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Liberty and JUSTICE
Joint Committee Stage Briefing on the Terrorist Asset-Freezing etc. Bill in the House of Lords

September 2010

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1. The Terrorist Asset-Freezing etc. Bill gives the Treasury highly intrusive powers to freeze the assets of anyone it has reasonable grounds to suspect is or has been involved in terrorist activity. In effect this means that the Executive can designate anyone 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] Liberty and JUSTICE both have serious concerns about these highly restrictive proposals and together call on parliamentarians to make important amendments to the Bill currently before the House.

2. The Bill seeks to put on a permanent footing effectively the same regime as that set out in orders which were struck down by the Supreme Court earlier this year.[2] Following the Supreme Court decision, the *Terrorist Asset-Freezing (Temporary Provisions) Act 2010* was rushed through Parliament in February in the space of five days. This Act validated the orders which the Supreme Court had struck down. The Act was only intended to be temporary in its effect and accordingly will sunset on 31 December 2010. When that Act was making its swift passage through Parliament it was said that these temporary measures would "*provide Parliament with the proper time needed to consider and debate permanent legislation in full*".[3] The passage of the present Bill gives Parliament the time to properly scrutinise this intrusive and coercive regime and ensure appropriate safeguards are put in place.

3. As currently drafted, the Terrorist Asset-Freezing etc Bill does not contain sufficient safeguards to ensure the regime complies with fundamental rights. In fact, it has some of the hallmarks of the profoundly unfair and illiberal control order regime currently under review. The Bill also fails to deal comprehensively with terrorist asset-freezing orders. Numerous other pieces of legislation and regulations set out separate regimes that allow for assets of individuals and groups to be frozen indefinitely on the say-so of either the Executive or the Council of the European Union. None of these regimes grant adequate safeguards to ensure innocent people are not swept up with the guilty. We believe there needs to be a wholesale review of

[1] See *Ahmed v HM Treasury* [2010] UKSC 2 (*Ahmed*) at [39] (Lord Walker and Lady Hale agreeing) in describing what is effectively the same regime of asset-freezing.
[2] *Ahmed,* a case in which JUSTICE intervened.
[3] Liam Byrne MP, then Chief Secretary to the Treasury, *Hansard*, House of Commons, 8 February 2010, column 663.

the terrorist asset freezing regime to comply with fundamental rights and traditional notions of British justice. We welcome the Government's wider review of counter-terrorism measures which the Home Secretary announced would "*help to inform us on what additional safeguards are needed in the proposed asset freezing Bill*".[4] However, we are disappointed that the Bill as introduced is clause-for-clause and, in most cases, word-for-word identical to a draft Bill published in February immediately after the passage of the emergency validating legislation. It is highly unfortunate that, in the five months following the damning Supreme Court decision in *Ahmed*, apparently no further thought was given by the Treasury to the serious human rights concerns identified by the Supreme Court's judgment.

Terrorist Asset-Freezing Regime

4. It is useful to set out the current terrorist asset-freezing regime and what is proposed by the Terrorist Asset-Freezing etc Bill. The power to freeze assets of a person suspected of involvement in terrorism include:

- Part 2 of the *Anti-Terrorism, Crime and Security Act 2001* (ACTSA) which provides that the Treasury may make a freezing order when action which constitutes a threat to the life or property of UK nationals or residents has been or is to be taken by a non-national (or government of another country);
- The *Al-Qaida and Taliban (Asset-Freezing) Regulations 2010*[5] which prohibit anyone (such as banks, building societies etc) from providing access to money or assets belonging to anyone who has been designated in a list attached to an EU Council Regulation[6] (such listed persons are those deemed to be members of Al-Qaida or the Taliban as well as the groups themselves);
- Part 6 of the *Counter-Terrorism Act 2008* which provides that a person affected by a decision of the Treasury made under the 2010 Regulations, or Part 2 of ATCSA, can apply for judicial review of the decision (which can take place in closed court with the use of special advocates – see more on this below).[7]

[4] See statement by the Secretary of State for the Home Department (the Rt Hon Theresa May MP), *Hansard*, 13 July 2010, Column 797
[5] SI 2010/1197 made 7 April 2010 under section 2(2) of the *European Communities Act 1972*.
[6] See Council Regulation (EC) No. 881/2002 of 27 May 2002 (as amended).
[7] Note also Part 3 of the *Terrorism Act 2000* which contains a series of measures relating to terrorist financing.

