Terrorist Asset-Freezing etc Bill

House of Lords Second Reading

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For further information contact

Eric Metcalfe, Director of Human Rights Policy

email: emetcalfe@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100

fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.

2. JUSTICE has a particular interest in the law concerning the freezing of assets of those suspected of involvement in terrorism.

3. We were granted leave to intervene in *Ahmed and others v HM Treasury* before the UK Supreme Court by way of both oral and written submissions. Among other things, the Court accepted JUSTICE's submission that the threshold of 'reasonable suspicion' under the Terrorism Order 2006 was not required by UN Security Council 1373. We also briefed parliamentarians on the provisions of the Anti-Terrorism Crime and Security Act 2001, the Counter-Terrorism Act 2008, and the Terrorist Asset Freezing (Temporary Provisions) Act 2010. Most recently, we responded to the Treasury's consultation on the draft Bill in June. We are also currently contributing to the coalition government's review of counter-terrorism legislation announced by the Home Secretary on 13 July.

Summary

4. The Bill is deeply flawed for the following reasons:

    - It goes much further than is required by UN Security Council Resolution 1373;

    - It does not address the UK's obligations under UN Security Council Resolution 1267;

    - It does not replace the asset-freezing powers in the Anti-Terrorism Crime and Security Act 2001 or the terrorist financing provisions of the Terrorism Act 2000;

    - It essentially continues the same asset-freezing regime that was established by the Terrorism Order 2006, and which the UK Supreme Court described as 'draconian' and held to be unlawful in January;

    - The few safeguards that the Bill contains are wholly inadequate;

    - Consequently, it is highly likely to be held by the courts to be incompatible with fundamental rights, in particular the right to private property and the right to respect for private and family life.

Background to the current Bill

5. The Bill is intended to replace the Terrorist Asset-Freezing (Temporary Provisions) Act 2010, which was enacted on an emergency basis following the judgment of the Supreme Court in *Ahmed and others v HM Treasury* on 27 January, and which is due to lapse on 31 December.[1]

The Supreme Court judgment in Ahmed and others v HM Treasury

6. *Ahmed and others v HM Treasury* concerned five men who had been designated under the Terrorism Order 2006 and the Al-Qaeda Order 2006, on the basis that the Treasury suspected them of involvement in financing terrorism. Under Part 3 of the Terrorism Act 2000, it is a criminal offence to finance terrorism, punishable by up to 14 years imprisonment. However, none of the men had been charged or convicted of terrorist financing.

7. The Terrorism Order 2006 and the Al-Qaeda Order 2006 were two executive orders that had been made under the United Nations Act 1946. This allows for the fast-track implementation of UN Security Council resolutions without the need for primary legislation.

8. The government maintained that it was necessary to make the Terrorism Order 2006 in order to give effect to its obligations under UN Security Council resolution 1373 ('UNSCR 1373'). This was adopted on 28 September 2001 and obliged all member states of the UN to take action to 'prevent and suppress the financing of terrorist acts' and 'freeze without delay funds or other financial assets … of *persons who commit or attempt to commit* terrorist acts'.

9. However, resolution 1373 made no mention of freezing the assets of those only suspected of involvement in financing terrorism.

10. Under the Terrorism Order 2006, sweeping financial restrictions could be imposed on any person whom the Treasury reasonably suspected of involvement in financing terrorism. The order also 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.

11. The Deputy President of the Supreme Court, Lord Hope, described the effect of designation under the 2006 Order in the following terms:[2]

> 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

[1] Section 1(1) of the 2010 Act.

[2] *Ahmed and others v HM Treasury* [2010] UKSC 2 at para 11.

> other economic resources, and the effect on both them and their families can be devastating.

