



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: Terrorist Asset- Freezing etc Bill (Second Report); and other Bills

Fourth Report of Session 2010-11

*Report, together with formal minutes and
appendices*

*Ordered by The House of Lords to be printed
9 November 2010*

*Ordered by The House of Commons to be printed
9 November 2010*

**HL Paper 53
HC 598**

Published on 12 November 2010
by authority of the House of Lords and
the House of Commons London:
The Stationery Office Limited
£0.00

Joint Committee on Human Rights

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

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

Current membership

HOUSE OF LORDS

Lord Bowness (Conservative)
Baroness Campbell of Surbiton (Crossbench)
Lord Dubs (Labour)
Lord Lester of Herne Hill (Liberal Democrat)
Baroness Morris of Bolton (Conservative)
Lord Morris of Handsworth (Labour)

HOUSE OF COMMONS

Dr Hywel Francis MP (Labour, *Aberavon*) (Chairman)
Dr Julian Huppert MP (Liberal Democrat, *Cambridge*)
Mrs Eleanor Laing MP (Conservative, *Epping Forest*)
Mr Dominic Raab MP (Conservative, *Esher and Walton*)
Mr Virendra Sharma MP (Labour, *Ealing Southall*)
Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at <http://www.parliament.uk/jchr>

Current Staff

The current staff of the Committee is: Mike Hennessy (Commons Clerk), Rob Whiteway (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick (Assistant Legal Adviser), James Clarke (Senior Committee Assistant), Michelle Owens (Committee Assistant), Claudia Rock (Committee Assistant), Greta Piacquadio (Committee Support Assistant), and Keith Pryke (Office Support Assistant).

Contacts

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Summary

We published a Preliminary Report on the Terrorist Asset-Freezing Etc Bill before its Report Stage in the House of Lords, pending our receipt of a response from the Government to the questions we raised about the human rights issues in the Bill. The Bill completed its passage through the Lords on 1 November 2011 and we received the Government's response to our questions on 22 October 2010. In this Report, we publish our views on the human rights issues raised by the Bill in light of the Government's response.

The standard of proof

In our Preliminary Report on the Bill, we welcomed as a human rights enhancing measure the Government's raising of the legal threshold for an asset-freeze from reasonable suspicion to reasonable belief, but we sought clarification as to whether this raising of the threshold means that the standard of proof has also been raised to the civil standard of "balance of probabilities."

The Government response makes clear that the Treasury do not consider that 'reasonable belief' requires the Treasury to be satisfied of the relevant facts to the civil standard of proof. As the Bill stands, therefore, a person's assets can be frozen even if the Treasury are not satisfied of that person's involvement in terrorism on the balance of probabilities.

In our view, there is scope to amend the Bill to provide for a standard of proof which is higher than that which is currently in the Bill, but which is still lower than the standard required to charge the person with a criminal offence. This would still be consistent with the power being used preventively, and we accordingly propose an amendment to the Bill.

Reasons

We asked the Government whether they would consider requiring the Treasury to include in the written notice of designation under clause 3(1)(a) of the Bill as much information about the reasons for designation as it is possible to give consistently with the public interest in non-disclosure.

The Government responded that it is unnecessary to make such specific provision in the Bill, because the basic administrative law principle of giving reasons for decisions of this sort applies, regardless of whether a duty is specified in the legislation or not.

However, experience of the control order regime does not suggest that reasons for imposing such preventive orders based largely on closed material will be forthcoming in practice. We therefore recommend that the Bill be amended to require a summary of reasons to be given in the written notice of designation, subject only to legitimate public interest concerns about non-disclosure. A mandatory statement of reasons in the written notice of designation would help to ensure that the new right of appeal is an effective remedy. We accordingly propose an amendment to the Bill.

The right to a fair hearing

We also asked the Government whether they accept that the principles enunciated by the House of Lords in the case of AF apply to asset-freeze proceedings, so that the designated

person must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations to the person who represents his interests.

The Government's response is that they do not consider that the disclosure principle in *AF* applies to proceedings related to asset-freezing designations. They say that asset-freezes are not equivalent to the stringent control orders which were the subject of the *AF* case because they do not have such a severe impact on human rights and the courts have yet to consider whether *AF* applies in asset-freezing cases. We find the Government's argument in this case entirely unconvincing.

