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Select Committee on the Constitution

2nd Report of Session 2010–11

Terrorist Asset-Freezing etc. Bill

Report

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Terrorist Asset-Freezing etc. Bill

1. The Constitution Committee is appointed "to examine the constitutional implications of all public Bills coming before the House; and to keep under review the operation of the constitution". In carrying out the former function, we endeavour to identify questions of principle that arise from proposed legislation and which affect a principal part of the constitution.

2. This report draws to the attention of the House aspects of the Terrorist Asset-Freezing etc. Bill.

3. The Bill was introduced in the House on 15 July 2010. The Second Reading debate is set down for 27 July and the first day of Committee stage is provisionally set down for 6 October. The Bill will replace the Terrorist Asset-Freezing (Temporary Provisions) Act 2010, which was fast-tracked through Parliament in February 2010 by way of an emergency response to the ruling of the United Kingdom Supreme Court in January 2010 in *HM Treasury v Ahmed*.[1] The Bill was preceded by a Draft Bill published in March 2010 alongside a public consultation document.[2]

4. **We share the Government's view that an effective regime of terrorist asset-freezing is an essential component of the United Kingdom's counter-terrorism strategy. In our view, however, the Bill raises a range of important constitutional concerns. These relate to the rule of law, to the principle of legal certainty, to the principle of effective parliamentary scrutiny, to the powers and responsibilities of the courts of law, and to the legal balance between executive powers and civil liberties.**

Legal Background

5. The freezing of terrorist assets is a matter that is governed in part by UN Security Council Resolutions. A growing number of such Resolutions are concerned with differing aspects of asset freezing but, for present purposes, two such Resolutions are critical: UNSCR 1267 and UNSCR 1373. As amended, the former provides for the freezing of funds and other financial resources derived or generated from property owned or controlled by the Taliban, Osama bin Laden or Al Qaida. A Sanctions Committee of the UN Security Council lists persons whose assets are to be frozen under this regime. In 2008 the European Court of Justice, in a strongly-worded judgment in the *Kadi* case, ruled that the absence of procedural protections at the UN level meant that the operation of the 1267 regime in the EU was contrary to fundamental rights and was thereby unlawful.[3] Its operation has since been amended, but fresh proceedings are pending before the Court of Justice challenging the current arrangements.

6. UNSCR 1373 requires all states to "prevent and suppress the financing of terrorist acts … [and to] freeze without delay funds and other financial assets

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1 [2010] UKSC 2.

2 Cm 7852.

3 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council* [2008] ECR I-6351.

or economic resources of persons who commit, or attempt to commit terrorist acts …"

7. The United Kingdom Government gave effect to both the 1267 and the 1373 regimes through Orders in Council made under the United Nations Act 1946. These may be referred to, respectively, as the Terrorism Order ('TO') and the Al Qaida Order ('AQO').[4] However, in the *Ahmed* case the Supreme Court unanimously ruled that the TO was *ultra vires* the United Nations Act 1946 and quashed it. By a 6–1 majority the Court ruled that a provision of the AQO was *ultra vires* the same Act and quashed that provision.

8. The 1267 regime is now the subject of the Al Qaida and Taliban (Asset-Freezing) Regulations 2010,[5] which entered into force on 7 April 2010. The 2010 Regulations are made not under the United Nations Act but under the European Communities Act 1972. The 1373 regime is currently the subject of the Terrorist Asset-Freezing (Temporary Provisions) Act 2010. The effect of the Act is to maintain the TO in force. Section 1(1) of the Act provides that the substantive provisions of the Act cover only the period between the date of its Royal Assent and 31 December 2010: in other words, the Temporary Provisions Act is subject to a non-renewable sunset provision. The Bill currently before the House seeks to place the substantive provisions of the Temporary Provisions Act on a permanent legislative footing.

9. **The opportunities for parliamentary pre-legislative scrutiny were limited owing to the dissolution of Parliament and the ensuing General Election. This makes it more important that the Bill is subject to full scrutiny now.** The public consultation period closed in June and the Treasury published a summary of responses on 15 July,[6] the day on which the Bill was introduced in the House.

