are understandable and the effect on the applicant and his family, whose human rights are also in issue, is serious."

96. The concerns expressed by the judge in that paragraph are not, as I read them directed specifically to article 7, but rather to article 8 and to the problems which have arisen in the context of licences sought from HMT. However, in so far as the judge says that the very wide definition of economic resources makes it impossible for members of the family of the person in particular to know whether they are committing an offence or a licence is needed, I respectfully disagree for the reasons I have given. I will return to article 8 in a moment but I do share some of the concerns which have been expressed as to the operation of the licence system.

97. Article 11 provides by 11(1) that HMT may grant a licence to exempt acts specified in the licence from the prohibition in article 7(1) or 8(1). By article 11(2) a licence may be (a) general or granted to a category of persons or to a particular person, (b) subject to conditions and (c) of indefinite duration or subject to an expiry date. By article 11(3) and (4), subject to notice provisions, HMT has power to vary or revoke a licence at any time. By article 11(5) any person who, for the purpose of obtaining a licence, knowingly or recklessly makes any statement or furnishes any document or information which is false in a material particular is guilty of an offence. By article 11(6) any person who has done any act under the authority of a licence and who fails to comply with any conditions attaching to that licence is guilty of an offence.

98. The licence system is plainly intended to be a central part of the scheme. It strikes me that, if the scheme is to be workable, it must be operated by all those concerned, especially HMT, fairly, expeditiously and with good will. In addition HMT must of course act lawfully when considering applications for licences. This involves taking account only of relevant considerations and acting rationally throughout. It seems to me to be critical that families and other third parties affected by TOs, which are in many ways draconian, should be treated fairly. Thus there was much discussion about whether it would be unlawful to sell a fruit cake without a licence to a person known by the seller to be one in respect of whom the prohibition applies. This problem should never arise in practice for two reasons.

99. First there must I think be a level, which might be described as *de minimis*, below which the TO cannot have been intended to bite. Would the designated person need a licence to buy a box of matches? Surely not because *de minimis non curat lex.* Secondly, and more importantly, as I see it, if HMT operate the licence system fairly, expeditiously and with good sense, giving proper reasons for their decisions, most if not all of the theoretical problems discussed in argument will become irrelevant. So too will the concerns expressed by the judge in [42]. For example, it would surely be irrational for HMT to refuse a licence in respect of expenditure of many every day activities. In this regard it is noteworthy that by article 11(2) a licence may be general and not addressed either to a particular category of person or to a particular person. Those are problems to be worked out in practice. Provided that the licence scheme is operated in the way I have indicated, I would hold that article 7 is both sufficiently certain, that it is proportionate and that it is not unlawful.

Article 8

100. The problem here is somewhat different. I was at one time attracted by Mr Owen's submissions. Article 8(1) does, however, seem to me to be clear. The prohibition is against making funds, economic resources or financial services available to a person referred to in article 7(2). I have already expressed my view that the meaning of "funds" and "economic resources" is sufficiently clear and certain. As to "financial services", they are defined in article 2 as "any service of a financial nature". The definition then adds "including but not limited to – (a) insurance-related services consisting of" four specified types of insurance and reinsurance and "b) banking and other financial services consisting of" 11 types of financial activity. I do not think that there should be any difficulty in identifying what is or is not within the expression "financial services".

101. The next question is whether it is sufficiently certain and proportionate to provide that a person must not make, for example, funds "available, directly or indirectly, to or for the benefit of a person referred to in article 7(2)" without a licence. It is said that the notion of making, say, funds available indirectly for the benefit of such a person is hopelessly vague. For my part, I respectfully disagree. There should be no difficulty in identifying whether funds, other assets or financial services are being made available directly or indirectly to another person. It seems to me to be proportionate to include such a provision. The provision has a legitimate purpose, namely in order to avoid terrorists obtaining funds – or other financial benefits which render other of their funds available for deployment – for their activities. As I see it, it is proportionate because of the licensing scheme, provided that the licensing scheme is operated properly and expeditiously. As I indicated above, if the scheme is operated as the draftsman of the TO intended, any problems about comparatively small sums can be solved by the granting of an appropriate licence or, perhaps, by an agreement that they are *de minimis*. Indeed, it might be sensible to develop a scheme whereby a licence was routinely granted in the case of small sums, if only to meet the fruit cake example.

102. As I see it, any possible unfairness of the provision is met by the defence provided by article 8(3). If the person against whom the charge is brought can show that he did not know and had no reasonable cause to suspect that he was making the funds, economic resources or financial services available to a person within article 7(2) he will have a defence. Thus, while I accept the general submission that the certainty and proportionality of a measure such as the TO cannot be left to the trial of a particular case, it is permissible to have regard to all the relevant circumstances, including the certainty or otherwise of the language, the provision here of a licensing system and the available defences, in deciding whether the relevant provision is unlawful. Having approached the problem in that way, I have reached the conclusion that article 8 is not unlawful or contrary to any provision of the ECHR.