In particular, Lord Hope found that the restrictions imposed by the orders 'strike at the very heart of the individual's basic right to live his own life as he chooses'.[3] Another Supreme Court justice, Lord Brown, commented that:[4]

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

12. The 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, which allows for fast-track implementation of UN Security Council resolutions. The President of the Supreme Court, Lord Phillips, said:[5]

> [UN Security Council Resolution 1373] nowhere requires, expressly or by implication, the freezing of the assets of those who are merely suspected of the criminal offences in question. Such a requirement would radically change the effect of the measures. Even if the test were that of reasonable suspicion, the result would almost inevitably be that some who were subjected to freezing orders were not guilty of the offences of which they were reasonably suspected. The consequences of a freezing order, not merely on the enjoyment of property, but upon the enjoyment of private and family life are dire. If imposed on reasonable suspicion they can last indefinitely, without the question of whether or not the suspicion is well-founded ever being subject to judicial determination.

13. Lord Brown noted that the UK government had gone much further than other common law countries had in implementing resolution 1373:[6]

> [Australian, Canadian and New Zealand] provisions implementing Resolution 1373 are altogether more tightly drawn than our Terrorism Order. Unless designated by the Sanctions Committee, people cannot be subjected to executive designation and asset freezing unless the following conditions are met: in Australia only when the Minister is satisfied that the person "is" involved in terrorism; in Canada only when the Governor General is satisfied that there are reasonable grounds to believe this; in New Zealand

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[3] Ibid, para 60.

[4] Ibid, para 192.

[5] Ibid, para 137.

[6] Ibid, paras 199-200.

> only if the Prime Minister believes this on reasonable grounds (except that he can make an interim designation for 30 days if he has good cause to suspect it). Contrast all this with the position under the Terrorism Order where HM Treasury can designate – on a long-term basis – merely on 'reasonable grounds for suspecting' the person to be involved in terrorism .... The way Australia, New Zealand and Canada have dealt with these UNSCRs to my mind tends to supports the conclusion I have reached about the impugned Orders...SCR 1373 certainly cannot be regarded as mandating the long-term asset-freezing of people not designated by the [UN] Sanctions Committee merely on the ground of reasonable suspicion.

14. The Supreme Court concluded, in particular, that the Treasury's orders violated a number of basic rights including:

    - The right to property under article 1 of the First Protocol to the European Convention on Human Rights;
    - The right to respect for family and private life under article 8 ECHR; and
    - The right of access to a court, protected under the common law and article 6 ECHR.

    In particular, Lord Phillips noted that 'access to a court to protect one's rights is the foundation of the rule of law'.[7] The Deputy President Lord Hope concluded that:[8]

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

The Terrorist Asset-Freezing (Temporary Provisions) Act 2010

15. Since the Supreme Court in *Ahmed* had held that the UN Act 1946 did not give the Treasury the power to make such a broad order, the asset-freezing regime was immediately void (the Supreme Court having refused to grant a stay of execution of its judgment).

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[7] Ibid, para 146.

[8] Ibid, para 6.

16. The previous government therefore 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'.[9] The Bill was introduced on 5 February and received Royal Assent on 10 February. At the same time, a draft Bill was also published.

Consultation on the draft Bill

17. Following the enactment of the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 ('the 2010 Act') in February, the previous government published a consultation in March on the draft Bill.

18. JUSTICE responded to the consultation on 17 June. In our response, we were extremely critical of the draft Bill, noting that it essentially 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.

19. By 15 July, the government had produced its response, and introduced the present Bill.

20. The explanatory notes to the current Bill describe it as being 'broadly based on the consultation draft'. This is, if anything, an understatement. As far as we have been able to discern, *Part 1 of the Bill is clause-for-clause and, in most cases, word-for-word identical to the draft Bill published in February*, save for subtle differences in the order of the clauses (e.g. clause 14 on circumventing prohibitions was previously clause 13, and the organisation of the chapters). The only substantive changes made following consultation appear to be:

    - The scope of the duty of confidentiality in clause 6(2) has been broadened very slightly to include not only persons who are 'provided' with confidential information but also those who 'obtain' it;

    - The offences in clauses 7-11 have been slightly reworded, but there is otherwise no material difference between the scope of the offences in the draft Bill and those in the current Bill;

    - Clause 9(3) now provides an exception for benefit payments made to family members;

[9] Explanatory notes to the Terrorist Asset-Freezing (Temporary Provisions) Bill, para 8.

