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Liberty and JUSTICE

Report Stage Briefing on the Terror Asset-Freezing Etc Bill in the House of Commons

December 2010

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

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Introduction and summary

1. The Terrorist Asset-Freezing etc Bill gives the Treasury the power to freeze the assets of any person it reasonably believes or suspects is or has been involved in terrorist activity. It does *not* require that the person has been convicted, charged or even arrested with, a terrorist offence. In other words, the Bill allows the Executive to designate individuals to be:

> *subjected to a regime which indefinitely freezes their assets under which they are not entitled to use, receive or gain access to any form of property, funds or economic resources unless licensed to do so by the executive.*[1]

2. In January 2010, the UK Supreme Court struck down the asset-freezing regime established by two terrorism orders made by the Treasury under the *United Nations Act 1946*. The Supreme Court struck down the orders because it held that the Treasury's orders went much further than was required by the UN Security Council resolutions 1266 and 1373. As one Justice of the Supreme Court put it:

> *The draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated.*[2]

3. When first introduced in the House of Lords in July, the current Bill essentially set out the same asset-freezing regime the Supreme Court had described as 'draconian' in January. Amendments passed at Committee stage in the House of Lords made minimal changes to the text of the Bill: the Executive is now required to have a reasonable 'belief' rather than 'suspicion' before imposing final asset-freezing orders and provides for appeal mechanisms rather than judicial review. In Committee no substantive changes to the Bill were proposed. It is disappointing that a legislative scheme which will so significantly impact on the human rights of those subject to it received such a scant amount of parliamentary scrutiny.

4. Liberty and JUSTICE believe that the asset-freezing regime proposed under the Bill, even as revised by the House of Lords, remains very much at odds with respect for fundamental rights and the rule of law. In particular, no person should

[1] See *Ahmed v HM Treasury* [2010] UKSC 2 at para 39 per Lord Phillips.
[2] Ibid, para 192.

have their assets indefinitely frozen on the basis of untested suspicion or belief alone. We believe the Bill as now presented at Report Stage remains flawed, given the Bill:

- allows for the Executive to designate individuals as suspected terrorists without the benefit of a criminal trial and largely on the basis of classified material which they will have little or no effective opportunity to challenge;

- makes those designated by the Executive, in the words of the Deputy President of the Supreme Court, 'effectively prisoners of the state';[3]

- goes much further than is required by UN Security Council Resolution 1373, a resolution which the UN's own Special Rapporteur on Terrorism, Counter-Terrorism and Human Rights has said 'cannot be seen as a proper response to a specific threat to international peace and security';[4]

- fails to address the UK's separate asset-freezing obligations under UN Security Council Resolution 1267, recently criticised by the General Court of the European Union as 'particularly draconian';[5]

- goes much further than other western countries have done in implementing the same UN Security Council resolutions;

- does nothing to address the parallel asset-freezing powers in the *Anti-Terrorism Crime and Security Act 2001* or the terrorist financing provisions of the *Terrorism Act 2000*, despite the recommendation of the Privy Council Review Committee as long ago as 2003 that these powers should be rationalised; and

- is inconsistent with the Coalition government's promise to 'reverse the substantial erosion of civil liberties' under the previous government.[6]

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[3] *Ahmed,* ibid, para 11 per Lord Hope of Craighead. This description of the asset-freezing regime was adopted by the General Court of the European Union in *Kadi (No 2).*
[4] Sixth Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN General Assembly, A/65/258: 6 August 2010), para 52.
[5] *Yassin Abdullah Kadi v European Commission* (T-85/10, 30 September 2010).
[6] *The Coalition: Our Programme for government* (May 2010), p11.

5. Liberty and JUSTICE do not suggest that freezing the assets of people who are actually involved in terrorist financing is unlawful. On the contrary, we believe that – used correctly – asset-freezing can be an invaluable tool in the fight against terrorism and the protection of fundamental rights. But it is of fundamental importance that we also have an asset-freezing regime that does not sweep up the innocent with the guilty, or one that makes it impossible for the innocent to actually prove their innocence. Accordingly, in this briefing we propose an alternative approach that we believe meets both concerns: disrupting and preventing terrorist financing and respecting the importance of the separation of powers and the presumption of innocence. In summary, our suggested amendments would:

- Require that the making of a designation be in the hands of the courts and not the Executive.

- Distinguish between designations of organisations and designations of individuals – as there is a fundamental difference in freezing the funds of a group and of seriously disrupting the livelihood a person and their family.

- When designations are made against an individual (and not a group) the designation regime must be brought into the criminal justice system. Applying these coercive powers on the basis of suspicion or belief of 'involvement in terrorism' will inevitably lead to those who have never been prosecuted having an order imposed on them. The only comparable example of this approach is control orders, which have been demonstrated to be unsafe and unfair. Our suggested amendments would allow for designation post-conviction, but also importantly allow for interim designations when criminal proceedings are in train, or just immediately before an arrest is made. But importantly, criminal prosecution or conviction must be anticipated or have occurred.

- Require the courts, when making a designation, to grant a licence to enable an individual and their family to have access to such funds as is reasonably necessary for their subsistence and travel and fees for legal representation. This would ensure that a licence is made in every case (something not currently required by the Bill) and put it in the hands of the courts and not the

Executive to determine (based on information given to it by the Treasury and other relevant government agencies) what is a reasonable level of funding.

- Uphold the basic principles of a fair trial by ensuring a person subject to this coercive regime knows the case against them and is able to present a full defence by removing the power to have special rules of court which allow for secret evidence, hearings which the interested person is barred from and the use of special advocates.

Background

6. The events leading up to the tabling of this Bill are set out in full in our briefing for Second Reading in the House of Commons on 15th November 2010.[7] We set out a brief background note at **Annex 1** of this briefing.

We do however wish to note at the outset our disappointment that Parliament is again being asked to look at a complex legislative regime within an inadequate time frame. Despite the fact that emergency legislation was introduced in February in order to give the Treasury time to devise a proper legal framework for asset-freezing powers and to *'provide Parliament with the proper time needed to consider and debate permanent legislation in full',*[8] the House of Commons Bill Committee considered the Bill for just one half day session. Following on from a limited debate in Second Reading, it is not surprising that there were no substantive amendments pushed to division in Committee. It is extremely disappointing that a Bill with such significant human rights implications now returns to the full House looking much the same as when it was referred. Our concern is exacerbated by the fact this Bill substantially replaces legislation first rushed through Parliament in five days, an Act which itself was replacing legislation which had been struck down by the Supreme Court.

Impact of freezing orders

[7] The *Liberty and JUSTICE Joint Briefing for Second Reading on the Terrorist Asset-Freezing etc. Bill in the House of Commons* (November 2010) is available at http://www.liberty-human-rights.org.uk/pdfs/policy10/joint-liberty-justice-terrorist-asset-freezing-etc-bill-briefing-second-read.pdf.
[8] Liam Byrne MP, then Chief Secretary to the Treasury, House of Commons *Hansard*, 8th February 2010 at column 663.