To avoid the unnecessary public expense of litigating that issue, as well as the delay in implementing the principle, we recommend that the Government should amend the Bill to give statutory effect in the asset-freezing context to the principle enunciated by the House in the case of *AF*. We propose two amendments which together would give effect to this.

Parliamentary Accountability

We asked the Government why the independent reviewer of the asset-freezing regime provided for by the Bill should not be appointed by Parliament and report directly to Parliament rather than the Treasury. The Government consider that the current process for appointing an independent reviewer of terrorism legislation provides an effective model. Our predecessor Committee consistently called for the post of statutory reviewer of terrorism legislation to be reformed to deal with the problem of perceived lack of independence.

We recommend that the Bill be amended to make the independent reviewer more independent of the Government and accountable to Parliament by providing for: parliamentary confirmation of the appointment by the Treasury; reporting by the independent reviewer directly to Parliament, not to the Treasury; and a single, non-renewable term of appointment of five years. We recommend that the independent reviewer should also have access to such independent expertise and support he or she considers necessary.

Other Bills not brought to the attention of either House.

We consider that the Local Government, Equitable Life Payments, Fixed Term Parliaments, Finance (No. 2), Savings Accounts and Health in Pregnancy Grant, National Insurance Contributions and Postal Services Bills do not raise human rights issues of sufficient significance to warrant us undertaking further scrutiny of them.

Bill drawn to the attention of both Houses

1 Terrorist Asset-Freezing etc. Bill

Date introduced to first House	15 July 2010
Date introduced to second House	2 November 2011
Current Bill Number	HC Bill 102
Previous Reports	Third of 2010-11

Introduction

1.1 We published a Preliminary Report on this Bill before its Report Stage in the House of Lords,¹ pending our receipt of a response from the Government to the questions we raised about the human rights issues in the Bill. The Bill completed its passage through the Lords on 1 November 2011 and was introduced in the Commons on 2 November. It is due to receive its Second Reading in the Commons on 15 November.

1.2 We received the Government’s response to our questions on 22 October 2010.² In this Report, we publish our views on the most significant human rights issues raised by the Bill in light of the Government’s response.

Significant human rights issues

(1) *The standard of proof*

1.3 In our Preliminary Report, we welcomed as a human rights enhancing measure the Government’s raising of the legal threshold for an asset-freeze from reasonable suspicion to reasonable belief, but we sought clarification as to whether this raising of the threshold means that the standard of proof has also been raised to the civil standard of “balance of probabilities.”

1.4 The Government response makes clear that the Treasury do not consider that ‘reasonable belief’ requires the Treasury to be satisfied of the relevant facts to the civil standard of proof. The Government rely on the Court of Appeal’s interpretation of the same phrase “reasonable belief” in the Anti-Terrorism, Crime and Security Act 2001³:

“when considering whether there are reasonable grounds for the relevant belief or suspicion, [the Special Immigration Appeals Commission] need not ... be concerned about satisfying itself that, on the balance of probabilities, the belief or suspicion is justified, or that it shares the belief or suspicion. It is merely concerned with deciding whether there are reasonable grounds for such belief or suspicion.”⁴

1 Third Report of Session 2010-11, *Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)*, HL 41/HC 535.

2 Ev 1.

3 Under s. 21(1) of the 2001 Act a person could be certified by the Secretary of State on the basis of a reasonable belief that the person’s presence in the UK was a risk to national security and a reasonable suspicion that the person was a terrorist..

4 *A v Secretary of State for the Home Department* [2004] EWCA Civ 1123.

1.5 As the Bill currently stands, therefore, a person's assets can be frozen even if the Treasury are not satisfied of that person's involvement in terrorism on the balance of probabilities. As we pointed out in our Preliminary Report, the lower the threshold for the use of the asset-freezing powers, the easier it is for the Government to interfere with people's right to property and to respect for their home, private and family life. Similarly, the lower the standard of proof, the less valuable the procedural protection afforded by the right of access to a court.

1.6 We note that some have advocated that asset-freezes should only be possible where a person has either been convicted of a terrorism-related offence (in which case their involvement in terrorism has been proved beyond reasonable doubt) or charged with such an offence (which requires a prosecutor to consider that there is a reasonable prospect of securing a conviction, that is, proving the charge beyond reasonable doubt). The Government oppose such a narrow approach on the basis that it would undermine the preventive use of the power to freeze assets.