103. In these circumstances, I would answer question iv) above, namely whether the principles of certainty and proportionality are satisfied, in the affirmative.

Conclusion on the lawfulness of the TO

104. For the reasons I have given, I would hold that, subject to the "or may be" point, the TO is not unlawful. I would sever "or may be " from the TO.

105. Finally in this regard I should refer to [46] in the judgment of the judge:

> "The purpose of asset freezing is to ensure that funds are not made available for terrorist purposes. Thus any criminal liability which could fall on those who make any assets available to a designated person should depend on whether it was or ought to have been known to the supplier that the asset in question could result in funds being available for terrorist purposes. That at the very least seems to me to be an appropriate limitation on criminal liability. How the requirements of the Sanctions Committee should be put into law is, as it seems to me, having regard to the principles to which I have referred a matter for Parliamentary consideration. Thus I am satisfied that neither Order in Council represents a necessary or expedient means of giving effect to the obligations imposed by the Committee."

106. While I entirely understand the sentiments behind that paragraph and am pleased that the government has at least (and at last) put a Bill before Parliament, I am unable to agree with the judge's view (if it is his view) in the above paragraph that it is for the court to identify the appropriate limitation upon criminal liability and that only Parliament could provide otherwise. My conclusion is that, with the exception of "or may be", the terms of the TO are within the statutory power conferred on the Crown, ie in effect the Government, by Parliament in section 1 of the UN Act and are not otherwise contrary to the ECHR or unlawful at common law.

v) Is the AQO unlawful?

107. The conclusions which I have reached so far lead to the conclusion that the AQO is also lawful, subject to one further point which is relevant only to the AQO. That point focuses on the nature and scope of the challenge that can be mounted against the AQO.

108. It is common ground that G is subject to the AQO only because he has been listed by the UN Sanctions Committee ('the Committee'). He has never had any contact with the Committee, has no idea who precisely made the decision or upon what evidence it was based, although he does now know that it was the UK Government which requested that he be listed. It presumably had some evidential basis for its request. Indeed, it was presumably the same basis as that relied upon by HMT in making a direction for his designation under the TO and was thus said to be so sensitive that G could not be given details. As to the Committee, Mr Singh stresses that there is no information in the public domain that throws any light on who its members are, what degree of independence they enjoy, what evidential test they apply and what, if any, safeguards are in place to protect the rights of the individuals affected.

109. G does not seek to challenge the legality of the SCRs (referred to above) that led to the AQO. Nor is it sought to challenge the legality of the use of Article 41 of the UN Charter to make named individuals subject to UN sanctions. It is correctly accepted that neither the provisions of the Charter nor those of any of the SCRs have direct effect in English law, unless or until they are enacted as part of domestic law or

become part of it pursuant to an EU instrument with direct effect. I have already indicated that HMT does not rely upon any EU Regulation in this case.

110. It follows from the above that, absent the AQO, G could not challenge his inclusion on the Committee's list. On the other hand, absent the AQO, he would not be affected by that inclusion as a matter of English law. As indicated in [14] and [15] above, the only challenge expressly contemplated by the AQO is that contained in article 5(4), which gives the High Court power to set aside "a direction" on the application of the person identified by the direction or any other person affected by it. G is not such a person because there is no dispute that he is a "person designated by the Sanctions Committee" within the meaning of article 3(1)(b) and therefore a "designated person" within the meaning of article 3(1). The AQO gives him no express right to apply to the High Court for any relief.

111. Mr Swift's submissions in this court may be summarised as follows:

i) article 3(1)(b) is self-executing in the sense that, once any person has been designated by the Committee, the provisions apply to him automatically;

ii) it is the existence of article 3(1)(b) that is the cause of the interference with G's property rights under article 1 Protocol 1 of the ECHR;

iii) G has access to the court to challenge by way of judicial review the decision to include article 3(1)(b) as part of the AQO;

iv) it follows that G has not been deprived of access to a court; and

v) any such challenge would fail because the AQO, including 3(1)(b), was made under the powers conferred by Parliament on the Crown under section 1 of the UN Act and is therefore lawful.

112. Mr Swift submits that Mr Singh is in reality seeking to challenge the listing of G by the Committee and that he is doing so by the back door in circumstances in which he cannot do so by the front door. I am bound to say that that is a very unattractive argument, especially where it was the UK Government which requested G to be listed in the first place. In the case of the TO, HMT correctly concedes that there must be procedures in place to enable a person against whom an order is made or a person affected by the order to challenge the direction which led to the order. There has been argument as to whether those procedures are adequate and I have expressed my view that appropriate procedures can be put in place to safeguard the interests of the individuals concerned.

113. The question is whether the court is powerless to achieve a solution whereby a person in the position of G can challenge the underlying basis of the case against him. The question is thus whether he can do so through judicial review. If he can do so under the TO, it would to my mind be very strange if he could not do so in the case of the AQO in a case where the evidence against him appears to be the same in both cases. If he cannot, I would be inclined to hold that the AQO was unlawful, by reason of the application of the principles briefly referred to in [43] to [45] above.