7. The very real human effect the terrorist asset-freezing regime has on those individuals subject to it must remain squarely at the centre of this debate, in which the Government purportedly seeks to *"strike a better balance and strengthen civil liberties safeguards without undermining public safety"*.[9] As outlined below, we think the Government's amendments to the Bill in the House of Lords have failed to strike this balance, leaving a severe impact on the human rights and civil liberties of those subject to these orders.

8. A person subject to an asset-freezing order has no access to any of their assets unless this is authorised by the executive. It will be an offence for anyone, be it a bank or friends or family, to provide that person (directly or indirectly – which includes providing assistance to the person's immediate family) with any financial assistance or funds of any kind. All this will be applied indefinitely to persons and their families, including their children, in circumstances where there has been no arrest, charge or conviction in respect of any offence. The current and proposed framework for terror asset-freezing should be placed in the same category as the discredited control order regime. Indeed there is recognition at the highest levels of the judiciary and Parliament that both types of orders can have equal impact on the lives of those subjected to them. Lord Brown in the Supreme Court in *Ahmed* stated that these orders *"could be thought even more paralysing"* than control orders.[10] Similarly the report of the Joint Committee on Human Rights on the current Bill found the Government's submission to the Committee that the asset-freezing order does not have a similarly severe impact on human rights as that of control orders to be *"entirely unconvincing".*[11]

9. Around the same time this Bill was introduced to the House of Lords, the Government announced its review of the *"most controversial and sensitive"* counter-terror legislation imposed by the previous government. As well as reviewing control orders, the Government stated that the review would also inform as to *"what additional safeguards are needed in the proposed asset freezing Bill"*.[12] As the

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[9] As stated in Second Reading by the Financial Secretary to the Treasury, Mr Mark Hoban, House of Commons *Hansard*, 15th November 2010 at column 677.
[10] Lord Brown in *Ahmed* at para 192. See also Lord Hope (with whom Lord Walker and Lady Hale agreed) at para's 4, 28 38 and 60.
[11] Joint Committee on Human Rights *Legislative Scrutiny: Terrorist Asset-Freezing etc Bill (Second Report); and other Bills (Fourth Report of Session 2010-11)* (HL Paper 53; HC 598) (12 November 2010).
[12] Statement of the Home Secretary, the Rt Hon Theresa May, House of Commons *Hansard*, 13th July 2010 at column 797.

outcome of the review has not yet been published, it is difficult to see how, if at all, its conclusions and findings can be incorporated into this Bill. Indeed, the problem with this conflicting timetable was noted in the Second Reading debate. On the one hand, the Government has recognised the previous government's failure to balance counter terror measures with the protection of civil liberties and human rights. On the other, it is pushing through counter terror legislation drafted by its predecessors, ignoring statements from both the Supreme Court and the Joint Committee on Human Rights which clearly point to a real risk that the terror asset-freezing regime is heading for the same litigation circuit as control orders. Since their inception, control orders have been heavily litigated at huge expense to the public purse. While not necessarily grabbing the same headlines, terror asset-freezing orders have also been subject to litigation leading ultimately to the ruling by the Supreme Court earlier this year. If enacted as currently provided for in this Bill, litigation will continue.

Government amendments fail to safeguard civil liberties

10. There were two main amendments to the Bill in the House of Lords Committee to address the civil liberties concerns: the legal threshold was changed from 'suspicion' to 'belief' for final designation orders, although the 'suspicion' threshold remains for interim orders made for a maximum of 30 days; and a right of full merits-based review of a decision to impose an asset-freeze on an individual was put in place. No substantive amendments were moved in Committee.

11. While any improvements are welcome, Liberty and JUSTICE consider that these changes fail to address the substantive flaws in the Bill. The amendments amount to tweaks to a legislative regime which fundamentally needs to change in order to better address the human rights concerns we outlined in detail in our Second Reading briefing.[13] Our main concerns with the Bill, and the basis for our proposed amendments, remain as follows.

(1) **Asset-freezing orders are still imposed by the Executive, rather than by judicial procedure.** The decision to impose an order with such restrictive conditions on an individual (who will potentially never know the evidence basis for the order) with criminal sanctions attached is one which must be made by a court in the first instance and not be left to Ministerial discretion.

[13] Available at http://www.liberty-human-rights.org.uk/pdfs/policy10/joint-liberty-justice-terrorist-asset-freezing-etc-bill-briefing-second-read.pdf.

We can see no reason why the asset-freezing regime cannot be tied to criminal proceedings, particularly given the Government has stated that most of the individuals subjected to terrorist asset-freezing orders to date have been arrested on suspicion of terrorist offences. The availability of an appeal procedure is not sufficient to divorce this process entirely from the criminal court, particularly when the decision being made involves a fact-based assessment in an individual case and does not require a political decision to be made, or any determination of public policy. For reasons of both practice and principle, if the protection of civil liberties is truly to be at the heart of this legislation, we consider that no less than a judicial process for the imposition of a terrorist asset-freezing order will suffice to meet the civil liberties concerns we have raised since the emergency legislation was first rushed through Parliament in February.

(2) **The threshold of 'reasonable belief', rather than 'reasonable suspicion' for a final designation remains insufficient.** The Government's amendment passed by the House of Lords can only be seen as a marginal change in what will be required before an order is made. If the terror asset-freezing framework is not tied to the criminal justice system, individual's assets will be able to be frozen indefinitely on the basis of untested 'reasonable belief'. Our concerns are reinforced by the Government's clarification to the Joint Committee on Human Rights that the standard intended for 'reasonable belief' does not even require the Treasury *"to be satisfied of the relevant facts to the civil standard of proof, that is, a balance of probabilities"*.[14] We are concerned, as is the Committee, that

> *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.*[15]

In line with our proposed amendments, we believe that assets should be able to be frozen in the first instance on the basis of reasonable suspicion but that the continuance of the order should then become dependant on the outcome

[14] Letter from Lord Sassoon, Commercial Secretary to the Treasury, to the Joint Committee on Human Rights Chair, dated 22 October 2010, annexed Written evidence to the JCHR Fourth Report of Session 2010-11, *Legislative Scrutiny: Terrorist Asset-Freezing etc Bill (Second Report); and other Bills* (HL Paper 53; HC 598) (12 November 2010), at page 16.
[15] Joint Committee of Human Rights, ibid, at para 1.5.

of a criminal investigation or prosecution. Ultimately the sufficient standard of proof for an asset-freezing order to remain in place will be that applied by the criminal courts: beyond reasonable doubt. The continued separation of these orders from the criminal justice process mirrors the fundamental flaw inherent in the control order regime, which itself has been so heavily discredited in the courts.[16] This low threshold continues the dangerous trend of imposing indefinite punishments and sanctions entirely outside of criminal justice norms and, as we have pointed out above, is not even required by the UNSC resolutions.[17]

[16] See Liberty's submission to the Counter-Terror Review, *From 'War' to Law* (August 2010), Chapter 1 on Control Orders, available at http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf.