The Scope of the Bill

10. It is important to note that the Bill does not cover the entirety of the United Kingdom's powers to order the freezing of terrorist assets. It does not even cover the range of such powers considered by the Supreme Court in *Ahmed*. Covering only the 1373 regime, the powers contained in the Bill constitute but one element of the UK's powers to order the freezing of terrorist assets. However, while 30 individuals are designated in the United Kingdom solely under the 1373 regime,[7] 39 persons are designated under both the 1267 and the 1373 regimes.[8] This would suggest that the two regimes are in practice closely inter-twined and it raises the question of whether it would be more satisfactory to have both the regimes governed by a single Act of Parliament. **We are concerned that the partial coverage of the Bill, and the maintenance of other terrorist asset-freezing measures under separate statutory regimes, makes the law unnecessarily complex.**

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4 In fact there are three TOs, dating from 2001, 2006 and 2009. The judgment of the Supreme Court concerned only the TO 2006 but the TO 2001 and TO 2009 are liable to be quashed on the same grounds, as the Bill's Explanatory Notes make clear (para 8). The TOs may therefore be treated as one, as the Temporary Provisions Act and the Bill currently before the House do.

5 SI 1197/2010.

6 Cm 7888.

7 Cm 7852, Box 4.A.

8 Cm 7888, para 5.30.

Such complexity risks undermining the constitutional principles of legal certainty and effective parliamentary scrutiny, as we specify below.

11. The constitutional principle of legal certainty may not be an absolute requirement in all circumstances, but any departure from it requires at least to be carefully explained. Yet in neither the consultation document accompanying the Draft Bill, nor in the Explanatory Notes accompanying the Bill is there any explanation offered as to why the 1373 regime should be governed by the Bill, whereas the 1267 regime should not. That it would be preferable for a single asset-freezing statute to govern the whole field was a view expressed by a number of Supreme Court justices in *Ahmed*. Lord Mance, for example, stated that "one can certainly feel concern about the development and continuation over the years of a patchwork of overlapping anti-terrorism measures, some receiving parliamentary scrutiny, others simply the result of executive action."[9] The same view was expressed in the House during its consideration of the Al Qaida and Taliban (Asset-Freezing) Regulations 2010.[10]

12. If the Bill is enacted in its present form the complexity of the United Kingdom's law of terrorist asset-freezing will be considerable. Not only will there be the dual regimes of the Terrorist Asset-Freezing etc. Act on the one hand and the Al Qaida and Taliban (Asset-Freezing) Regulations on the other, there will in addition be the separate regimes provided for under Part 2 of the Anti-terrorism, Crime and Security Act 2001 ('ATCSA') and under Schedule 7 to the Counter-terrorism Act 2008 ('CTA').

13. As the Supreme Court several times emphasised in *Ahmed*, freezing orders have extremely grave consequences. Lord Hope, Deputy President of the Court, stated in his leading judgment, for example, that "the restrictions strike at the very heart of the individual's basic right to live his own life as he chooses … It is no exaggeration to say … that designated persons are effectively prisoners of the state. I repeat: their freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating".[11] In the same paragraph of his judgment, Lord Hope endorsed Collins J's description of asset-freezing orders as "draconian". Earlier in his judgment Lord Hope stated that the consequences of asset-freezing orders were "drastic" and "oppressive".[12]

14. Lord Mance considered it "desirable" that the regimes governed by the TO and the AQO "should be debated in Parliament alongside the primary legislation which Parliament did enact".[13] On this view, not only should the 1373 and 1267 regimes be governed by a single Act of Parliament, but that Act should likewise govern *all* the UK's various regimes of terrorist asset-freezing, including those presently governed under separate statutory provision (such as Part 2 of ATCSA and Schedule 7 to the CTA).

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9 [2010] UKSC 2, para 220.

10 See HL Deb, 25 March 2010, col GC 458 (speech of Baroness Noakes from the Opposition front bench and speech of Baroness Hamwee for the Liberal Democrats).

11 [2010] UKSC 2, para 60.