114. The argument addressed to the judge by Mr Singh on behalf of G was that there must be implied into the AQO a right of access to the court by way of judicial review. That is not in dispute. It is the extent or content of the right that is in dispute. Mr Singh submitted to the judge that, since fundamental rights were affected, that review must include a means of challenging the factual basis upon which the Committee's designation of him was made. This appears from the beginning of [16] of the judgment. The judge continued:

> "16. …. This would require the court to have power to set aside the order notwithstanding that G was on the Sanctions Committee list if on consideration of the facts it took the view that he ought not to have been listed because he was not involved in any terrorist activity. This was all the more important because there was no means whereby G could mount an effective challenge to his listing since he did not know nor was there any procedure whereby he could be informed of what material had led the Committee to list him. It is known that he was listed following information given against him by the government. Thus, without the support of the government, his chances of achieving delisting are infinitesimal.
>
> 17. …. In a document entitled 'Guidelines of the Committee for the Conduct of its Work' [issued by the UN in respect of its Sanctions Committee] delisting is dealt with at paragraph 8. The listed person may present a petition which should 'provide justification for the de-listing request, offer relevant information and request support for de-listing'. The petition can be presented either through the person's state of residence or what is called 'the focal point process'. The relevant governments, including naturally of the state in which the person resides, will be notified and asked to comment and to indicate if they recommend de-listing. Any information in support of de-listing held by a government should be forwarded to the Committee and any opposition to de-listing will also be conveyed to the Committee. After 3 months, a decision will be taken and the person notified of it.
>
> 18. It is I think obvious that this procedure does not begin to achieve fairness for the person who is listed. Governments may have their own reasons to want to ensure that he remains on the list and there is no procedure which enables him to know the case he has to meet so that he can make meaningful representations. Nevertheless, that is what the Security Council has approved and the Resolution, which Member States are obliged to put into effect, requires

> the freezing of the assets of those listed. Article 103 of the Charter makes clear that the obligations under the Charter take precedence over any other international agreements. Thus human rights under the ECHR cannot prevail over the obligations set out in the Resolutions.
>
> 19. Mr Singh has relied on the constitutional right of access to the court, a right which cannot be taken away save by express words in a statute. An Order in Council following the exercise of the Royal Prerogative is itself amenable to judicial review. Accordingly, submits Mr Singh, albeit no right of challenge is contained in the Order, there must be such a right. …."

115. The judge then considered between [19] and [25] a number of the well-known authorities, some of which I have referred to above. Then between [26] and [33] he discussed in some detail the position in EU which I touched upon earlier. He was critical of the decision of the CFI in *Kadi* and said at [32] that if the views of Advocate General Maduro were accepted, the AQO would have to be quashed. At [33] he noted Mr Singh's submissions that fundamental principles of domestic law are not within article 103 of the UN Charter because they are not "obligations under any other international agreement" but are conferred, not only by article 6 of the ECHR, but by long-standing principles of the common law.

116. As I read the judgment the judge did not accept that submission, on the basis that by Article 25 of the UN Charter the Members of the UN "agree to accept and carry out the decisions of the Security Council". However he relied upon two statements of principle in *R (Al Jeddah) v Defence Secretary* [2008] UKHL 58, [2008] 1 AC 332, where the House of Lords considered whether internment of a British citizen in Iraq pursuant to an SCR permitting internment if "it was necessary for imperative reasons of security" overrode his rights conferred by article 5 of the ECHR. As the judge observed in [34], Lord Bingham drew attention in [33] to the facility for the Security Council to adopt resolutions couched in mandatory terms in which case Article 25 of the Charter bound Member States to comply with them. However, Lord Bingham accepted that, while maintenance of international peace and security is a fundamental purpose of the UN, so too is the promotion of respect for human rights. In [39] Lord Bingham considered how the power or duty to detain on the express authority of the Security Council and the fundamental human right enshrined in article 5 of the ECHR could be reconciled. He said this:

> "There is in my opinion only one way in which they can be reconciled: by ruling that the U.K. may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by [the relevant resolutions], but must ensure that the detainee's rights under Article 5 are not infringed to any greater extent than is inherent in such detention."

117. To like effect, Lord Carswell said at [136]:

> "I would emphasise … that that power [viz: to detain] has to be exercised in such a way as to minimise the infringements of the detainees' rights under Article 5(1) …"

Mr Singh notes that in *Al Jeddah* the applicant thus retained a right to a full merits based review, which was proceeding in the Administrative Court at the date of his release and, Mr Singh tells us, has now been amended to a private law claim for false imprisonment.

118. The judge concluded that the reasoning of Lord Bingham and Lord Carswell was clearly applicable to the inevitable breaches of property rights and infringement of Article 8 rights resulting from the application of the AQO to G. I agree. The judge's solution can be seen from this important sentence at the end of [36]:

> "Mr Crow in the course of argument accepted – or rather, he was not instructed to oppose – the view I expressed that there should be a power in the court to decide whether the basis for listing existed which would then bind the Government to support de-listing."