[17] The UNSCR 1373 requires the freezing of funds of those who *"commit or attempt to commit"* terrorism.

Proposed amendments

Amendment 1 – Designation by the court

Clause 1, page 1, line 8 leave out 'a person designated by the Treasury' and insert 'an individual or organisation designated by the court'.

Effect

12. This will amend clause 1 to redefine a designated person as one who is designated by a court rather than the Treasury.

Amendment 2 – Substituted new clauses 2-10

Pages 1 - 5, leave out Clauses 2 to 10 and insert—

"*Pre-arrest designation*

2 Court's power to make pre-arrest designations

(1) A court may make a designation of an individual for the purposes of this Part if—

(a) the Treasury has made an application for designation of the individual;

(b) an arrest warrant has been issued against the individual in respect of a terrorism offence but the individual has not yet been arrested; and

(c) the court considers that it is necessary for purposes connected with protecting members of the public from terrorism that financial restrictions should be applied in relation to the individual.

(2) For this purpose a "terrorism offence" means any one or more of the following—

(a) an offence for the time being listed in section 41(1) of the Counter-Terrorism Act 2008;

(b) an offence for the time being listed in Schedule 2 of the Counter-Terrorism Act 2008 that has a terrorist connection.

(3) For the purposes of this Part an offence has a terrorist connection if the offence—

(a) is, or takes place in the course of, an act of terrorism, or

(b) is committed for the purposes of terrorism.

3 Notice of pre-arrest designation

(1) The hearing of an application under section 2 may take place in the absence of the individual in question and without the individual having been notified of the application.

(2) Where a designation is made under section 2 the Treasury must give written notice of the designation to the designated individual unless the court considers the disclosure of the designation should be restricted for reasons connected with the prevention or detection of serious crime or the apprehension of the individual.

4 Duration of pre-arrest designation

(1) A designation made under section 2 or renewed under subsection (2) expires—

(a) 7 days beginning with the date on which it was made or renewed, or

(b) on the making of a designation under section 6 in relation to the same individual,

whichever is the earlier.

(2) The court may renew a designation made under section 2 at any time before it expires if—

(a) the requirements in section 2(1) continue to be met, and

(b) the court is satisfied that reasonable steps have been taken to execute the arrest warrant.

Designations

5 Court's power to designate organisations

(1) The court may designate an organisation for the purposes of this Part if—

(a) the Treasury has made an application for designation of the

organisation;

(b) the court reasonably believes the organisation is concerned in terrorism; and

(c) the court considers that it is necessary for purposes connected with protecting members of the public from terrorism that financial restrictions should be applied in relation to the organisation.

(2) For the purposes of subsection (1) an organisation is concerned in terrorism if it—

(a) commits or participates in acts of terrorism,

(b) prepares for terrorism,

(c) is otherwise concerned in terrorism.

6 Court's power to make designations against individuals

(1) A court may make a designation of an individual for the purposes of this Part if the Treasury has made an application for designation of the individual and the following two conditions are met.

(2) The first condition is that ─

(a) the individual has been arrested for a terrorism offence but proceedings for the offence have not yet been started against the individual;

(b) the individual has been charged with a terrorism offence but proceedings have not been concluded against the individual; or

(c) the individual has been convicted of a terrorism offence.

(3) The second condition is that the court considers that it is necessary for purposes connected with protecting members of the public from terrorism that financial restrictions should be applied in relation to the individual.

(4) For this purpose a "terrorism offence" means any one or more of the following─

(a) an offence for the time being listed in section 41(1) of the Counter-Terrorism Act 2008;

(b) an offence for the time being listed in Schedule 2 of the Counter-Terrorism Act 2008 that has a terrorist connection; or

(c) conduct committed outside the United Kingdom which would, if carried out in any part of the United Kingdom, have constituted an offence as described in paragraphs (a) and (b).

(5) For the purposes of this Part an offence has a terrorist connection if the offence—

(a) is, or takes place in the course of, an act of terrorism, or

(b) is committed for the purposes of terrorism.

7 Notice of application for designation

(1) If an application under section 5 or 6 is made without the respondent being given notice the court must either—

(a) dismiss the application, or

(b) adjourn the proceedings.

(2) If the court adjourns the proceedings

(a) it may make an interim designation if it thinks it necessary to do so; and

(b) the interim designation continues in effect until the full hearing of the application.

(3) In this section "full hearing" means a hearing of which notice has been given to the respondent in accordance with rules of court.

(4) An interim designation is to be treated as a designation for the purposes of this Part.

8 Duration of designation

(1) A designation made under section 5 (organisations) expires at the end of the period of one year beginning with the date on which it was made, unless renewed.

(2) A designation made under section 6 (individuals) expires—

(a) in the case of designation of an individual arrested for a terrorism offence where proceedings had not yet started—

(i) at such time as the court determines;

(ii) two weeks after the proceedings for the terrorism offence for which the individual was arrested have started; or

(ii) 2 months from the date the individual was arrested;

whichever is sooner;

(b) in the case of an individual who has been charged with a terrorism offence but proceedings have not been concluded, at the conclusion or discontinuation of the proceedings or at such earlier time as the court determines;

(c) in the case of an individual convicted of a terrorism offence, at such time as the court determines.

(3) The court may renew a designation made under section 5 or 6 at any time before it expires, if the requirements in section 5 and 6 continue to be met.

(4) A renewed designation is to be treated in the same way as a designation and expires in accordance with subsection (1) or (2).

(5) Where a designation expires the Treasury must give written notice of that fact to the designated individual or organisation.

9 Variation or revocation of designation

The court may vary or revoke a designation made under this Part if—

(a) the Treasury or a designated person make an application to vary or revoke the designation; and

(b) the court considers it is appropriate to vary or revoke the designation.

10 Rules of court on notification

Rules of court relating to designations made under this Part must secure that the Treasury must publicise the designation where the court considers it necessary and appropriate to do so.".