Under clauses 1 and 2 of the Terrorist Asset-Freezing etc. Bill as currently drafted the Treasury will have the power to designate anyone it has reasonable grounds for 'suspecting' is or has been involved in terrorist activity. Under clause 1, any person, group or entity included on an EU Council Regulation[8] list will automatically have their assets frozen. The EU list implements UN Security Council resolution 1373 (2001) which lists anyone "*who commit, or attempt to commit, participate in or facilitate the commission of terrorist acts*".

5. This confusing regime has been put in place following a number of United Nations Security Council (UNSC) resolutions which require Member States, including the UK, to freeze terrorist assets. The first of these resolutions was passed before the tragic attacks of September 11, 2001. UNSC resolution 1267 (1999) provided for the freezing of funds and other financial resources derived from or generated from property owned or controlled by the Taliban. This was taken further with UNSC resolution 1333 (2000) which provided states should freeze funds and other financial assets of Usama bin Laden and members of Al-Qaida. On 28 September 2001, as part of the response to September 11, the UNSC decided that action needed to be taken to freeze the assets of anyone who commits or attempts to commit terrorist acts or facilitates their commission – passing UNSC resolution 1373 (2001). Through these processes two lists were created. One, regulated by what is known as the 1267 Committee, lists people whose assets should be frozen on the basis of involvement with the Taliban or Al-Qaida. The other, regulated by the 1373 Counter-Terrorism Committee, lists anyone UNSC members consider have committed or attempted to commit such acts. Someone included on this list will not necessarily be notified of which country recommended their inclusion on the list, nor the reasons why, and has no genuine opportunity to challenge their inclusion,[9] and certainly no access to any independent judicial process.

6. Under the changes proposed by the Terrorist Asset-Freezing etc. Bill, UK legislation will no longer automatically freeze the assets of anyone included on these

[8] See Council Regulation (EC) No 2580/2001 of 27 December 2001.
[9] In 2006 the UNSC passed Resolution 1730 (2006) which established a Focal Point within the UN Secretariat which listed persons could apply to seek to be de-listed. Such a request will be forwarded to the country that designated the person originally and that country will be asked to reconsider the listing. However, if the country still considers the person should remain on the list it is likely they will remain on it indefinitely. See also UNSC Resolution 1909 (2009), which provides that the Focal Point no longer receives de-listing requests from anyone listed by the 1267 Committee concerning Al-Qaida and the Taliban. Such requests are received by the Office of the Ombudsperson.

UN lists. Instead, as noted above, the Treasury can designate a person it suspects of committing terrorist acts and anyone on a list maintained by the EU will have their funds automatically frozen. However, the EU lists seek to implement the UNSC resolutions, so in practice the same people and entities should be included in both lists. Again, the EU listing procedure offers no real possibility for review for a person included on such a list.

7. The Terrorist Asset-Freezing etc. Bill was introduced in response to a Supreme Court ruling earlier this year, that secondary legislation that sought to implement the UNSC resolutions was invalid.[10] The Court held that the orders were ultra vires (beyond power) as they had not been properly authorised by Parliament and did not provide effective safeguards – particularly the order allowing for the freezing of the assets of anyone on a UN list without giving any opportunity of review. The Supreme Court made clear that the "*draconian*" regime had significant repercussions on the life of the people subjected to it and their family members.

8. It is of interest to note that although the freezing of the assets of those who have committed or attempted to commit terrorist acts is an important element of broader counter-terrorism measures, the amount of funds currently frozen are certainly not huge. As recently as 30 June 2010, Parliament was informed that a total of 202 accounts of "*suspected terrorist funds*" were frozen in the UK, containing a total of "*just under £360,000*".[11] This averages out at £1,782 per account.

Impact of a terrorist asset-freezing order

9. Before turning to our specific concerns in relation to the Bill, it is important to consider the very real human effect the terrorist asset-freezing regime has on those individuals subject to it. Any person (be they an individual or group) designated as one to whom this regime has applied has no access to any of their assets unless this is authorised by the Executive. It is 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. Such a regime can be applied indefinitely to persons who may never have been convicted, charged, or even arrested in respect of any offence.

[10] See *Ahmed v HM Treasury* [2010] UKSC 2.
[11] See written statement by the Financial Secretary to the Treasury (Mr Mark Hoban), *Hansard*, 26 July 2010, Column 56WS-57WS.