In other words, the current Bill is essentially the draft Bill that was published in February with only marginal differences.

21. In its response to the consultation, the government noted that the Home Office was currently conducting a review of terrorism legislation and suggested that it may consider further safeguards after this review has been completed:

> the Government will consider further whether there is a strong case for strengthening civil liberties safeguards in the asset freezing regime alongside the wider counter-terrorism review that it is undertaking, which is due to conclude in Autumn 2010. If the conclusions for the review support the case for making further changes to strengthen civil liberties safeguards in the asset freezing regime the relevant amendments will be bought forward.

22. As much as we welcome the coalition government's current review of counter-terrorism measures, we think it obvious that – following the damning judgment of the Supreme Court in February – compatibility with fundamental rights should have been at the heart of the consultation exercise from the very outset. It is highly unfortunate that, after five months, apparently no further thought appears to have been given by the Treasury to the serious human rights concerns identified by the Supreme Court's judgment.

The Bill

23. Like the draft Bill published in February, the current Bill suffers from a number of serious flaws that makes it deeply unsuited to serve as permanent asset-freezing legislation. These are:

    a. It does not address the UK's obligations under UN Security Council Resolution 1267;

    b. It does not replace the existing asset-freezing and terrorist financing powers in other terrorism legislation, including those under Part 2 of the Anti-Terrorism Crime and Security Act 2001;

    c. It goes much further than is required by UN Security Council Resolution 1373;

    d. Consequently, it is highly likely to be held by the courts to be incompatible with fundamental rights; and

    e. The few safeguards that the Bill does contain (judicial review, independent review, and use of special advocates) are inadequate.

Failure to implement UNSCR 1267

24. The draft Bill deals only with the UK's obligations under UNSCR 1373. The implementation of UN Security Council Resolution 1267 (also known as 'the Al Qaeda order') has instead been left to the Al Qaida and Taliban (Asset Freezing) Regulations 2010[10] which the Treasury made in April under section 2(2) of the European Communities Act 1972. We think it is extremely undesirable for the law relating to terrorist financing to be further fragmented in this way. As Lord Mance noted in his judgment in *Ahmed and others*:[11]

> 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 ....
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> It may well be thought desirable that such measures should be debated in Parliament alongside the primary legislation which Parliament did enact, and correspondingly undesirable that there should be developed and continued, as a result of executive Orders, a patchwork of measures that have and have not been debated in Parliament.

Failure to address other asset-freezing provisions of UK law

25. The Bill also fails to address the other provisions of UK law dealing with terrorist financing and terrorist asset-freezing. Indeed, to read the explanatory notes for the current Bill, one might not even be aware that Part 2 of the Anti-Terrorism Crime and Security Act 2001 already provides for the power to freeze the assets of those who pose a threat to the UK's national security. Similarly, Part 3 of the Terrorism Act 2000 contains a series of measures relating to terrorist financing and Parts 5 and 6 of the Counter-Terrorism Act 2008 provide measures for financial restriction proceedings. The Al Qaida and Taliban (Asset Freezing) Regulations 2010 also make provision for asset-freezing under UNSCR 1267. Rather than take the opportunity of the last several months to address wholesale rationalisation and reform, the Treasury clearly intends for the asset-freezing provisions of the Bill to operate alongside these other provisions.

26. Rather than continue to add to the current 'patchwork', we think it better that the entire law on terrorist financing should be addressed as part of a comprehensive overhaul of counter-terrorism legislation. Among other things, this would enable Parliament to consider such questions as the implementation of UN obligations, national security and the protection of

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[10] SI 2010/1197, made 7 April 2010.

[11] Paras 220 and 223.

human rights in the round – i.e. by reference to the full range of measures, rather than in a piecemeal fashion.