Effect

13. This will remove clauses 2 -10 and substitute new clauses, the effect of which is set out below.

New clauses 2-4

14. These proposed clauses would allow a Court (defined later as the High Court and its equivalent in Scotland) to designate a person as one whose assets can be frozen if an arrest warrant for a terrorism offence has been issued in respect of that person. In order for an arrest warrant to be issued the police are required to reasonably suspect that a terrorism offence is about to take place, has taken place or is taking place. Proposed clause 3 would allow the Treasury to apply to the court on an ex parte basis (without notifying the person against whom the arrest warrant has been issued). The designation could last seven days or until a later determination is made (under new clause 6, for example following the actual arrest or charge). In order to deal with circumstances where the person against whom the arrest warrant has been issued has not been apprehended, proposed clause 4 would enable the court to renew the designation for another seven days if the same conditions are met and the court is satisfied that reasonable steps have been taken to execute the arrest warrant (and apprehend the person). The requirement for the police to renew the designation every seven days would ensure the designation of someone who has not been arrested (but for whom there is an arrest warrant) does not continue indefinitely as the court would need to be satisfied each week that reasonable steps are being taken to apprehend the person and it is necessary to continue to make the designation. The definition of what constitutes a terrorism offence is tied to the offences set out in the *Counter-Terrorism Act 2008* (which applies to terrorism specific offences such as weapons training etc, as well as to murder, explosions etc that have a terrorist connection). The definition of 'terrorism' is defined in later Amendment 12 as being the same as that in the *Terrorism Act 2000*.

New clause 5

15. This proposed clause will allow the Court to designate an organisation as one which can have its assets frozen. The Treasury can bring the application and the court can make a designation if it reasonably believes the organisation is concerned in terrorism and the designation is necessary to protect the public from terrorism. The term 'concerned in terrorism' is the same as that used when determining

whether to ban a suspected terrorist organisation under the *Terrorism Act 2000*.[18] The only difference is the removal of a reference to promoting or encouraging terrorism (which includes glorification of terrorism).

New clause 6

16. This clause would allow a court to designate an individual on application by the Treasury where an individual has been arrested; charged or convicted. In contrast to the present Bill this would mean that a person could only be designated (and have their assets frozen) on a continuing basis if a criminal investigation was underway; criminal proceedings were in train; or they had been through the criminal justice process and been convicted of a terrorism offence. The court could designate a person who has been convicted of a terrorism offence as well as those arrested or charged with a criminal offence (the designation could last during the criminal investigation – which could be converted into a more lasting designation if the person was later convicted of a terrorism offence). In addition the court would need to consider if the designation was necessary for purposes connected with protecting members of the public from terrorism. The definition of a terrorism offence is tied to the offences set out in the *Counter-Terrorism Act 2008* (which applies to terrorism specific offences such as weapons training etc, as well as to murder, explosions etc that have a terrorist connection). In addition, if the offence was committed outside the UK it would also be caught if the conduct would have constituted an offence under UK laws – thereby ensuring that those convicted of, or subject to proceedings elsewhere for, like offences can have their assets frozen in the UK where necessary.

New clause 7

17. This clause requires a person to be given notice of the fact that a designation is sought where a designation is sought post arrest, post-charge or post conviction. This is so that the person can make representations before a designation is made. However, we understand there may be circumstances in which it is not appropriate to notify a person before an application is made. Therefore, proposed new clause 7 allows an application to be made without notice, whereby an interim designation can be made if the court considered it necessary to do so, pending a full hearing by which time the person will have been notified of the hearing.

[18] See section 3 of the *Terrorism Act 2000*.

New clause 8

18. Proposed new clause 8 sets out the period by which a designation remains in effect. This will differ according to the type of designation. Proposed clause 8(1) provides that a designation of an organisation can last for up to one year (and can be renewed). Proposed clause 8(2) provides that designation of an individual will depend on whether criminal proceedings are in train or have been concluded. For those convicted of a terrorism offence the court imposing the designation can determine in each individual circumstance how long the designation should remain in force. For those charged with a terrorism offence the designation can remain in force during the course of the proceedings or such earlier time as the court determines. An application to the court to renew a designation can be made by the Treasury at any time before it expires. In relation to those arrested for a criminal offence but not yet charged the designation can remain in force until the person is charged (and gives a two week leeway to allow the Treasury to make an application for a new designation post-charge), or if charges are not brought, the designation will expire within 2 months. Alternatively, the court may decide a lesser amount of time is appropriate.

New clause 9

19. This proposed clause would allow a court to vary or revoke a designation (including a pre-arrest designation) if the Treasury or designated person applies for variation or revocation and the court considers it appropriate to do so.

New clause 10

20. This proposed clause would allow rules of court to be made setting out when the Treasury should publicise the fact of a designation – ensuring that it is up to the court in each individual designation to decide on how widely (if at all) a designation should be publicised.

Briefing

21. In line with the principles set out earlier in this briefing, in these amendments we propose a system which gives the power to make these intrusive orders to the

courts on application by the Executive. We have proposed a two-tier system depending on whether the designated is for an organisation or an individual.[19]

22. Groups and organisations that have been shown to be concerned in terrorism can already be banned by the Government – making it an offence for anyone to be a member of such an organisation, to organise or attend meetings on behalf of the organisation, or provide funding to the organisation. Aside from some procedural concerns and the breadth of the current proscription powers,[20] we believe banning violent terrorist groups can be an important part of any counter-terrorism strategy. If such an organisation fits the criteria for proscription we can see no reason why any assets held by such an organisation should not be subject to being frozen by the courts. Proposed new clause 5 above would allow a court to do just that whenever it considers an organisation is 'concerned in terrorism' – the test currently available in relation to proscription.

23. We believe that applying the terrorist asset-freezing regime to individuals is quite a different thing to applying it to legal entities and bodies. As already noted, terrorist asset-freezing measures can have a devastating effect on an individual's life and liberty, not to mention the effect on family members. In respect of individuals, just as with control orders, the current (and proposed) terrorist asset-freezing regime undermines the presumption of innocence, the 'golden thread' that runs through centuries of the criminal process to the Magna Carta, and can effectively allow punishment without trial. Just as with the control order regime, the terrorist asset-freezing regime places unending restrictions on individual liberty based on suspicion rather than proof. It relies on secret intelligence and a person subject to the regime cannot test the case against him or her in any meaningful way.

24. UNSC resolution 1373 (2001) requires a state to impose asset-freezing measures on those who "*commit, or attempt to commit, terrorist acts or who participate in or facilitate the commission of such acts*". The extremely broad counter-terrorism offences already on the statute book criminalise acts of terrorism as well as attempts, facilitating, encouraging, preparing, planning, conspiring and

[19] Given the EU and international dimensions of those subject to the EU list, we have not proposed amendments to this regime but call on the Government to lobby for change and the EU level and consider what amendments are possible to bring this in line with requirements of procedural fairness.

[20] See Chapter 5 of *From 'War' to Law: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010*, available at www.liberty-human-rights.org.uk

inciting terrorism. Anyone convicted of such offences will clearly be considered to be one who has 'committed or attempted to commit' acts of terrorism. Our proposed new clause 6 would allow a court to designate anyone convicted of a terrorism offence. We have suggested applying this to the broad range of terrorist offences as already defined in the *Counter-Terrorism Act 2008* which includes offences such as murder, use of explosions etc which have a terrorist connection as well as any of the other specific terrorist offences under the myriad of anti-terrorism legislation. We have also proposed applying it to conduct undertaken other than in the UK which would (if it took place in the UK) constitute a terrorism offence. This deals with the Government's argument (as set out in the Committee stage debates) that persons convicted of terrorism offences overseas may require designation in the UK.