1.7 In our view, there is scope to amend the Bill to provide for a standard of proof which is higher than that which is currently in the Bill, but which is still lower than the standard required to charge the person with a criminal offence, and which is therefore consistent with the power being used preventively.

1.8 We recommend that the Bill be amended to require that the Treasury be satisfied to the civil standard of proof, that is, on the balance of probabilities, that the relevant facts exist.

1.9 The following amendment to the Bill would give effect to this recommendation:

Clause 2, page 2, line 1, after "believe" insert "on the balance of probabilities".

(2) Reasons

1.10 We asked the Government whether it would consider requiring the Treasury to include in the written notice of designation under clause 3(1)(a) of the Bill as much information about the reasons for designation as it is possible to give consistent with the public interest in non-disclosure.

1.11 The Government responded that it is unnecessary to make such specific provision in the Bill, because the basic administrative law principle of giving reasons for decisions of this sort applies, regardless of whether a duty is specified in the legislation or not.

1.12 However, experience of the control order regime does not suggest that reasons for imposing such preventive orders based largely on closed material will be forthcoming in practice.

1.13 We recommend that the Bill be amended to require a summary of reasons to be given in the written notice of designation, subject only to legitimate public interest concerns about non-disclosure. A mandatory statement of reasons in the written notice of designation would help to ensure that the new right of appeal is an effective remedy.

1.14 The following amendment to the Bill would give effect to this recommendation:

Clause 3, page 2, line 27, after sub-paragraph (1)(a) insert:

“(aa) explain, as fully as possible consistent with the public interest in non-disclosure, the reasons why they are satisfied that the conditions in section 2(1) are satisfied.”

(3) *The right to a fair hearing*

1.15 We asked the Government whether they accept, in light of the decisions in *Bank Mellat* and *Kadi*, that the principles enunciated by the House of Lords in the case of *AF* apply to asset-freeze proceedings, so that the designated person must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations to the person who represents his interests.

1.16 The Government’s response is that they do not consider that the disclosure principle in *AF* applies to proceedings related to asset-freezing designations. It says that asset-freezes are not equivalent to the stringent control orders which were the subject of the *AF* case because they do not have such a severe impact on human rights and the courts have yet to consider whether *AF* applies in asset-freezing cases.

1.17 We find the Government’s argument that the principle in *AF* does not apply to asset-freeze proceedings entirely unconvincing. It ignores the fact that the Supreme Court in *Ahmed* found asset-freezes to be at least as restrictive of an individual’s liberty as control orders. It ignores the fact that the European Court of Justice in *Kadi* applied the principle in *A v UK* (which underpins the judgment in *AF*) to asset-freeze proceedings. And while it is strictly speaking true that the decision of the Court of Appeal in *Bank Mellat* concerned financial restriction proceedings under the Counter-Terrorism Act 2008 rather than asset-freeze proceedings *per se*, there is no distinction in principle between the two types of proceedings.

1.18 In the different context of the Superannuation Bill, the Chair of the Public Administration Select Committee, Bernard Jenkin MP, recently commented on the tendency of Governments to resist the implications of court judgments on human rights questions and warned that this might be an appropriate subject of an inquiry by his committee:⁵

I point out that Governments of both parties have a long history of wishful thinking when it comes to such cases. I speculate that it appears that the easier course in the short term is often to risk defeat in the courts sometime in the distant future rather than to confront the legal realities and their implications immediately. That is not conducive to better governance and decision making, and if it continues to happen under this new Administration there will perhaps be a case for the Public Administration Committee to launch an inquiry into why the Government’s legal advice has so often proved deficient in such cases. I place the Government on notice about that.