Mr Crow QC was then appearing for HMT. In my judgment, that concession was correctly made.

119. I would accept the submission that the court has power to consider an application for judicial review by a person to whom the AQO applies as a result of designation by the Committee and, on such an application, to ask the court, so far as it can, to consider what the basis of the listing was. This will not be a challenge to the AQO itself but, if – to take the example of G – it were held that G should not have been listed, I see no reason why HMT (or the relevant Government body) should not, as the judge put it, be bound to support delisting. I feel sure that, if it were so held, HMT would wish to have G delisted and take appropriate steps to that end.

120. So far as possible in the circumstances, G should be put in the same position as he is as a subject of a direction under the TO, with the right to challenge it under article 5(4) of it. There must be procedures to enable him, again so far as possible, to discover the case against him, so that he may have an opportunity to meet it. This may involve, as in the case of the TO, appropriate use of a special advocate. How the system will work in a particular case will depend upon the circumstances, as the House of Lords held is appropriate in the control order cases in *MB and AF*. There may be greater difficulties in a case where HMT knows nothing of the facts upon which the designation was made by the Committee. I would leave the possible problems in such a case to be solved when they arise. Here there is no such problem because HMT knows all the facts relevant to the TO and must know either all or most of the facts which led to G's designation by the Committee.

121. In these circumstances, I would not set aside the AQO as the judge did. Although I would answer the question whether the AQO was unlawful in the negative, I would hold that G is entitled to a merits based review of the kind I have indicated.

vi) The challenge to the TO in the Respondents' Notice

122. The judge understood one of Mr Owen's arguments on behalf of A, K, M and Q to be that section 1 of the UN Act did not enable the taking of measures which would be enforceable against individuals. The judge rejected Mr Owen's argument (as he understood it) in the following terms:

> "Mr Owen, Q.C. submitted that s.1 of the 1946 Act should apply only to inter-state relations and not to sanctions to be imposed on individuals within a state. He relied on statements in Parliament when the Bill was being considered. It may well be that no one at the time thought that Article 41 would be used against individuals, but that is nothing to the point. The Charter clearly requires Member States to take the action needed to carry out decisions of the Security Council (Article 48). The wording of s.1 of the 1946 Act is clear: it applies to any measure which the Security Council calls upon the U.K. to apply under Article 41. The resolutions in question focus on individuals and it is not nor could be suggested that they are ultra vires Article 41. It follows that, whatever may have been the belief in 1946, s.1 of the Act can apply to the Resolutions which require the freezing of the assets of those who fall within the scope of the Resolutions."

It is not difficult to agree with the judge's reasoning in this respect.

123. By a Respondents' Notice, however, Mr Owen avers that, in that regard the judge misunderstood his argument. It is idle for us to enquire into whether it was then indeed misunderstood. The argument (says Mr Owen) was and is, rather, that the UN Act does not enable a detailed criminal regime, with severe penalties, to be created from the foot of a resolution as broadly worded as that, in particular, of SCR 1373 (2001). The argument, as thus clarified, is, as Mr Swift in effect responds, one which lacks hard edge. But, whatever its parameters, it seems to me to add little to the issues already considered; and I reject it. The enabling power expressly encompasses criminal provisions; and I cannot accept that the potential severity of the punishment under the TO falls outside it. Nor, when I compare the words of the SCR 1373 (2001) with those of the TO, can I accept that the former is too broadly worded to enable the making of the latter: on the contrary there is a striking affinity between the terms of paragraph one of the resolution and of the principal articles, namely 7 and 8, of the TO. Nor do I find it helpful in this regard to speculate, as Mr Owen invites us to do, upon whether other, more extreme, provisions could lawfully have been introduced under the Act by reference to the alleged width of the resolution.

CONCLUSION

124. For these reasons I would hold that the TO is lawful, provided the words "or may be" are excised from article 4(2) of the TO. However, given that the directions under the TO were made by reference to the words "or may be", I would quash the directions as made. I would also hold that the AQO is lawful but that G is entitled to a merits based review of the kind I have indicated.

Lord Justice Sedley:

125. This case is not simply about the making of executive orders which freeze individuals' assets to a point where they are effectively prisoners of the state. It is about the steady encroachment of executive government on liberties which it is its duty to respect and protect. Against such encroachments the only resort of the individual is to the courts, and the Administrative Court of the Queen's Bench Division has held both Orders in Council with which we are concerned to constitute an abuse of governmental power.

126. The Orders in question were made by the Treasury during 2006 with the purpose of freezing the assets of persons suspected of aiding terrorism. By that date there were already in existence at least two statutory regimes – that is to say regimes introduced by Parliament in primary legislation – which enabled the executive to freeze terrorist assets: Part III of the Terrorism Act 2000, and the Anti-Terrorism, Crime and Security Act 2001, passed in the immediate wake of 9/11 and providing both for Parliamentary scrutiny of freezing orders and for compensation for anyone who wrongly suffers consequent loss. There was also Council Regulation EC 881/2002, which again provides for the freezing of terrorist assets but which has been neither transposed nor treated as having direct effect.