25. As described above, our proposed amendments could also provide for designations where a person has been arrested or charged with a terrorist offence, to cover the situation where a criminal investigation is underway or where proceedings have begun against a person but have not yet been concluded. Limiting designation in this way is, according to the Treasury's own analysis, likely to have little impact on the number and type of designations that already occur. In a consultation carried out earlier this year before introducing this Bill, the Treasury stated that "*asset-freezing does not necessarily or even mainly involve closed source material and individuals who are never prosecuted before a Court. On the contrary, the vast majority of cases involve individuals who are charged and prosecuted with terrorist offences*".[21] It should thus have little impact in practice to ensure that designations only apply to those who have been, or are involved in, the criminal justice system. And of course this upholds the important and long-held principles of presumption of innocence and fair trial rights.

26. Clauses 3 and 7 of the Bill as it is currently drafted provide that the Treasury must publicise a designation except in the case of designated children or when the Treasury considers disclosure of the designation should be restricted in the interests of national security, to prevent or detect serious crime or in the interests of justice. Our proposed new clause 10 would require rules of court to be made setting out when the Treasury should publicise such information and leave it up to the Court to

[21] See HM Treasury, *Public Consultation: draft terror asset freezing bill*, March 2010, Cm 7852 at paragraph 4.39, available at: http://www.hm-treasury.gov.uk/d/consult_terrorist_assetfreezing_bill.pdf

determine how much information is to be disclosed. We believe, given the inevitable impact on the right to privacy of the designated person in having the fact of that designation widely publicised, this is a matter best left to the Court to decide in an individual case than for the Executive. Clause 10 as currently drafted provides that if the Treasury has limited disclosure of the designation it is an offence for a person to disclose the fact of the designation. Again, if a court orders the designation the usual rules of court, including contempt of court, can govern issues of disclosure.

Amendment 3 – Clause 17: Licences

Clause 17, page 8, line 5, leave out "Treasury" and insert "court".

Clause 17, page 8, after line 5 insert–

"( ) On an application under section 2 or 6 the Treasury must submit a draft licence to the court in respect of the designated person.

( ) On making a designation under section 2 or 6 the court must grant a licence in respect of the designated person.

( ) In granting a licence under this section the court must be satisfied that the effect of the licence would be to enable an individual designated under section 2 or 6 to have access to such funds as is reasonably necessary for travel and subsistence, including of any dependants of the designated person, and for payment of fees for legal representation, legal advice or other legal services for the benefit of the designated person.

Clause 17, page 8, line 14, leave out "Treasury" and insert "court".

Clause 17, page 8, line 19, leave out "Treasury consider" and insert "court considers".

Effect

27. This will amend clause 17 to ensure that a licence enabling living expenses to be made available to a designated person and his or her children, as well as necessary legal fees, must be made by the court when a designation is made under

proposed new clauses 2 or 6 (note this will not apply to organisations subject to designation).

Briefing

28. Under the current terrorist asset-freezing regime the Treasury may (but is not required to) grant licences to allow for limited funding to be provided to designated persons and their family members on a case-by-case basis. The Treasury has said that the key objective of the licensing regime "*is to strike an appropriate balance between minimising the risk of diversion of funds to terrorism and meeting the human rights and humanitarian needs of affected individuals and their families*".[22] During the Committee stage debates on the Bill, the Commercial Secretary to the Treasury, Lord Sassoon, said that the licensing regime was a "*very significant safeguard*" as it allows proper expenditures to be made. On this basis Lord Sassoon said "*Therefore, I do not recognise the word 'draconian' in that sense as we ensure, under individual or general licences, that money can be released for the appropriate uses, whether that is to pay legal bills or family expenses and so on*".[23] Yet, there is no requirement in the Bill as currently drafted that would require the Treasury to issue any such licence. It is completely at the Treasury's discretion. Even though there appears to be a Treasury policy to issue a licence, considering the significant impact of these orders an unseen policy is an inadequate reassurance.[24] If this is to truly be considered to be any sort of safeguard there must be a requirement for a licence to be issued that ensures basic subsistence and access to funding for legal fees. This is also a sensitive decision that requires an analysis of the circumstances of the designated person and their family and what likely terrorist finance risks are involved. Clause 17 of the Bill as currently drafted maintains this discretionary role for the Treasury. In making an application for the designation of an individual the Treasury should be required to submit a draft licence to the court. It should be then up to the court to decide what the terms of the licence should be having regard to what is reasonably necessary for subsistence and travel and any legal fees. This will mitigate against the harshness of this regime and ensure that the needs of individuals and their families form part of the court's decision in making the designation.

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[22] Ibid at paragraph 5.10.
[23] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 136 per Lord Sassoon.
[24] At Second Reading the Government stated it is *"the Treasury's policy…to issue an individual licence to designated persons straight away to enable them to carry on paying for their ordinary, everyday expenses"*: see House of Commons *Hansard*, 15th November 2010 at column 679.

Amendment 4 – Clause 20: Provision of information to Treasury

Clause 20, page 9, leave out lines 29-32. Clause 20, page 9, line 33, leave out "or (2)".

Effect

29. This will remove clause 20(2) and any consequential reference to it.

Briefing

30. Clause 20(2) as currently drafted allows the Treasury to require a designated person to provide any information the Treasury asks for about their expenditure, including expenditure by or on behalf of the person or for the benefit of the designated person. In practice this can be an onerous requirement on an individual and their family. The Supreme Court in *Ahmed* noted in that case that this imposed an extraordinary burden on the designated person and their family with the wife of one of the designated persons being "*required to report to the Treasury on every item of household expenditure, however small, including expenditure by her children*".[25]

31. Given that a designated person should have no funds available to them apart from what is allowed under licence by the Treasury, and subclause (1) also requires the person to provide information about any funds or economic resources they hold or own, there seems little reason to require the person to stipulate exactly how they spend their money. It is not difficult to see how such a power can become particularly intrusive and degrading if a person and their family are required to demonstrate every item of expenditure – including on food, toiletries, school books etc. We see no need to include this provision and believe it should be removed entirely.

Amendment 5 – Clause 22: Self-Incrimination

Clause 22, page 11, after line 13 insert–

[25] *Ahmed* at paragraph 39.

"(3) A person must comply with a request under this Chapter even if doing so might constitute evidence that the person has committed an offence.

(4) But in criminal proceedings in which a person is charged with an offence—

(a) no evidence relating to any answer given, or anything else done, in response to the request may be adduced by or on behalf of the prosecution, and

(b) no question relating to those matters may be asked by or on behalf of the prosecution,

unless evidence relating to those matters is adduced, or a question relating to those matters is asked, in the proceedings by or on behalf of the person.