1.19 In our view the Government’s approach to the implications of the *AF* decision is such a case. We are quite certain that the principle in the *AF* case will be held to apply to asset-

freeze proceedings. To avoid the unnecessary public expense of litigating that issue, as well as the delay in implementing the principle, we recommend that the Government should accept the inevitable by amending this Bill to give statutory effect in the asset-freezing context to the principle established by the European Court of Human Rights in *A v UK*, and applied by the House of Lords in *AF (No. 3)*, the Court of Appeal in *Bank Mellat* and the European Court of Justice in *Kadi*, that the person affected by a preventive measure such as a control order or an asset-freeze must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. We recommend two amendments to the Bill to achieve this.⁶

1.20 First, we recommend that the relevant provision of the Counter-Terrorism Act 2008 be amended so as to require rules of court to secure that the court’s otherwise absolute duty of non-disclosure in asset-freeze proceedings (s. 67(3)(c) of the Counter-Terrorism Act 2008) is expressly qualified by the duty to ensure sufficient disclosure to protect the right to a fair hearing.

1.21 The reason this amendment is necessary is that, according to the evidence of the special advocates, the decision in *AF (No. 3)* has not been sufficient to prevent continuing breaches of the right to a fair hearing in practice in control order cases. In the absence of a clear statutory duty to provide the affected person, at the outset of the proceedings, with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate appointed to represent his interests, the courts have adopted an “iterative approach” to disclosure. According to the iterative approach, the court does not decide once and for all what material must be disclosed to the controlled person at the outset of the proceedings, but rather identifies the bare minimum with which the controlled person could possibly refute the case against him, returning to the question of whether further disclosure is required at a later stage. As some of the special advocates explained in their evidence to the previous JCHR,⁷ this approach is not compatible with the right to a fair hearing: it does not ensure sufficient disclosure at the outset of proceedings, to enable effective instructions to be given to special advocates, and even if it eventually leads to sufficient disclosure it only occurs after considerable delays in the proceedings to challenge severely restrictive measures. Even if the Government were to accept that the principles in *AF (No.3)* apply to asset-freeze proceedings, this would not be sufficient to ensure that the right to a fair hearing is adequately protected. A clear statutory duty is therefore required. **The following amendment would give effect to this recommendation:**

Clause 28, page 13, line 41, at end insert:

“(5) In section 67(3) of the Counter-Terrorism Act 2008 (rules of court about disclosure)—

(a) in paragraph (c) after “that” insert “subject to paragraph (ca) below”;
and

(b) after paragraph (c) insert—

⁶ Amendments to the same effect were moved by Lords Pannick and Lester at Report Stage in the Lords but were withdrawn without a division: HL Deb 25 Oct 2010 cols 1072-1080.

⁷ See e.g. the Report on the 2010 Control Order Renewal, 9th Report of 2009-10.

(ca) that in relation to a final designation, the material disclosed by the Treasury on which they rely is sufficient to enable each designated person to give effective instructions to a person appointed as a special advocate to represent that party’s interests;”.

1.22 **The second amendment we recommend would reinstate the supremacy of the right to a fair hearing over the duty not to disclose information in the public interest.** It is included in Schedule 1 of the Bill because it is a consequential amendment which follows from the previous amendment’s qualification of the otherwise absolute prohibition on the disclosure of material where the court considers that the disclosure would be contrary to the public interest. The amendment removes the provision in the Civil Procedure Rules which explicitly subordinates the overriding objective of the system of civil justice (to deal with cases justly) to the State’s interest in ensuring that information is not disclosed contrary to the public interest.

1.23 Both the control order and asset-freezing regimes are founded on legal provisions which purport to impose absolute duties on courts to ensure that information is not disclosed contrary to a wide range of public interests, regardless of the implications for the right to a fair hearing. CPR rule 79.2 in the asset-freezing context and the equivalent, CPR rule 76.2, in the control order context, are the most striking provisions which embody that elevation of non-disclosure over justice. The control order litigation, culminating in *AF*, has been a gradual process of judicial reinstatement of the right to a fair hearing, by reading into the legal framework words which qualify the absolute duties in order to protect the right to a fair hearing. This amendment is necessary in order to make explicit that the right to a fair hearing is no longer subordinated to an unqualified duty not to disclose (see Baroness Hale’s criticism of the provision in her judgment in *MB [2007] UKHL 46* at para. 59).

1.24 The following amendment would give effect to this recommendation:

Schedule 1, page 29, line 28, after sub-paragraph (f) insert—

“(ff) Leave out rule 79.2.”

(4) Parliamentary accountability

1.25 We asked the Government why the independent reviewer of the asset-freezing regime provided for by the Bill should not be appointed by Parliament and report directly to Parliament rather than the Treasury.