127. Although we have been given no explanation of why these legislative measures are inadequate, they have been sidestepped by the making of the Terrorism Order 2006 and the Al-Qaida Order 2006, which are Orders in Council requiring no prior parliamentary debate or scrutiny, and each of which confers on its maker a range of powers correctly described by Collins J as draconic.

128. The case for the Treasury is that s.1 of the United Nations Act 1946 gives it something as close to absolute power as any department of state could hope for. So long as it relates to the subject-matter of a UN resolution not involving the use of armed force, it permits ministers to place before the Monarch for signature (a constitutional formality) a measure, backed by penal sanctions which until 1957 could include the death penalty, which ministers consider to be necessary or expedient (and the "or", I agree, is plainly disjunctive). It follows that the executive is empowered to make Orders which it knows to be unnecessary but considers to be expedient. This is relevant not simply as an illustration of the breadth of the powers ostensibly conferred by s.1 of the 1946 Act but because in the present case the existence of two statutory regimes designed for the same purpose means that neither Order in Council was necessary: both Orders, if they are to be held intra vires, must therefore be shown to be expedient.

129. Asked whether there were any implicit constitutional limits to the statutory power, counsel for the Treasury accepted that it would not permit the introduction of torture or detention without trial. If the argument he went on to develop is right, however, I can see no reason why it should not. But the reason why s.1 of the 1946 Act would not permit the introduction of torture or executive detention of suspects is, in my judgment, fundamental to this case and inconsistent with the government's argument. It is that, absent a manifest delegation by Parliament to the executive of a power which it alone possesses (and which few constitutional theorists now regard as unlimited), no words of general delegation will allow the executive to encroach on rights and freedoms of which the rule of law is the source and the courts are the

guarantor. The authorities cited by the Master of the Rolls at [43-2] reiterate this principle.

130. The words "such provision as appears necessary or expedient" are words of high apparent generality. It may well appear necessary or expedient to governments (we know that in some parts of the world it alarmingly often does) to authorise the use of torture or inhuman or degrading treatment or detention without trial for ends which to them seem to warrant it. But on no possible view can our Parliament be taken to have authorised the executive, by using the powers given by s.1 of the 1946 Act, to legislate for such ends.

131. Setting aside for the moment the questions of necessity and expediency, I do not doubt that it lies within the s.1 power to make provision, including the creation of new criminal offences, for freezing terrorist assets. For the reasons given by the Master of the Rolls I accept that this may legitimately include the assets of persons reasonably suspected of abetting terrorism, albeit this goes beyond the terms of the UN resolutions. But, for the reasons I have given, it would not be open to the Treasury to include in an Order in Council a privative clause denying access to the courts; and the corollary, as it seems to me, is that the courts must be vigilant to ensure that the way in which the order operates does not turn their supervisory role into tokenism.

132. Art. 5(4) of the Terrorism Order allows the court to set aside a direction. For the reasons given by Collins J and now by the Master of the Rolls, however, this is nowhere near adequate. If the court is to ensure that there is at least a reasonable basis for the Treasury's action, and to supervise designations along with directions, a properly structured and resourced system is needed. Such a system, albeit criticised, has been put in place by Parliament in relation to control orders (which have a similarly paralysing effect on the life of the individual concerned). But, despite ministerial assurances, there is still nothing in place to assure justice for those subjected to freezing orders.

133. I am unable to accept that it is the role of the courts to devise such a system in order to save delegated legislation from invalidity. It was one thing for their Lordships' House in *Roberts v Parole Board* [2005] UKHL 11 to authorise the Parole Board to resort to the use of a special advocate where a particularly sensitive case prevented their affording a prisoner the open hearing to which he would otherwise have been entitled. It is another for the courts to devise a surrogate system for securing fair hearings, at what will be considerable public expense, for individuals for whom the executive has not – or not so far – found it expedient to provide a fair hearing.

134. I turn in the light of these general considerations to the issues addressed by the Master of the Rolls.

Suspicion of involvement

135. The enlargement of the scope of the Security Council resolution from those who commit or attempt to commit terrorist acts to persons reasonably suspected of doing so is, I agree, capable of coming within the "expedient" limb of s.1 – so long as it is accompanied by proper judicial safeguards to ensure that suspicion is truly fact-based and genuinely reasonable. At present there is no such provision, and I do not think it is sufficient for the court to look forward to a time when there will be.

Suspicion of possible involvement

136. The inclusion of those who it is *suspected may be* involved in funding terrorism is, on any rational view, a bridge too far. There is practically nobody of whom this could not be said. The words are not merely tautologous (I doubt whether the drafter of the Order would thank Mr Swift for his initial submission that they were). Can they then be severed?