12 Ibid, para 6.

13 Ibid, para 223.

15. The TO and AQO had no parliamentary scrutiny: they were laid before Parliament but subject to no debate or scrutiny in Parliament. The Al Qaida and Taliban (Asset-Freezing) Regulations 2010 were subject to some, albeit modest, parliamentary deliberation, amounting to less than one hour in each House. But it was not possible for amendments to be tabled or considered, even though speakers from the (then) Opposition front benches indicated that they wished to do so.[14]

16. In our view it would be preferable for Parliament to be presented with a clear and comprehensive account of the full range of asset-freezing powers contained in the UK's counter-terrorism law, so that it can understand which powers are necessary and useful, and which not. To present to Parliament a Bill which covers only one aspect of these powers, without a full explanation of how those powers relate to other regimes (including those contained in Part 2 of ATCSA and in Schedule 7 to the CTA) risks presenting an account of the law that is partial.

17. Given (a) the limited nature of the parliamentary deliberation available with regard to the 2010 Regulations, (b) the strongly expressed opinions of the Supreme Court and, above all, (c) the extraordinarily grave consequences of an asset-freezing order, there is a strong case that the Terrorist Asset-Freezing etc. Bill should cover not only the 1373 regime but also the 1267 regime and, indeed, that it should cover the entirety of the UK's law concerning the freezing of terrorist assets.

18. **A comprehensive statute, rather than the piecemeal approach favoured in the Bill, would significantly aid effective parliamentary scrutiny on the one hand, and would be more likely to satisfy the constitutional principle of legal certainty on the other. In our view it would be preferable for all terrorist asset-freezing measures to be contained in a single Act.**

The Reasonable Suspicion Test

19. Clause 2(1) of the Bill will empower the Treasury to make a designation where there are "reasonable grounds for suspecting that the person is or has been involved in terrorist activity". As the Supreme Court made clear in *Ahmed*, this test is significantly broader than that used in UNSC Resolution 1373, Article 1(c) of which requires states to freeze assets of "persons who commit, or attempt to commit, terrorist acts". In other words, **Parliament is being asked to legislate in a way which will on a permanent basis significantly extend the scope of the law beyond that which is necessary by reference to international law.** As Lord Mance stated in *Ahmed*, the wording of UNSC Resolution 1373 "does not suggest that the Security Council had in mind 'reasonable suspicion' as a sufficient basis for an indefinite freeze".[15] And as Lord Hope stated in the same case, this is no mere drafting exercise: it is "bound to have a very real impact on the people" that are exposed to the asset-freezing regime.[16]

20. It is notable that neither the regime under Part 2 of the Anti-terrorism, Crime and Security Act 2001, nor that under Schedule 7 to the Counter-

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14 HL Deb, 25 March 2010, col GC 458.

15 [2010] UKSC 2, para 225.

16 Ibid, para 58.

terrorism Act 2008 uses a test of reasonable suspicion. Assets may be frozen under Part 2 of the 2001 Act only on the basis of the Treasury's reasonable *belief*. This same test of reasonable belief is adopted in paras 1(3) and 1(4) of Schedule 7 to the 2008 Act. There is an important point of principle in the distinction between suspicion and belief. A test of reasonable suspicion will be satisfied where the Treasury suspect that someone *may be* or *may have been* involved in terrorist activity, whereas a test of reasonable belief requires the Treasury to believe that someone *is* or *has been* involved in terrorist activity. **It is unclear to us why a test of reasonable belief is acceptable in the contexts of the 2001 and 2008 Acts, whereas the significantly lower threshold of reasonable suspicion is adopted in the Bill**.