1.26 The Government consider that the current process for appointing an independent reviewer of terrorism legislation provides an effective model. It says that the reason for requiring a copy of the report to be first submitted to the Treasury is to ensure that no material that would be harmful to national security is inadvertently released. We note, however, that a practice has grown up whereby reports of the independent reviewer are published at the same time as the Government’s response to the report, complete with press releases by the Government quoting the most congenial parts of the reviewer’s report. This goes far beyond the Government’s stated rationale for requiring the reviewer’s reports

to be submitted to the Government before Parliament, and gives the appearance that the reports are primarily reports to Government not Parliament.

1.27 Our predecessor Committee consistently called for the post of statutory reviewer of terrorism legislation to be reformed to deal with the problem of perceived lack of independence.⁸ We note that similar concerns were expressed in the House of Lords about the perceived lack of independence of the statutory reviewer of the terrorism legislation during the passage of the Counter-Terrorism Bill in 2008.⁹

1.28 We recommend that the Bill be amended to make the independent reviewer more independent of the Government and accountable to Parliament by providing for:

- (1) parliamentary confirmation of the appointment by the Treasury;**
- (2) reporting by the independent reviewer directly to Parliament, not to the Treasury; and**
- (3) a single, non-renewable term of appointment of five years.**

The following amendments would give effect to this recommendation:¹⁰

Clause 31, page 15, line 25, at end insert—

- “() A person may not be appointed under subsection (1) unless-**
- (a) the Secretary of State lays a report before both Houses of Parliament which recommends the person and sets out the process by which he was chosen,**
 - (b) a Minister of the Crown tables a motion in both Houses to approve the report laid under this subsection, and appoint the person, and**
 - (c) such a motion is agreed by a resolution of both Houses of Parliament.”**

Clause 31, page 15, line 31, leave out “send the Treasury a” and after “report” insert “to Parliament”

Clause 31, page 15, line 34, leave out sub-clause (4).

Clause 31, page 15, line 38, after sub-clause (5) insert—

- “() Appointment under sub-section (1) shall be for a non-renewable term of five years.”**

1.29 We also recommend that the independent reviewer should have access to such independent expertise and support as he or she considers necessary.

⁸ Sixteenth Report of 2009-10, *Counter-Terrorism Policy and Human Rights*: *Bringing Human Rights Back In* (March 2010), at paras 117-118.

⁹ HL Deb 13 October 2008 col 586 (House of Lords Committee Stage debate on the Counter-Terrorism Bill).

¹⁰ Amendments to this effect were moved by Lord Judd at Report Stage in the House of Lords but disagreed by 143 votes to 122: HL Deb 5 Oct 2010 cols 1080-1092.

Bills not requiring to be brought to the attention of either House on human rights grounds

1.30 We consider that the following Bills do not raise human rights issues of sufficient significance to warrant us undertaking further scrutiny of them:

- Local Government Bill
- Equitable Life Payments Bill
- Fixed Term Parliaments Bill
- Finance (No. 2) Bill¹¹
- Savings Accounts and Health in Pregnancy Grant Bill
- National Insurance Contributions Bill
- Postal Services Bill.

¹¹ See Memorandum on retrospectivity from the Treasury dated 30 September 2010, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/leg-scru-2010-11/finance-no-2-bill-2010/>

Conclusions and recommendations

Significant Human Rights Issues

(1) The standard of proof

1. We recommend that the Bill be amended to require that the Treasury be satisfied to the civil standard of proof, that is, on the balance of probabilities, that the relevant facts exist (Paragraph 1.8)

(2) Reasons

2. We recommend that the Bill be amended to require a summary of reasons to be given in the written notice of designation, subject only to legitimate public interest concerns about non-disclosure. A mandatory statement of reasons in the written notice of designation would help to ensure that the new right of appeal is an effective remedy. (Paragraph 1.13)

(3) The right to a fair hearing

3. we recommend that the relevant provision of the Counter-Terrorism Act 2008 be amended so as to require rules of court to secure that the court's otherwise absolute duty of non-disclosure in asset-freeze proceedings (s. 67(3)(c) of the Counter-Terrorism Act 2008) is expressly qualified by the duty to ensure sufficient disclosure to protect the right to a fair hearing. (Paragraph 1.20)
4. The second amendment we recommend would reinstate the supremacy of the right to a fair hearing over the duty not to disclose information in the public interest. (Paragraph 1.22)