137. On the face of it nothing could be easier. Why then did neither party, either before Collins J or in this court, suggest it? In the case of the respondents, whose aim has been to impugn the entire Terrorism Order, the answer is evident: they contend that, like the bad apple in the barrel, this provision contaminates the entire regime. For them, severance is the Treasury's easy way out. The Treasury, however, has eschewed this means of escape from its own ambition: Mr Swift's argument travelled between the submission that the words "or may be" added nothing and – when asked by the court why they could not then be severed – that they were important and should remain there. This is why it is only on our insistence that severance has become an issue.

138. For the reasons given by the Master of the Rolls, I agree that the offending words fall within the blue-pencil test set out by Lord Bridge in *DPP v Hutchinson* [1990] 2 AC 783. But the question remains whether the order taken as a whole exceeds the statutory powers under which it purports to be made.

139. Whatever the answer to that question, it is plain that none of the present freezing orders can stand, since they all adopt the "or may be" formulation. (This, indeed, may be why the Treasury would not accept the possibility of excising the words from the Order in Council.) In agreement with the Master of the Rolls, I would quash them for this reason alone.

Procedural safeguards

140. The Master of the Rolls has set out the disturbing history of non-provision of measures and resources to ensure that individuals subjected to freezing orders get a fair hearing. The question is not simply one of bringing in special advocates, who themselves cannot be treated as a limitless and ever-ready resource: see what this court has recently said in *Murungaru v Home Secretary* [2008] EWCA Civ 1015, §13 et seq. It is also a question of the failure to modify RIPA to accommodate the requirements of justice in freezing order cases. The Master of the Rolls has described this unhappy situation at [60-64] in terms with which I respectfully agree. I also agree with him that we must take the law as it is, not as it ought to be. But the law as we now have it is an Order in Council which is markedly deficient in the opportunity which it gives, or which is provided by other means, to ensure that a freezing order cannot be made or confirmed without a fair hearing.

141. The Master of the Rolls has analysed at [69-78] the tranches of issues which may arise in relation to open and closed material. His conclusion is that these can be fairly managed case by case. I do not dissent from this, but once again it does not seem to me to resolve the vires question: is it the role of the courts not simply to ensure that what is lawfully enacted is fairly administered but to fill the gaps in enactments in order to make them valid?

Uncertainty

142. The same concern attends the question of vagueness in the criminalisation of acts proscribed by the Terrorism Order. I accept, as the European Court of Human Rights has accepted, that rough edges are unavoidable in the definition of many crimes. In such cases the arbiter has to be a court of criminal jurisdiction. But the degree of imprecision in the phrases "deal with" and "financial services" is considerable, and (in respectful disagreement with the Master of the Rolls) I do not think it sufficient to rely upon an administrative application of the principle *de minimis non curat lex* to keep them within bounds. It is not right to expect people to run the risk of prosecution – with severe possible penalties – in order to ascertain whether a gift of food or a loan of a few pounds to a controlled person has infringed the Order. Nor is it fair or realistic to expect every such act to be preceded, out of caution, by an application for a licence – a step which, apart from anything else, logically forfeits any reliance on a *de minimis* exclusion.

143. It may not be easy to devise a form of words which would achieve the desired result with reasonable precision and without prolixity; but what in my judgment matters is that in this respect too the Terrorism Order, in contrast to the legislative provision mentioned in my second paragraph, ranges alarmingly wide.

The Terrorism Order

144. I come back therefore to the question whether, since the prior existence of parallel powers in primary legislation makes it unnecessary, the Terrorism Order as it stands can properly be said by government to be expedient. In my judgment it cannot. If its only vice was the inclusion of the words "or may be", it could be cured by severance. But it is far from being the only vice. The Order criminalises a wide and uncertain range of everyday acts. It makes no proper provision (and none is made elsewhere) for according due process to those against whom it is deployed. Even with the objectionable words "or may be" excised, the Order appears to me to be incompatible with the rule of law in its failure to accord legal protection to those it affects and the legal uncertainty of what it forbids. In agreement with Collins J I would hold the Order to be outwith the powers contained in s.1 of the United Nations Act 1946.

145. I would accordingly dismiss the Treasury's appeal. I stress that this would not leave the United Kingdom without means to stop funds reaching terrorist organisations: the Acts of 2000 and 2001 continue to provide such means.

The Al Qaida Order

146. The particular vice identified in the Al Qaida Order is that it is self-executing. The respondent G thus had no way of challenging his designation once he was named by the Security Council. The unnerving aspect of his case – and there is no reason why it should be unique – is that it was the United Kingdom's security services which asked the Security Council to nominate him in the first place. By this simple means, given the provisions of the Order, judicial oversight is apparently avoided.