21. The Treasury's publication summarising the responses to the public consultation on the Draft Bill makes it clear that "most respondents" felt that the draft legislation "did not sufficiently safeguard civil liberties".[17] Among the proposals made by respondents was the suggestion that the legal test for imposing an asset freeze should be raised to a higher standard than reasonable suspicion. Ministers' response, as we have seen, is to maintain the previous Government's policy of relying on a test of reasonable suspicion. However, the Coalition Government has stated that "it will consider further whether there is a strong case for strengthening the civil liberties safeguards in the asset freezing regime along the lines proposed by respondents to the consultation in the light of the conclusion of the wider review of counter-terrorism legislation" which the Secretary of State announced in the House of Commons on 13 July.[18] This is an internal Home Office review, to be overseen by the former Director of Public Prosecutions, Lord Macdonald of River Glaven. The terms of reference for the review were not published when the Secretary of State made her statement, but she listed the following matters as falling within the review: control orders; stop and search powers in section 44 of the Terrorism Act 2000; the use of terrorism legislation in relation to photography; the use of the Regulation of Investigatory Powers Act 2000 by local authorities; access to communications data; extending the use of deportations with assurances; measures to deal with organisations that promote hatred or violence; and the pre-charge detention of terrorist suspects. The Secretary of State stated that the Government's work on the use of intercept as evidence would continue to be done separately and would not form part of this review. The Secretary of State also said that the review will "help to inform what additional safeguards are needed" in the Terrorist Asset-Freezing etc. Bill. The Government have since emphasised that, in the light of this review, they will "consider in particular whether there is a strong case for raising the legal threshold for freezing a person's assets".[19]

22. The House may wish to consider whether it is appropriate for the Government to introduce legislation which, even before it is introduced, appears in this way to be caught by an ongoing internal Home Office review of counter-terrorism powers. **The Committee urges those responsible for the review to ensure that it is clear as soon as possible, and at the latest by the time this Bill commences its Committee stage in this House, what recommendations as to the reasonable suspicion test will follow from its work**. If it is concluded that this should remain the

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17 Cm 7888, para 1.4.

18 See HC Deb, 13 July 2010, cols 797–809; see also HL Deb, 13 July 2010, cols 644–52.

19 Cm 7888, para 1.7.

appropriate test, a more compelling explanation of and justification for this position will need to be forthcoming than any the Government has hitherto provided.

23. The Government argues that, in order to be "consistent with UNSC Resolution 1373 and to meet the UK's national security needs, the asset freezing regime should be preventative in nature".[20] **We agree with this, but we fail to see why it should follow that a preventative regime requires to be founded on the low threshold of reasonable suspicion (especially when, as we have noted, other statutory regimes use a test of reasonable belief).**

Judicial Process and Procedural Fairness

24. Clause 22 of the Bill provides that any person affected by a designation decision may apply to the High Court (in Scotland, the Court of Session) for the decision to be set aside. Clause 22(3) further provides that in such a case "the court must apply the principles applicable on an application for judicial review". **We would have grave reservations about whether this procedure, as it is ordinarily understood and practised, would be adequate to safeguard against potential abuse**. In a claim for judicial review the court is classically not making a determination for itself as to whether a designation is necessary, but is merely reviewing whether the Treasury's decision to make a designation is reasonable. **We are cautiously optimistic, however, that the courts' role will not be so limited**.

25. We note that the provisions of ss 66–68 of the Counter-terrorism Act 2008 ('CTA') will apply to actions brought under clause 22. These provisions enable special rules of the court to be made in respect of "financial restrictions proceedings". We note further that, as regards England and Wales, the rules of court referred to by s 66 CTA have been provided for in Part 79 of the Civil Procedure Rules ('CPR'). Part 79 CPR is in large measure adapted from Part 76 CPR, which governs procedure in control orders cases under the Prevention of Terrorism Act 2005. In practical terms one of the most important features of Part 79 is the rule in 79.22(4) that a designated person is "entitled to adduce evidence and to cross-examine witnesses" (a similar rule appears in Part 76). This is likely to render the experience of cases brought under clause 22 quite different from regular judicial review cases, notwithstanding the reference in clause 22(3) to the principles of judicial review. This is what has happened in respect of control orders. When a control order is judicially reviewed under s 3(10) of the Prevention of Terrorism Act the established case law of the Administrative Court makes it clear that the court must make up its own mind whether there are reasonable grounds for suspicion, having considered all the evidence. The test is an objective one.[21] Were the courts' powers to be more limited than this (as they are in ordinary judicial review proceedings) in control orders or asset-freezing cases, where the consequences for individual rights are as grave as they are, the regime would fall foul of Article 6 ECHR.[22] For all that clause 22(3) says about the principles of judicial review, therefore, the reality is that the courts are likely to develop the law in

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20 Ibid, para 3.7.