27. In the circumstances, merely adding safeguards to the current Bill – while surely desirable in relation to the Bill itself – is not a satisfactory way to legislate on a matter as important as terrorism. We recognise that Parliament has, to an extent, created a rod for its own back by introducing a sunset clause of 31 December. We also recognise that the current review of counter-terrorism is unlikely to produce, at least in the short-term, wholesale reform of the entire legal framework governing counter-terrorism measures. Nonetheless, the coalition government should at the very least commit itself to bringing forward a draft consolidation Bill on this issue in 2011 for pre-legislative scrutiny.

Retention of the 'reasonable suspicion' threshold

28. Clause 2 of the Bill sets out the Treasury's power to designate persons for the purposes of asset-freezing. Specifically, clause 2(1)(a) provides that the Treasury may designate a person where they 'have reasonable grounds for suspecting' that the person 'is or has been involved in terrorist activity'.

29. It is obvious that, by retaining the 'reasonable suspicion' test of the original Terrorism Order quashed by the Supreme Court in *Ahmed*, the Bill goes significantly further than what is required by UNSCR 1373. As the President of the Court, Lord Phillips of Worth-Matravers held:[12]

> Paragraph 1(c) [of UNSCR 1373] requires the freezing of the assets of those who commit the acts that the Resolution has required should be criminalised and their agents. Thus what the Resolution requires is *the freezing of the assets of criminals*. The natural way of giving effect to this requirement would be by freezing the assets of those convicted of or charged with the offences in question. This would permit the freezing of assets pending trial on a criminal charge, but would make the long term freezing of assets dependent upon conviction of the relevant criminal offence to the criminal standard of proof.
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> *The Resolution nowhere requires, expressly or by implication, the freezing of the assets of those who are merely suspected of the criminal offences in question. Such a requirement would radically change the effect of the measures.* Even if the test were that of reasonable suspicion, the result would almost inevitably be that some who were subjected to freezing orders were not guilty of the offences of which they were reasonably suspected. The consequences of a freezing order, not merely on the

[12] *Ahmed*, paras 136-137. Emphasis added.

> enjoyment of property, but upon the enjoyment of private and family life are dire. If imposed on reasonable suspicion they can last indefinitely, without the question of whether or not the suspicion is well-founded ever being subject to judicial determination.

The Deputy President, Lord Hope, similarly held that:[13]

> SCR 1373(2001) is not phrased in terms of reasonable suspicion. It refers instead to persons 'who commit, or attempt to commit, terrorist acts'. The preamble refers to 'acts of terrorism'. The standard of proof is not addressed. The question how persons falling within the ambit of the decision are to be identified is left to the member states. Transposition of the direction into domestic law under section 1 of the 1946 Act raises questions of judgment as to what is 'necessary' on the one hand and what is 'expedient' on the other. *It was not necessary to introduce the reasonable suspicion test in order to reproduce what the SCR requires*. It may well have been expedient to do so, to ease the process of identifying those who should be restricted in their access to funds or economic resources. But widening the scope of the Order in this way was not just a drafting exercise. It was bound to have a very real impact on the people that were exposed to the restrictions as a result of it.

30. It is therefore beyond doubt that a test of 'reasonable suspicion' is not needed in order to implement the UK's obligations under UNSCR 1373. The explanatory notes to the Bill offer no explanation for the Treasury's decision to retain the test. The consultation paper stated that:[14]

> In line with [Financial Action Task Force] guidelines, the Government continues to believe that 'reasonable suspicion' *is the appropriate legal test* if States are to have a fully effective preventative asset-freezing *regime in accordance with the requirements of UNSCR 1373 (2001).*

The Treasury's response to the consultation similarly states:[15]

> The Government believes that, to be consistent with UNSCR 1373 (2001) and to meet the UK's national security needs, the asset freezing regime should be preventative in nature. This means that the regime should not only allow assets to be frozen when someone has already been convicted of a terrorist offence, but it should allow preventative action to be taken to disrupt terrorist activity. Taking a preventative

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[13] Ibid, para 58. Emphasis added.

[14] Para 4.5. Emphasis added.

[15] HM Treasury, *Draft Terrorist Asset Freezing Bill: Summary of Responses* (Cm 7888: July 2010), para 3.7.

approach is consistent with standards set out by the international Financial Action Task Force (FATF) and with the approach taken by many other countries. *The Government believes that the ability to act on reasonable suspicion is an appropriate standard*, consistent with the preventative nature of the measures.