147. Unless an effective form of judicial review is available to challenge the nomination, this would in my view be a use of delegated powers to block access to the courts and accordingly a fatal flaw in the Order. But, although I am not sanguine about the

viability of a merits review in the face of security-sensitive material, I do not dissent from the holding of the Master of the Rolls that such review is in principle available under the Al Qaida Order. I stress the word "under": contrary to the Treasury's submission, it is not necessary for the individual affected to show the material part of the Order to be ultra vires; it will be sufficient if he can establish that he should not have been listed.

148. But the foregoing, which is necessarily broad and predictive, may prove over-optimistic. If it does, and if it turns out either generally or in any one case that judicial review is unable for legal or practical reasons to afford an effective challenge to listing, I see no reason why the present claim might not be renewed, since the premise of our decision upon it would have proved false. In that event it is the vires of this part of the Order which will be in issue.

149. The other criticisms of the Al Qaida Order, reflecting the criticisms of the Terrorism Order, ought to receive the same answer, as indeed they did from Collins J. But G has not been made subject to a direction under art. 4 of the Al Qaida Order: the freezing order made against him is part of a discrete process under the Order which sidesteps art. 4, and I am prepared to accept that this is the permissible limit of his challenge.

150. Upon this narrow footing, which represents at best a partial and potentially a Pyrrhic victory, I would allow the Treasury's appeal in as much of G's case as relates to the Al Qaida Order.

Lord Justice Wilson:

151. Where the judgments of the Master of the Rolls and Sedley LJ are in accordance, I agree with both of them. Where they are not in accordance, I agree with that of the Master of the Rolls. I therefore consider not only that the AQO is valid but that, subject to severance of the words "or may be" ("the three words") from Article 4(2), the TO is also valid.

152. The problems presented to us in the appeal are profoundly and inherently difficult. The UK government is obliged to carry out the decisions of the U.N. Security Council: Article 25 of the Charter. In order to combat terrorism the Security Council has passed a series of fierce resolutions. By such of the resolutions, principally No. 1333 (2000), as have given rise to the AQO, the Council, seeking to respond to the threat in a manner probably far from the contemplation of the founders of the UN in 1946, has set up a system for a committee of its own to designate, by list, a person as being a member of Al Qaida or an associate thereof, whom all member states are thereupon at once obliged to deprive of access to finance. The understandable objective is immediate disabling action against a person at global level. But the way in which the Sanctions Committee operates in reaching a conclusion that a person be so designated is opaque and it is not amenable to review by the courts of the member states. Even though in principle it may be possible for the court of the state which proposed a person's designation to examine the material which it placed before the Committee in support of its proposal, that court has no access to any other material upon which the Committee may have relied in deciding to designate him. The Committee's procedures for determining a request that a person be de-listed are almost as opaque; and, notwithstanding the Council's recent attempts, by resolutions No. 1730 (2006) and, since the hearing before us, No. 1822 (2008), to improve such

procedures, for example by allowing the listed person in his own capacity to lodge at the "focal point" a request for de-listing instead of making such a request through the state of which he is a citizen or in which he is a resident, there is no evidence which establishes that, at UN level, the listed person's fundamental rights to fair consideration of his request for de-listing are observed. Yet such is the system which the UK government is bound to implement; and our courts cannot review the UN's operation of it. This inherent and intractable difficulty about the operation of the system reflected in the AQO is compounded by the swingeing disabilities which the UN resolutions referable to each of the systems reflected in the AQO and in the TO require to be imposed upon persons designated thereunder and upon all those who make funds or economic resources available to them.

153. On top of the inherent difficulty we have, first, the U.K. executive's impermissible arrogation of extra power by the insertion of the three words into Article 4(2) of the TO. Mr Owen rightly submits that, for example, the Treasury would presumably have reasonable grounds for suspecting that all those who do no more than to live in the same household with a terrorist *may be* persons who participate in or facilitate the commission of acts of terrorism. That such persons should all be swept into the net of liability to designation is not mandated by such of the resolutions, principally No. 1373 (2001), as have given rise to the TO; and it represents an arresting example of executive illegality even if born of nothing worse than cavalier draftsmanship. We have, second, the Treasury's failure to date to make provisions to govern the procedure for applications under article 5(4) of the TO to set aside directions for designation, even though the likely need for special advocates to participate in the appraisal of closed evidence in at any rate a significant proportion of such applications was expressly recognised in Parliament two years ago and even though, according to Mr Swift, the Treasury also then recognised the need to provide in this regard for an exception to the blanket prohibition against the use of intercept evidence in s.17 RIPA. The Treasury has chosen to begin to operate the TO; indeed it has made no less than 45 directions for designation thereunder. Yet the promised procedures to enable the court to fulfil its role in deciding whether to set the directions aside are not yet in place. The delay is unexplained and so I think may fairly be described as lamentable. Like the Master of the Rolls, however, I do not accept that it follows that, apart from the need to sever the three words, the TO is unlawful.