(4) Parliamentary accountability

5. We recommend that the Bill be amended to make the independent reviewer more independent of the Government and accountable to Parliament by providing for:
(1) parliamentary confirmation of the appointment by the Treasury;
(2) reporting by the independent reviewer directly to Parliament, not to the Treasury; and
(3) a single, non-renewable term of appointment of five years.
6. We also recommend that the independent reviewer should have access to such independent expertise and support as he or she considers necessary. (Paragraph 1.29)

Formal Minutes

Tuesday 9 November 2010

Members present:

Dr Hywel Francis, in the Chair

Baroness Campbell

Lord Dubs

Lord Lester of Herne Hill

Lord Morris of Handsworth

Dr Julian Huppert

Mrs Eleanor Laing

Mr Dominic Raab

Mr Virendra Sharma

Mr Richard Shepherd

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

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

Paragraphs 1.1 to 1.30 read and agreed to.

Summary read and agreed to.

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

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

Written evidence reported and ordered to be published on 26 October was ordered to be reported to the House for printing with the Report.

[Adjourned till Tuesday 16 November at 2.00 pm]

Declaration of Lords Interests

Members declared the following interests relevant to scrutiny of this Bill:

Lord Lester of Herne Hill

Category 10: Non-financial interests:

Member, Expert Counsel Panel, Liberty

Member of Council, JUSTICE

A full list of Members' interests can be found in the Register of Lords' Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm>

No other members present declared interests.

List of Written evidence

- 1 Letter from Lord Sassoon, Commercial Secretary to the Treasury, to the Committee Chair, 22 October 2010 p 16

Written evidence

1. Letter from Lord Sassoon, Commercial Secretary to the Treasury, to the Committee Chair, 22 October 2010

TERRORIST ASSET FREEZING ETC. BILL

Thank you for your letter dated 13 October 2010, requesting further information on the Terrorist Asset Freezing Etc. Bill and the operation of the asset freezing regime. I will deal with your questions in turn.

(1) The scale of the problem

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

Under the Terrorism (United Nations Measures) Order 2009 designated persons comprise the persons listed under Council Regulation (EC) 2580/2001 and persons designated under a direction made by the Treasury. 33 persons are listed under the Council Regulation.

There are currently 63 persons (41 individuals and 22 entities) subject to a direction made by the Treasury. Of these, 28 individuals and 1 entity are UK residents or citizens or hold funds here.

Of the 28 UK individuals, 22 were designated post arrest and have now been charged and convicted of terrorism-related offences. The remaining 6 individuals' designations were not linked to criminal proceedings.

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

In the 12 months from 13 October 2008, three new designations were made by the Treasury, but one of these individuals has subsequently been delisted. In the 12 months from 13 October 2009, no new designations were made. This information is reported publicly in Treasury's Quarterly Report to Parliament on the operation of the asset freezing regime. Please note that these figures are for new designations. They do not include pre-existing designations that were renewed during this period.

(2) The breadth of the power

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

The Treasury do not consider that 'reasonable belief' requires the Treasury to be satisfied of the relevant facts to the civil standard of proof, that is, a balance of probabilities. In reaching this conclusion the Treasury note the Court of Appeal's judgment in *A & Ors v*

Secretary of State for the Home Department [2004] EWCA Civ 1123 which concerned an appeal from certification under section 21(1) of the Anti-Terrorism, Crime and Security Act 2001 on the basis of a reasonable belief that a person's presence in the United Kingdom was a risk to national security and a reasonable suspicion that the person was a terrorist. In that case Lord Justice Pill stated:

A reasonable belief may be held on the basis of the receipt of information which has not been proved in the ordinary sense of that word. (paragraph 30)

At paragraph 229 Lord Justice Laws stated:

Belief and suspicion are not the same, though both are less than knowledge. Belief is a state of mind by which the person in question thinks that X is the case.