31. We are at a loss to understand these statements. The Supreme Court has made clear that a 'reasonable suspicion' test is not required in order to implement UNSCR 1373. The Treasury consultation paper and its subsequent response cites the FATF guidelines to support its conclusion that a 'reasonable suspicion' test *is* required. However, the question of what UNSCR 1373 requires by way of implementation is ultimately a question of law and the FATF is neither a judicial nor a legislative body. It is merely an advisory group set up to establish guidelines on money laundering and terrorist financing. Accordingly, it would be wholly improper for the Treasury to prefer the views of such a body on the question of implementation ahead of the conclusions of the Supreme Court.

Incompatibility of 'reasonable suspicion' test with fundamental rights

32. It is a basic principle of UK human rights law that any interference with qualified Convention rights such as article 8 must be shown to be both necessary and proportionate.[16] The Treasury has repeatedly cited the need to implement UNSCR 1373 as its justification for legislating.[17] Yet, as the Supreme Court has ruled, a test of reasonable suspicion is not necessary in order to implement UNSCR 1373. Moreover, as Lord Roger observed, it is the 'inevitable' consequence of adopting a reasonable suspicion test that 'sooner or later, someone will be designated who has not actually been committing or facilitating terrorist acts':[18]

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[16] See e.g. the judgment of the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at p 80: whether interference with a fundamental right is proportionate to the legitimate end sought depends on whether: '(i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'. See also the speeches of Lord Bingham in *Razgar v Secretary of State for the Home Department* [2004] UKHL 27 at para 20 ('[the question of proportionality] must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage') and in *Huang v Secretary of State forthe Home Department* [2007] UKHL 11 at para 19.

[17] See e.g. para 3 of the Explanatory notes: 'The purpose of Part 1 of the Bill is to give effect in the United Kingdom to resolution 1373 (2001) adopted by the Security Council of the United Nations on 28th September 2001 ("resolution 1373") relating to terrorism'.

[18] Para 174.

> mistakes in designating will inevitably occur and, when they do, the individuals who are wrongly designated will find their funds and assets frozen and their lives disrupted, without their having any realistic prospect of putting matters right.

The severity of the consequences for those designated was put in the starkest terms by Lord Hope:[19]

> 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.

33. As Lord Hope also noted, the restrictions imposed by the orders 'strike at the very heart of the individual's basic right to live his own life as he chooses'.[20] The consultation paper claims that the Supreme Court 'did not condemn the Terrorism Order 2006 on wider grounds of incompatibility with fundamental rights'.[21] However, only one member of the Court, Lord Brown, expressed a view that a proportionality challenge would have failed had the financial restrictions been imposed by primary legislation rather than by Order.[22] Lord Phillips merely agreed with Lord Mance that the criminal provisions of the Order were not so unclear as to breach article 7 ECHR. Both expressed doubt over whether the Order also was disproportionate in terms of article 8 and article 1 of Protocol 1, but declined to express a final view.[23] The majority of the Supreme Court declined to rule on the questions of certainty and proportionality, but made clear its view that the asset-freezing regime imposed by the Order was 'draconian'.[24]

34. Given the clear terms of the Supreme Court's judgment in *Ahmed*, we think it beyond question that the courts will ultimately find the draft Bill's adoption of a reasonable suspicion test in relation to designation to be a disproportionate interference with Convention rights, on the basis that it cannot be shown to be necessary for the sake of implementing UNSCR 1373. As we noted in our submissions to the Court in *Ahmed*:

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[19] *Ahmed and others v HM Treasury* [2010] UKSC 2 at para 11.

[20] Para 60.

[21] Para 4.3.

[22] Para 201.

[23] See para 235 per Lord Mance and para 144 per Lord Phillips.

[24] Lords Hope and Brown described the regime as 'draconian' at paras 5, 60 and 192. Lord Walker and Lady Hale agreed with Lord Hope's judgment and, at para 174 of his judgment, Lord Rodger agreed with Lord Hope's reasoning at paras 60-61.