154. The respondents contend that it is not for the courts to fill significant gaps in a legislative scheme or to devise a system which will save it from invalidity. In my view however the proposition is too wide; and, at any rate in relation to the disputed orders, the courts are not driven to be so negative. For the courts' existing powers, which the Master of the Rolls has analysed in [55] to [78] above, enable them adequately to address the difficulties which may well arise in the determination of applications under Article 5(4) of the TO; and, insofar as in an individual case the difficulties prove not to be susceptible to adequate address, the applicant will be the beneficiary: see the conclusion at [78] above. Nor should we be inhibited by the prospective cost to the Treasury of the necessary procedures, in particular of special advocates, in circumstances in which it has expressly recognised the likely need for them.

155. "Expedient" has become a dirty word. It has come to mean "unprincipled". The reader will have noticed the stress which Sedley LJ has laid on it. But, with profound respect,

the word must be considered in the context in which it arises in this case, namely s.1(1) of the UN Act. The power given to the executive is to "make such provision as appears … necessary or expedient for enabling … measures [which the Security Council has called on it to apply] to be effectively applied". So the power to make expedient provision is confined within the contours of effective implementation; and we must adjudge the validity of the orders by reference to whether they are necessary or expedient in relation to the objective of achieving effective implementation of the requisite measures. My view, therefore, is that, if they are to be valid, the orders have to do much more than to 'relate' to the subject of a UN resolution, such being the verb used by Sedley LJ in his analysis of the subsection at [128] above. We are all agreed that, as Collins J considered, one part of the TO, albeit not "necessary", is "expedient" in relation to that objective: it is the provision in article 4(2) that a person's designation is permissible even if the Treasury has only "reasonable grounds for suspecting" that he falls into one of the specified categories. We are all further agreed that, as Collins J again considered, three other words in that paragraph are neither necessary nor expedient in relation to that objective. But the remainder of the TO and the whole of the AQO have in my view to be adjudged not just expedient but necessary in relation to that objective. There is an appropriately close correlation between the words of the two principal resolutions and those of the two orders. It is true that, briefly in oral submission and rather more fully by a note filed following the hearing, Mr Owen has drawn our attention to the Terrorism Act 2000 and to ATCSA 2001. But, notwithstanding what he submitted to be some overlap between some provisions in the former and the requisites of resolution No. 1373 (2001), he did not argue – still less did Collins J hold – that the provisions of either or both of the Acts were such as to render it other than "necessary" for the effective implementation of the resolution that the executive should have introduced further legislation in one form or another. Moreover, in relation to resolution No. 1333 (2000), it is obvious that its new system of individual designation at UN level requires member states to bring into force specific provisions which interlock with it.

156. In my view, therefore, the words of the UN Act themselves, naturally construed, are insufficient to justify a conclusion that, apart from the three words, the orders are invalid. The respondents need to reach for some further principle of law which either requires the words of the Act so to be read down as to yield such a conclusion or directly strikes the orders down. In this regard the respondents focus in particular upon the criminal offences for which the orders provide and which are rightly said to be fundamental to them; upon the wide but otherwise allegedly uncertain boundaries both of the prohibited acts and of the class of persons who might find that they had perpetrated them; and upon the potential severity of the consequences of their perpetration. Their argument is that in this regard the orders fail to satisfy the principle that criminal offences should be defined with maximum certainty. In this respect I agree with the analysis of the Master of the Rolls in [86] to [103] above. Given the obligation of the UK government to implement the SCRs, which expressly and inevitably require it to deploy criminal sanctions, it has not been demonstrated, at any rate to my satisfaction, that the latter could have been formulated with any significantly greater degree of certainty. In my view the identical definitions of "economic resources" in Article 2(1) of each order and of "deal with" in Article 7(6) of each order are sufficiently precise. If and insofar as there are ambiguities in other areas, the principle against doubtful penalisation will avail defendants. For example in *R(M) v. HMT*, cited at [17] above, the House of Lords, in referring to the ECJ an issue

as to the construction of EU Council Regulation 881/2002, itself offered, as its opinion, a strikingly narrow construction of the provisions in Article 2.2 and 2.3 of the regulation against making funds available "for the benefit of" a designated person, being provisions unsurprisingly analogous to those contained in Articles 8(1) both of the AQO and indeed also of the TO.

157. In my view therefore, subject to severance of the three words, the TO is valid. The issue as to the validity of the AQO raises a particular problem to which, in my view, the Master of the Rolls finds a sufficient, creative solution in [113] to [120] above, namely in a merits-based judicial review of the executive's response to a person's application to it that it should request, or support his own request, for de-listing by the Sanctions Committee. I cannot associate myself with the observation of Sedley LJ at [146] above that it is unnerving that it was our own government which requested the Committee to designate G. In relation to him it clearly wanted to achieve the global effect of designation at UN level; although its grounds must have seemed good to the Committee, it is impossible for us to assess their strength. Nor can I endorse his observation, at [149] above, that the process to which G has been made subject "sidesteps" Article 4 of the AQO. In that there is no doubt about G's identity as a person designated by the Committee, there has been no room for a direction under Article 4; and I do not entirely understand why our conclusion as to the validity of the AQO should turn on its absence in his case.