In the same case Lord Justice Neuberger stated:

... in deciding whether there are, as a matter of fact, reasonable grounds for suspicion or belief, SIAC is not necessarily concerned with primary facts, and, to that extent, there is no need to establish a primary fact on the balance of probabilities. For instance, subject to consideration of its reliability (which may raise all sorts of factors) a newspaper report relating to the activities of an appellant may be taken into account by the Secretary of State under s21 or by SIAC under s25. In such a case it is not necessary for SIAC to be satisfied on the balance of probabilities that the reported facts are true; it would merely need to be satisfied, on the balance of probabilities, as to the existence of the newspaper report. (I should emphasise that SIAC may, even if so satisfied, give no or little weight to the contents of the newspaper report, if it thought it right to do so.) Secondly, when considering whether there are reasonable grounds for the relevant belief or suspicion, SIAC need not, as I have sought to explain, be concerned about satisfying itself that, on the balance of probabilities, the belief for suspicion is justified, or that it shares the belief or suspicion. It is merely concerned with deciding whether there are reasonable grounds for such belief or suspicion. (paragraph 370)

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

The Government do not believe it is necessary or desirable to change the drafting of this clause. The formulation of ‘purposes connected with’ protecting the public from a risk of terrorism is a well-established and settled test that is used in the Prevention of Terrorism Act 2005. Changing the wording would indicate a wish to apply a different necessity test to asset freezes than is applied to control orders, whereas in the Government’s view, the necessity tests should remain consistent.

The Government also do not believe that it is necessary for the word “reasonably” to be included in the necessity test. The determination of whether a freeze is necessary for purposes connected with protecting the public from a risk of terrorism is a matter for the Government’s discretion taking into account all relevant considerations. Any decision by the government is ultimately subject to review by the courts on appeal.

(3) The right of access to court

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

The Government believes that Ministers are best placed to take decisions to impose asset freezes, but that these decisions should be subject to scrutiny by the courts in cases where a person wishes to challenge their asset freeze. Decisions to impose asset freezes should be taken by the executive because they are preventative (and not punitive) measures that are taken on the basis of operational advice to protect national security. Ministers are then accountable for these decisions both to Parliament and to the courts. This clear accountability means that Ministers are best placed to weigh the protection of national security with the interests of the designated person.

Whilst the courts are responsible for giving permission to impose control orders, the Government does not believe that the courts should have the same role in asset freezing, because the circumstances are clearly different. Although asset freezes interfere with property rights, they do not impact on human rights to the same extent as control orders. In contrast to control orders, asset freezing is not only used against people in the UK who cannot be prosecuted or deported. Indeed, only around 10 per cent of asset freezing cases (i.e. the 6 out of 63 cases highlighted in Q1 above) involve people who are in the UK or hold funds here and who are not being prosecuted for a terrorist offence. In cases where people are being prosecuted for terrorist offences, evidence against them will be brought before a court both when they are charged, and later at their trial.

In the case of terrorist groups or individuals overseas, the asset freeze has a less direct impact because it only applies within UK jurisdiction. Overseas terrorist groups and individuals have not challenged their asset freezes in the UK courts, and we do not believe that mandatory court decision-making or approval would add any real value in these cases. Indeed, it may even provide groups like Hamas with a public platform on which to challenge the UK's operational and foreign policy decisions.

We therefore believe that the right way of recognising the need for proper judicial scrutiny over asset freezing is not to introduce mandatory court involvement for all cases, but rather to make clear that there is robust court scrutiny of those cases where individuals or entities wish to challenge their freezes. That is why the Government brought forward amendments to this Bill to specify that challenges to designations should be on the basis of an appeal, rather than judicial review.

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

The Treasury believe that it is reasonable to draw a distinction between the decision to impose an asset freeze and secondary decisions that are taken about the implementation of the freeze. The decision to impose a freeze is the central decision that interferes with a designated person's rights. It is therefore right that these decisions should be considered by the court under an appeal procedure.

Licensing decisions may, for example, involve questions about whether precise licensing conditions, such as reporting requirements, are proportionate. The Government's view is

that the judicial review process is sufficient to ensure proper scrutiny of these decisions. As the Constitution Committee has acknowledged, the judicial review process is a flexible tool that in a national security context can provide a robust scrutiny of the executive's decision.