(5) Sub-paragraph (4) does not apply to—

(a) an offence under section 112 of the Social Security Administration Act 1992;

(b) an offence under section 5 of the Perjury Act 1911 (false statements made otherwise than on oath in England and Wales); or

(c) an offence under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (corresponding provision for Scotland).".

Effect

32. This will amend clause 22 to insert new subsections (3) – (5).

Briefing

33. Under proposed clauses 20 and 21 the Treasury can request any person (including a designated person and anyone else resident in the UK) to provide any information, or documents, as the Treasury may require in relation to establishing and monitoring the terror asset-freezing regime. Clause 22 makes it an offence for anyone to fail to comply with such a request. We believe provision must be made in relation to the requirement to provide information where to do so may result in self-incrimination. Article 6 of the *Human Rights Act 1998*[26] provides the right to a fair trial which includes the privilege against self-incrimination. The proposed amendments above (modelled on provisions in existing legislation – specifically Schedule 3 to the *Welfare Reform Act 2009*) continue to require a person to submit

[26] Article 6 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

such information but any such evidence which is self-incriminatory should not be admissible in any criminal proceedings against that person. The Government in the Committee stage debates on this amendment, as tabled by Baroness Hamwee, stated that "*the right against self-incrimination would form a reasonable excuse … to refuse to comply*" with a request for such information.[27] We do not, however, believe it appropriate to rely on a general defence in such a fundamental area. Legislation should not be drafted in such a way so that a person is open to prosecution for failure to comply with a statutory obligation, with the onus on them to raise a defence if prosecutions are brought forward. This proposed amendment should, we believe, form part of the provisions of the Bill to ensure persons relying on their right not to self-incriminate are not unfairly left open to prosecution.

Amendment 6 – Clause 25: Power of Treasury to disclose information

Clause 25, page 12, leave out lines 12-13.

Effect

34. This will remove clause 25(1) of the Bill.

Briefing

35. Clause 25(1) of the Bill as currently drafted provides that nothing done under Chapter 3 powers "*is to be treated as a breach of any restriction imposed by statute or otherwise*". This is a breathtakingly broad power to remove any requirement for Treasury officials or others to act in accordance with any laws, both statutory and common law, when acting under the terrorist asset-freezing powers in relation to requesting and disclosing information. The only exception for this is contained in subclause (2) which states that this does not authorise a disclosure that contravenes the *Data Protection Act 1998* or Part 1 of the *Regulation of Investigatory Powers Act 2000*. However, on the face of it this still exempts Treasury officials from the *Human Rights Act 1998*, common law principles of negligence and defamation and any other statutory requirement. During the Committee stage debate on the Bill Lord Sassoon for the Government explained the purpose of the provision as follows:

[27] *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 174 per Lord Wallace.

In fact, this provision applies to anyone giving information to the Treasury as well as to any information supplied by the Treasury. Therefore, the purpose of the provision is primarily to protect persons when they disclose information to the Treasury. For example, it protects a bank that has provided information about a customer to the Treasury in accordance with the requirement under the Bill from being subject to an action taken by the customer on the basis of a breach of confidence.[28]

However, the provision is certainly not drafted in any way that reflects these comments. Nor does it seem necessary to indemnify persons acting when disclosing information to the Treasury. In the example given by Lord Sassoon a bank providing information on a customer pursuant to a statutory obligation would clearly not be acting in breach of confidence, as it would have to be an 'unauthorised use' of the information to be considered so.[29] There will also be no breach of confidence if disclosure is in the public interest.[30] If, despite this, this is indeed the concern of the Government the provision should actually reflect that. But instead the provision is drafted so broadly as to say that nothing done, by anyone, under clauses 19-25, will be treated as a breach of any restriction imposed by statute. Lord Sassoon also said in the Committee stage debates that the general wording of this provision "*is not, as a matter of constitutional principle, capable of overriding any provision in the Human Rights Act*".[31] This is a matter of statutory interpretation and it is not certain that the courts would take the same view – particularly given the terminology is "*a breach of any restriction imposed by statute or otherwise*" – which is clear and certain. In any event, in a matter as important as disapplying the law, which may include the *Human Rights Act 1998*, it is incumbent on Parliament to be as clear as possible in its intention and not rely on vague principles of statutory interpretation.

Amendment 7 – Clauses 26-28: Appeals and Review of decisions

Page 12, line 33, leave out clause 26. Page 13, line 6, leave out clause 27.

[28] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at columns 198-199 per The Commercial Secretary to the Treasury (Lord Sassoon).
[29] See *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 per Megarry J.
[30] *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109 per Lord Goff.
[31] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 199 per The Commercial Secretary to the Treasury (Lord Sassoon).

Clause 28, page 13, leave out lines 22-24 and insert—

"(i) on an application under sections 2, 5 or 6 of the Terrorist Asset-Freezing etc. Act 2010 (court's designation of organisations or individuals), or".

Clause 28, page 13, line 26, leave out "appeal or".

Clause 28, page 13, leave out lines 30-32 and insert—

"(i) on an application under sections 2, 5 or 6 of the Terrorist Asset-Freezing etc. Act 2010 (court's designation of organisations or individuals), or".

Clause 28, page 13, line 34, leave out "appeal or".

Effect

36. This will remove clauses 26 and 27 from the Bill (appeals and review of decisions by the court) and amend clause 28 to make reference to applications made to the court under proposed new clauses 2, 5 or 6 (rather than appeals made under clause 26 and applications made under clause 27).

Briefing

37. These amendments are consequential on the earlier proposed amendments being made which requires a court to make a designation rather than Treasury officials. Clause 26 was introduced immediately prior to Committee stage in the House of Lords and allows for an appeal of the Treasury's decision to designate. This appeal could only occur after the decision to designate has already been made, and while awaiting the court's decision the person would be left without access to their own funds. As explained above, we do not believe it appropriate for the Executive to make the designation in the first place and our proposed Amendment 2 would give the power to the courts to do this – making any appeal mechanism redundant (as the normal court rules on appeals would then apply). Clause 27 provides for review of a Treasury decision by way of judicial review. If Amendment 2 proposed above is successful the designation itself should be by the court and any decision by the Treasury will be subject to the normal rules regarding judicial review of executive action. It would therefore be unnecessary to continue to retain clause

27. The amendments to clause 28 are also consequential on the amendments proposed in Amendment 2 being made.

Amendment 8 – Clause 28: Special rules of court, special advocates etc.

Clause 28, page 13, leave out lines 38-44 and page 14, leave out lines 1-2.