21 See, e.g., R (Secretary of State for the Home Department) v. Bullivant [2008] EWHC 337 (Admin).

22 This was recognised by Sullivan J in *Re MB* [2006] EWHC 1000 (Admin).

financial restrictions proceedings under Part 79 such that they do not merely review the reasonableness of the Treasury's decisions, but that they come instead to a judgment of their own on the basis of the evidence as to whether there is reasonable suspicion that a designation order is necessary.

26. None of this is transparent on the face of the Bill, however. Indeed, the reference in clause 22 to the principles of judicial review is liable to give a misleading impression.[23] It is possible to understand what the powers of the courts are actually likely to be under clause 22 only by extensive reference to the Bill, to the Counter-terrorism Act 2008, to Part 79 CPR, to Part 76 CPR, and to the courts' case law on control orders. **It would be strongly preferable for the Bill to spell out what the courts' powers truly are in financial restrictions proceedings. To this end clause 22 should be substantially redrafted**.

27. The courts have ruled in a series of cases that processes of disclosure need to be carefully managed in order to protect the rights of controlled or designated persons. In *Secretary of State for the Home Department v AF*[24] the House of Lords ruled that a controlee "must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations". In *Bank Mellat v HM Treasury*[25] the Court of Appeal applied this ruling to the context of asset-freezing, stating that a party whose assets are frozen "must be given sufficient information to enable it actually to refute, in so far as that is possible, the case made out against it".[26] We share the view expressed by the Court that this is the bare minimum of what is required in order to satisfy the requirements of Article 6 ECHR.

28. Despite these welcome procedural innovations as regards evidence, the intensity of judicial review, and disclosure, **we remain concerned about the overall fairness of procedures which involve closed material.** Part 79 CPR provides for the use of closed material and special advocates in financial restrictions proceedings. All of this is familiar, not least from control orders cases. We note what experienced special advocates have said about this in publications in learned journals and in evidence to the Joint Committee on Human Rights.[27] First, even though special advocates are now permitted to adduce evidence, they lack the resources to find suitable evidence by which closed material can be rebutted. Secondly, it is extremely difficult for special advocates to mount effective challenges where the Government objects to disclosure of closed material. Thirdly, the severe restriction on special advocates being able to communicate with controlled or designated persons very substantially limits their effectiveness.[28] It is to be noted that the severity of these restrictions is not shared in other jurisdictions that have employed special advocates, such as Canada, which have far broader powers to force disclosure of closed material.

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23 See, e.g., the debate in the House of Commons on the Terrorist Asset-Freezing (Temporary Provisions) Bill on 8 February 2010.

24 [2009] UKHL 28.

25 [2010] EWCA Civ 483.

26 Ibid, para 21.

27 See, respectively, M. Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) 28 *Civil Justice Quarterly* 314 and Joint Committee on Human Rights, *9th Report for 2009–10*, HL 64, HC 395.

28 See in this context Part 79.20 CPR.

29. **The House will want to note these ongoing concerns.** Despite the advances which the courts have made in terms of procedural protections in this area, the use of special advocates and closed material, which Parliament is being asked once again to endorse in this legislation, remains a contested matter. We note that the internal Home Office review of counter-terrorism legislation will consider the use of closed material and special advocates in the context of control orders.[29] We reiterate that the outcome of the review in this regard should be made clear as soon as possible and, at the latest, before the commencement of the Bill's Committee stage in this House.

30. **We will keep a close watch on all the matters raised in this report and may undertake further scrutiny of this important Bill in the autumn.**

31. We reiterate that we share the Government's view that an effective regime of terrorist asset-freezing is an essential component of the United Kingdom's counter-terrorism strategy. The concerns raised in this report focus on the means used to achieve this end, not on the end itself.

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[29] Cm 7888, para 3.15.