(4) The right to a fair hearing

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

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

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

- **Requiring the Treasury to include in the written notice of designation under clause 3(1)(a) of the Bill as much information about the reasons for designation as it is possible to give consistent with the public interest in non-disclosure;**
- **Revoking the CPR's subjection of the duty to deal with cases justly to the duty not to disclose information contrary to the public interest;**
- **Ensuring that references in the rules of court to the duty not to disclose information are qualified by reference to the right to a fair hearing; and**
- **Providing in the rules of court for communication between special advocates and the designated person after sight of the closed material, with the permission of the judge, obtainable without notice to the Treasury?**

These questions all relate to the issue of whether the decision in *AF and Others* applies to asset freezing cases.

In *AF and Others* the House of Lords ruled, for the stringent control orders before them, that in order for proceedings to be compatible with Article 6 (right to a fair trial), the controlled person must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.

The Government has made it clear that it does not consider that the disclosure principle in *AF* applies to proceedings related to asset freezing designations as these proceedings are not equivalent to the stringent control order proceedings under consideration in the *AF* case. Accordingly, we do not intend to amend the CPR. There is ongoing litigation concerning the extent to which *AF* applies in contexts outside of stringent control orders and the courts have yet to consider whether *AF* applies in asset freezing cases.

However, it should be noted that section 67(6) of the Counter-Terrorism Act 2008 requires that nothing in that section, or in rules of court made under it (which include provisions relating to the Treasury's disclosure of information only to the court and a special advocate), requires the court to act in a way that is inconsistent with Article 6. In short,

this means that, notwithstanding provision allowing for closed proceedings, it is the duty of the court to ensure that the proceedings comply with Article 6. The Bill is therefore fully compliant with ECHR Article 6 and does not need to be amended to ensure this.

Question 9 asks specifically whether the legislation should contain a requirement for designated persons to be notified of the full reasons for their designation, subject only to the public interest concerns. To the extent that this proposal is intended to address AF type concerns, we do not believe this is appropriate for the reasons given above—in short, because we believe that it is for the courts to determine the application of AF and the courts have not ruled on these principles in the context of asset freezing. To the extent that the proposal is intended only to ensure that the Treasury complies with the basic administrative law principle of giving reasons for decisions of this sort, it is unnecessary because administrative law principles apply regardless of whether a duty is specified in legislation or not.

The Committee's concern about communication between a special advocate and designated persons after disclosure of the sensitive material relates to the wider operation of the special advocate system and is one that can be considered in the context of the forthcoming Green Paper on the use of sensitive material in judicial proceedings.

(5) Parliamentary accountability

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

The Government considers that the current process for appointing an independent reviewer for the Terrorism Act 2000 and the Prevention of Terrorism Act 2005 provides an effective model for the independent reviewer of the asset freezing regime. The independent reviewer will, of course, be free to examine any aspect of the regime.

The Bill already requires that the Government lays the independent reviewer's report before Parliament, after having first received a copy of the report. The purpose of requiring a copy of the report to be first submitted to the Treasury is to ensure that no material that would be detrimental to national security is inadvertently released. The report's findings and recommendations will otherwise be released in full to Parliament.

(6) Comprehensiveness of the statutory framework

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

I recognise the Committee's desire to see consolidated legislation for all of the asset freezing regimes implemented in the UK. However, the 31 December 2010 sunset clause in the temporary asset freezing legislation passed by Parliament in February has meant that the Government has had to focus on the immediate priority of ensuring that permanent asset freezing legislation is in place by the 31 December deadline to avoid an unfreezing of terrorist assets. In our judgment, it would not have been possible to introduce and pass

consolidating legislation on this timescale; nor would it have been desirable to extend the sunset clause in the temporary legislation, given that this would have meant extending the life of the existing terrorist asset freezing regime, without the further safeguards that we have proposed.

I hope that the Committee finds these replies helpful and I look forward to discussing these issues in further detail at Report stage on 25 October

22 October 2010

List of Reports from the Committee during the current Parliament

Session 2010-11

First Report	Work of the Committee in 2009-10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598

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

Session 2009-10

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

Thirteenth Report	Equality and Human Rights Commission	HL Paper 72/HC 183
Fourteenth Report	Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill	HL Paper 73/HC 425
Fifteenth Report	Enhancing Parliament's Role in Relation to Human Rights Judgments	HL Paper 85/HC 455
Sixteenth Report	Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In	HL Paper 86/HC 111