> in principle, asset-freezing measures should be justified only where the individual in question has: (a) been convicted of a serious criminal offence; which (b) makes clear his involvement in financing terrorism or other serious crime (cf. the Proceeds of Crime Act 2002). If there is a case for such measures being imposed in exceptional circumstances without a criminal conviction first being secured, there must nonetheless be sufficient safeguards against unfairness, including: (a) prior judicial authorisation based on (b) evidence of involvement in terrorist financing, proved to at least the civil standard; and (c) a fair hearing in open court. If such measures are to be imposed *ex parte* on an emergency basis without prior judicial authorisation, the case is even stronger for prompt judicial confirmation with a high standard of proof and full disclosure to the designated person.

In other words, a standard of reasonable suspicion would only be acceptable where designation was made as a matter of urgency on an interim basis, in the manner of a freezing order in ordinary civil proceedings.

Lack of adequate safeguards

35. The explanatory notes suggest that provision of the right 'to challenge decisions involving interferences … offer adequate and effective safeguards against arbitrary interference'.[25] However, the right of a designated person to apply to court for the designation to be set aside (clause 22(2)) will be of little comfort in the interim, given the severe interference that designation is likely to pose and the length of time it will inevitably take for any legal challenge to be properly determined. As Baroness Hale noted in *R (Wright) v Secretary of State for Health* concerning the provisional listing of care workers that prevented them from working pending their appeal to the Care Standards Tribunal:[26]

> The care worker suffers possibly irreparable damage without being heard whatever the nature of the allegations made against her. The care worker may have a good answer to the allegations no matter how serious they are. There may well be cases where the need to protect the vulnerable is so urgent that an "ex parte" procedure can be justified. But one would then expect there to be a swift method of hearing both sides of the story and doing so before irreparable damage …. *The problem, it seems to me, stems from the draconian effect of provisional listing, coupled with the inevitable delay before a full merits hearing can be obtained*.

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[25] Explanatory notes, para 116.

[26] [2009] UKHL 3, para 29.

In *Wright*, the House of Lords unanimously ruled that the lack of opportunity to make representations prior to listing, together with the 'draconian effect of provisional listing' and 'the inevitable delay before a full merits hearing can be obtained' amounted to a breach of the right to a fair hearing under article 6 of the European Convention on Human Rights. As we submitted in *Ahmed*, the same is no less true in respect of asset-freezing decisions made without prior judicial authorisation, and without the person affected having the opportunity to challenge the case against him or her.

36. The difficulties involved in judicial review of the Treasury's asset-freezing decisions are compounded by the fact that nearly all such decisions are based to some degree on classified material. Clause 23(4) of the Bill allows for the use of closed proceedings and special advocates in review proceedings. While this is undoubtedly an improvement over the previous regime under the Terrorism Order 2006 which allowed no possibility of effective review whatsoever, it is important not to confuse the use of special advocates with the idea of a fair hearing. Following the judgments of the European Court of Human Rights in *A and others v United Kingdom*[27] and the House of Lords in *AF and others v Secretary of State for the Home Department (No 3),*[28] we welcome the recent Court of Appeal decision in *Mellat v HM Treasury*, which ruled that:

> the requirements of article 6(1) are such that the information to be provided by the Treasury must not merely be sufficient to enable [designated persons] to deny what is said against it. The [designated person] must be given sufficient information to enable it actually to refute, in so far as that is possible, the case made out against it.

37. Despite these rulings, however, we remain of the view that the closed material/special advocate procedure suffers from a number of inherent defects which makes it inherently incapable of delivering a fair hearing. These include (i) the prohibition on communication between the special advocate and the designated person following receipt of the closed material; (ii) limitations on the special advocate's access to expert evidence; and (iii) the lack of accountability of special advocates in performance of their duties. In this respect, the Treasury consultation paper claimed that special advocates are 'bound by the ethical standards of the Bar Council'.[29] However, the Bar Council has never addressed the ethical issues arising from the use of special advocates, nor has it issued any guidance concerning professional standards on this matter. Since special advocates are explicitly stated to be not

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[27] (2009) 49 EHRR 29.