Effect

38. This will remove subclause 28(4) from the Bill.

Briefing

39. Subclause 28(4) applies the provisions of the *Counter-Terrorism Act 2008* to terrorist asset freezing cases to allow for special rules of court to be made which can allow for closed hearings, secret evidence and special advocates. These special rules of court are similar to those used in control order cases. They can allow proceedings to be determined without a hearing, there can be different modes of proof and evidence, decisions regarding the proceedings don't need to be given to a party and indeed proceedings can take place in the absence of a party.[32] Just as in control order proceedings, special advocates can be appointed by the Attorney General to represent a person in closed proceedings and are not allowed to disclose any exempt material to the affected person. There are also limitations on the special advocate's access to expert evidence and a lack of accountability of special advocates in performance of their duties. All of this not only means that proper and effective legal representation is impossible, but also that intelligence on which the decision is based cannot be effectively challenged. Indeed, during the Lords Committee stage debates the Government stated that under this regime "*some cases will inevitably involve the use of sensitive, or closed, material such as intelligence material that it would not be in the public interest to disclose to the individual concerned*".[33]

40. Lord Wallace for the Government stated that the Government was not of the view that litigation under the control order regime on the right to a fair hearing was

[32] See sections 66-68 of the *Counter-Terrorism Act 2008.*
[33] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at columns 202-203 per The Advocate-General for Scotland (Lord Wallace of Tankerness).

applicable in the context of the terror asset-freezing regime. In particular, the Government has refused both at House of Lords Committee and in correspondence to the Joint Committee on Human Rights to recognise the applicability of the case of *AF*[34] in which the Supreme Court held that a person must know at least the basic case against them. It is clear that under this regime as currently drafted a person may never know the case against them before their assets and property are indefinitely frozen by the Executive. If these special rules of court continue to apply, even the much vaunted right of appeal could be rendered meaningless if a person does not even know what the decision to designate is based on. The Joint Committee on Human Rights considered the Government's refusal to apply the principle in *AF* to asset-freezing proceedings to be *"entirely unconvincing"*, leaving it open to the *"unnecessary public expense of litigating that issue, as well as the delay in implementing the principle",* which it considered to be *"inevitable"*.[35] Given these powers do not guarantee the right to a fair hearing we believe the application of these powers must be removed from this Bill.

Amendment 9 – Clause 29: Powers to make rules of court

Page 14, line 3, leave out Clause 29.

Effect

41. This will remove clause 29 from the Bill.

Briefing

42. Clause 29, which was introduced just prior to the Committee stage in the House of Lords, allows special rules of court (allowing for secret evidence, closed hearings, special advocates etc) to be made initially by the Lord Chancellor (without consultation with anyone other than the Lord Chief Justice of England and Wales) instead of by the Civil Rules Committee. The reason given for this amendment was that *"Rules are needed immediately the Act is in force and, given the short time frame, it would be very difficult for the committees to make such provision*".[36] We do

[34] *Secretary of State for the Home Department v AF & Ors* [2009] UKHL 28.
[35] Joint Committee on Human Rights, ibid, at para 1.19.
[36] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 207 per The Advocate-General for Scotland (Lord Wallace of Tankerness).

not, however, believe that any such special rules allowing for secret evidence and the like should be made at all and believe therefore that this provision should be removed entirely.

Amendment 10 – Clause 30: Treasury report

Clause 30, page 15, line 22, leave out "on them".

Effect

43. This will remove the words "on them" from clause 30(1)(a) so that the Treasury must prepare a report about the exercise of any powers conferred by the Bill (not just the powers conferred on the Treasury).

Briefing

44. This is a consequential amendment if the amendments proposed above are made to ensure that the exercise of any powers under this Part of the Bill (including by the court) are reported on by the Treasury – not just the exercise by the Treasury of its powers.

Amendment 11 – Clause 32: Penalties

Clause 32, page 16, line 40, leave out "10 or".

Effect

45. This will remove reference to section 10 in the list of offences for which penalties apply.

Briefing

46. This is a consequential amendment if Amendment 2 proposed above is accepted as it proposes removing clause 10.

Amendment 12– clause 42: Interpretation

Clause 42, page 21, after line 42 insert–

"'organisation' includes any association or combination of persons;
'terrorism' has the same meaning as in the Terrorism Act 2000 (see section 1(1) to (4) of that Act);
'the court'—

(a) in relation to proceedings relating to a designation in the case of which the designated person is a person whose principal place of residence is in Scotland, means the Outer House of the Court of Session;

(b) in relation to proceedings relating to a designation in the case of which the designated person is a person whose principal place of residence is in Northern Ireland, means the High Court in Northern Ireland; and

(c) in any other case, means the High Court in England and Wales;".

Effect

47. This proposed amendment will introduce three new definitions into the general interpretation section of clause 42.

Briefing

48. These interpretations relate to new terms proposed in Amendment 2 – in particular in relation to proposed substituted clauses 2, 5 and 6. It uses the same definition of 'organisation', 'terrorism' and 'the court' as is found in the *Terrorism Act 2000* and the *Prevention of Terrorism Act 2005*.

Conclusion

49. It is clear that the remorseless and devastating effect of the terrorist asset-freezing regime has severe implications for personal rights and freedoms. Inclusion on such a list is an extremely serious step and should be taken with the utmost caution on the basis of suspicion and later evidence and proof. We accept that countering terrorist plots may require the suspension of funding. In particular, denying support to organisations that fund and carry out terrorism is essential to disrupt such grave activities. That is why we take no issue with the many counter-

terrorism provisions that criminalise the funding of national and international terrorist groups or persons. We do, however, have serious concerns with the proposals in the Terrorist Asset-Freezing etc. Bill (as well as the current provisions of the *Al-Qaida and Taliban (Asset-Freezing) Regulations 2010*). It would be a surprising and regressive move if the Executive could continue to impose measures that the Supreme Court has described as 'draconian' and "*scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing*".[37] Replacing discredited past and present regimes with a near identical system for asset-freezing will only invite expensive litigation and further reforming legislation. It would also be wholly out of step with the Government's professed commitment to civil liberties.

[37] See Lord Brown in *Ahmed* at [192].

ANNEX 1

Background

50. Shortly after the 9/11 attacks, the UN Security Council passed UN Security Council Resolution 1373 (UNSCR 1373), one of a series of resolutions aimed at preventing the financing of terrorism.[38] In particular, UNSCR 1373 directed UN member states to:

> *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.*[39]

51. To implement this Resolution, the UK Government, under the *United Nations Act 1946*,[40] made a series of executive orders – in particular the Terrorism Order 2006 and the Al Qaeda Order 2006 – that created an entire regime to enable the freezing of assets of any person it 'reasonably suspected' of involvement in terrorism, whether or not that person had been charged or convicted of terrorist offences. In addition, the Treasury orders made no provision for those affected by the financial restrictions to challenge the basis on which they had been suspected of involvement in financing terrorism.