[28] [2009] UKHL 28.

[29] Para 4.20.

professionally responsible to those whom they represent,[30] it is extremely difficult to see how the relevant professional standards of England and Wales or Scotland would apply. Indeed, as we noted in our 2009 report *Secret Evidence*, there would be insuperable practical difficulties in the Bar Council professionally regulating special advocates because of the need to obtain the relevant security clearance. That the Treasury consultation paper should have referred to Bar Council oversight as a safeguard suggests its lack of understanding of the problems surrounding the use of closed material and special advocates in general.

38. In addition to the use of special advocates and secret evidence, clause 23(3) allows the use of intercept material as evidence. However, we note that the use of special advocates in relation to intercept would be utterly unnecessary if the ban on intercept under section 17 of the Regulation of Investigatory Powers Act 2000 were lifted. As it is, the UK is the only western country with a statutory prohibition on the use of intercept as evidence. We continue to find it absurd that intercept will be used as secret evidence in asset-freezing hearings when it is used in open court in such countries as Australia, Canada, New Zealand, South Africa and the United States.[31]

39. Lastly, although the provisions for quarterly reporting by the Treasury (clause 24) and the provision of an independent reviewer to report annually (clause 25) are welcome, we consider that these hardly constitute adequate safeguards against disproportionate counter-terrorism measures. Indeed, as we noted in our evidence to the House of Lords Constitution Committee's inquiry on fast-track legislation, independent review has rarely provided much of a check against the disproportionate use of counter-terrorism powers, see e.g. the annual reports of the independent reviewer on the use of indefinite detention under Part 4 of the Anti-Terrorism Crime and Security Act 2001, as well as the 2003 report of the Privy Counsellors which recommended the repeal of Part 4 as 'a matter of urgency'. Notwithstanding these reports, Parliament passed on three opportunities to repeal Part 4. Similar provisions in the Prevention of Terrorism Act 2005 for independent statutory review and annual renewal by Parliament did not prevent, for example, the government's unlawful use of 18 hour curfews.[32] Reports to Parliament and independent reviews may perform a useful function but they generally do little to overcome the defects of incompatible legislation.

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[30] See e.g. section 6(4) of the Special Immigration Appeals Commission Act 1997: a special advocate 'shall not be responsible to the person whose interests he is appointed to represent'.

[31] See JUSTICE's report *Intercept Evidence: Lifting the ban* (October 2006).

[32] It was not until the House of Lords judgment in *JJ* in October 2007 that this was corrected.

Conclusion

40. In conclusion, we consider it highly unfortunate that the Bill seeks to do no more than put the old draconian asset-freezing regime of the Terrorism Order 2006 on a statutory footing. It is equally unfortunate that the law on terrorist financing continues to be developed in an apparently piecemeal and *ad hoc* manner. More generally, we fear that the extensive and long-term use of unlawful and disproportionate measures undermines respect for the rule of law. As Lord Phillips of Worth-Matravers said recently:[33]

> The so called 'war against terrorism' is not so much a military as an ideological battle. Respect for human rights is a key weapon in that ideological battle. Since the Second World War we in Britain have welcomed to the United Kingdom millions of immigrants from all corners of the globe, many of them refugees from countries where human rights were not respected. It is essential that they and their children and grandchildren should be confident that their adopted country treats them without discrimination and with due respect for their human rights*. If they feel that they are not being fairly treated, their consequent resentment will inevitably result in the growth of those who, actively or passively are prepared to support terrorists who are bent on destroying our society. The Human Rights Act is not merely their safeguard. It is a vital part of the foundation of our fight against terrorism*.

We trust that the government's review of counter-terrorism measures will consider closely the defects have been identified with the current Bill.

ERIC METCALFE
JUSTICE
22 July 2010

[33] Lord Phillips of Worth-Matravers, Gresham Lecture, 8 June 2010, pp 37-38.