52. In January 2010, the UK Supreme Court quashed the Terrorism Order 2006 and the Al-Qaeda Order 2006 on the basis that both orders went well beyond the terms of the *United Nations Act 1946*,[41] and violated fundamental human rights including the right to property,[42] the right to respect for family and private life,[43] and the right of access to a court.[44] Lord Hope, the Deputy President of the Supreme Court, outlined the effect of the asset-freezing order:

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[38] See also, for example, UN Security Council Resolutions 1267 (1999); 1333 (2000); and 1371 (2001).
[39] Emphasis added; UNSCR 1373 (2001), para 1(c).
[40] This Act was designed to fast-track implementation of security council resolutions, e.g. the emergency imposition of sanctions).
[41] See Lord Phillips at para 137; Lord Brown at para's 199-200.
[42] Under Article 1 of the First Protocol to the European Convention on Human Rights.
[43] Under Article 8 of the European Convention on Human Rights.
[44] Protected under the common law and Article 6 of the European Convention on Human Rights.

It is no exaggeration to say…that designated persons are effectively prisoners of the state… [T]heir 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.[45]

53. As a result of the Supreme Court judgment, the asset-freezing regime was immediately void (the Supreme Court having refused to grant a stay of execution of its judgment). After the judgment was handed down the previous government introduced emergency legislation to provide for the *'temporary validity'* of the 2006 Order (together with the 2001 and 2009 Orders, made in similar terms) in order to maintain asset-freezing restrictions *'whilst the Government takes steps to put in place by means of primary legislation an asset freezing regime to comply with the obligations in resolution 1373'*.[46] The emergency Bill was introduced on 5th February 2010 and received Royal Assent on 10th February. At the same time, a draft Bill was also published, followed by a Treasury consultation in March and final tabling of the Bill in July. The draft Bill, however, did no more than put the previous asset-freezing regime under the Terrorism Order 2006 on a statutory footing and – to this extent – was no better than the 2010 Act passed on an emergency basis. Nor was the current Bill, when first published in July, any better. Although it was described as being *'broadly based on the consultation draft'*, this was, if anything, an understatement, with most clauses of Part 1 being word-for-word identical with the draft Bill published in February.

EU List designation

54. Also of great concern is the fact that those designated by the EU have no right at all to appeal or review a decision to include them on the list. If a person is included on such a list they are automatically subject to the UK terror asset-freezing regime under the current provisions of the Terrorist Asset-Freezing etc. Bill. Clause 22 as currently drafted, which provides for judicial review of a decision of the Treasury, does not apply to people on the EU list (as the Treasury makes no 'decision' in respect of them – their inclusion is automatic). The *Counter-Terrorism Act 2008* (which sets out a judicial review procedure almost identical to that contained in clause 22 in respect of other terror asset-freezing decisions) is not being amended to enable judicial review for those on the EU list. This leaves these

[45] *Ahmed and Ors v HM Treasury*, ibid, at para 11.
[46] Explanatory Notes to the Terrorist Asset-Freezing (Temporary Provisions) Bill, para 8.

individuals without any possibility of effective review, something which the Supreme Court was highly critical of in its judgment in *Ahmed* earlier this year. The Court's finding of a breach of the right to a fair trial would apply just as strongly to the current clauses in the Bill. And while primary legislation cannot be struck down as the secondary legislation was, Parliament should not be legislating on this basis. We presume that the new Coalition Government is intent on respecting traditional common law rights to a fair trial. We also caution that not providing access to any sort of meaningful review directly contravenes the right to a fair trial in Article 6 of the *Human Rights Act 1998*.[47] As such, we believe the Terrorist Asset-Freezing etc. Bill as currently drafted would be open to challenge on numerous human rights grounds, not least the right to a private and family life (Article 8), the right to a fair trial (Article 6) and the right to property (Article 1 of Protocol 1).

55. We appreciate that the UK has international obligations in respect of those persons who have been designated by the UNSC 1267 Committee (in respect of those who are said to be members of Al-Qaida or the Taliban) and by EU Council Regulations. However, we believe the UK should urgently review the cases of all persons currently on EU lists (who as a result of the 2010 Regulations and the Terrorist Asset-Freezing etc. Bill, automatically have their funds frozen in the UK). If such persons have not been convicted of terrorism offences the UK should take steps, as is permitted by the EU Council Regulations, to unfreeze the funds of such persons after consultation with other member states.[48] We are particularly concerned that many of those currently included in the Consolidated List of those subject to the terrorist asset-freezing regime have not had their cases reviewed since 2002.[49] We do not propose suggesting any amendments to remedy this issue in the Bill currently before the House, but we urge the Government to urgently review the current arrangements and ensure procedural fairness is at the heart of the EU list designation regime.

Overlap with other terrorist asset-freezing regimes

56. The Terrorist Asset-Freezing etc. Bill does not purport to set out a comprehensive scheme in relation to terrorist asset-freezing orders. As outlined in

[47] Article 6 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.
[48] See Article 6 of Council Regulation (EC) No 2580/2001 of 27 December 2001.
[49] See HM Treasury, *Consolidated List of Financial Sanctions Targets in the UK*, last updated 30 July 2010, available at: http://www.hm-treasury.gov.uk/d/terrorism.htm

our Second Reading briefing, the current Bill, if passed, will join a range of primary and secondary legislation aimed at preventing terrorist financing, including Part 3 of the *Terrorism Act 2000*, Part 2 of the *Anti-Terrorism, Crime and Security Act 2001* (ACTSA); the *Al-Qaida and Taliban (Asset-Freezing) Regulations 2010*[50] and Part 6 of the *Counter-Terrorism Act 2008.* As Lord Mance noticed in his judgment in *Ahmed*: "*One can certainly feel concern about the development and continuation over the years of a patchwork of over-lapping anti-terrorism measures, some receiving Parliamentary scrutiny, others simply the result of executive action*".[51] As the law currently stands, a number of people have been designated under both regimes which, as the House of Lords Select Committee on the Constitution has said suggests "*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*".[52] The Committee went on to express its concerns "*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*".[53] The complexity created by these separate regimes will only be exacerbated if this Bill is enacted as currently drafted. We agree with the Committee's conclusion that:

> *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.*[54]

We call on the Government to approach this issue in the broadest possible way and bring forward a fair and comprehensive regime to deal with all types of terrorist asset-freezing measures. If wholesale reform in this way is not possible the Government should, at the very least, commit itself to bringing forward a consolidation Bill on this

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[50] SI 2010/1197 made 7 April 2010 under section 2(2) of the *European Communities Act 1972*.
[51] *Ahmed* at [220].
[52] House of Lords Select Committee on the Constitution, Terrorist Asset-Freezing etc. Bill, 2nd Report of Session 2010-11, 22 July 2010, HL Paper 25, paragraph 10.
[53] Ibid.
[54] House of Lords Select Committee on the Constitution, Terrorist Asset-Freezing etc. Bill, 2nd Report of Session 2010-11, 22 July 2010, HL Paper 25, paragraph 16.

issue in 2011. In the meantime, as a bare minimum, we urge Parliament to consider the amendments proposed below to ensure the procedure by which a person is designated as one to whom the terrorist asset-freezing regime applies is as fair and transparent as possible.