10. As Lord Brown said in the recent Supreme Court case of *Ahmed*:

> *The draconian nature of the regime imposed under these asset-freezing orders can hardly be over-stated. Construe and apply them how one will – and to my mind they should have been construed and applied altogether more benevolently than they appear to have been – they are 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.*[12]

11. Lord Hope agreed with Sedley LJ in the Court of Appeal, that people designated in this way "*are effectively prisoners of the state*".[13] As money is required in order to take any form of transport, effectively such people's freedom of movement is in the hands of Treasury officials who can decide whether money for such travel should be dispensed. And of course, finding or maintaining any employment is effectively discouraged given any monies earned will be immediately frozen. The day to day reality for someone subject to such a regime was vividly set out in *Ahmed*. In this case, one of the people subjected to such a regime had never been told the reason for his inclusion on the list and was required to subsist on his wife's social security payments. For many years the family was required to list and inform the Treasury of every last penny spent during the month,[14] including on food, school uniforms, toiletries and medical expenses. It is clear that such requirements imposed on individuals have a severe impact, not just on personal property, but on a person's family and private life. In fact, in *Ahmed*, two of the designated men were said to have had significant mental health difficulties and marriage break-ups as a result of the burden imposed on them and their wives by this regime.[15] As Lord Hope pointed out:

> *The overall result is very burdensome on all the members of the designated person's family. The impact on normal family life is remorseless and it can be devastating...*

[12] *Ahmed* at [192].
[13] See *Ahmed* at [4].
[14] See *Ahmed* at [37].
[15] See Ahmed at [31}.

> *…the restrictions strike at the very heart of the individual's basic right to live his own life as he chooses… It is no exaggeration to say … that designated persons are effectively prisoners of the state. I repeat: their freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating.*[16]

12. There is no doubt that this is a harsh and coercive regime that has severe implications for a designated person and their family. In this respect, as in many others, the regime is comparable to control orders. Those subjected to it may well be innocent of any offence, and may not necessarily know why they have been subjected to the regime. As Lord Rodger in *Ahmed* noted "*the harsh reality is that 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*."[17]

EU List designation

13. 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 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

[16] See *Ahmed* per Lord Hope (DP) (with whom Lord Walker and Lady Hale agreed) at [38] and [60].
[17] *Ahmed* at [182].

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*.[18] 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).

14. 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.[19] 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.[20] 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

15. As set out above, the Terrorist Asset-Freezing etc. Bill does not purport to set out a comprehensive scheme in relation to terrorist asset-freezing orders. If this Bill is passed as currently drafted there will be three primary pieces of legislation dealing with asset-freezing and a number of pieces of secondary legislation. 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*

[18] Article 6 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.
[19] See Article 6 of Council Regulation (EC) No 2580/2001 of 27 December 2001.
[20] 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

of executive action".[21] 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*".[22] 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*".[23] 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.*[24]

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 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.

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[21] *Ahmed* at [220].
[22] 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.
[23] Ibid.
[24] 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.

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

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

Amendment 2 – Substitution of clauses 2-6

Pages 1 -3, leave out Clauses 2 to 6 and insert–

"**2 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.

3 Court's power to designate individuals

(1) A court may designate 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 the individual—

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

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

(c) 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.

(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.

4 Notice of application

(1) If an application under section 2 or 3 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.

5 Duration of designation

(1) A designation made under section 2 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 3 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 at any time before it expires, if the requirements in section 2 and 3 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.

6 Variation or revocation of designation

The court may vary or revoke a designation 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.".

Effect

17. This will remove clauses 2 -6 and substitute new clauses – the effect of which is set out below.

New clause 2

18. This will allow a Court (defined later as the High Court and its equivalent in Scotland) 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*.[25] The only difference is the removal of a reference to promoting or encouraging terrorism (which includes glorification of terrorism).

New clause 3

19. This will allow a court to designate an individual on application by the Treasury. In contrast to the present proposals a person can only be designated (and have their assets frozen) if they have been through the criminal justice process or

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

criminal proceedings are in train. So the court can designate a person who has been convicted of a terrorism offence as well as those arrested or charged with a criminal offence (the designation can last during the criminal investigation – which can be converted into a more lasting designation if the person is later convicted of a terrorism offence). In addition the court needs to consider if the designation is 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).

New clause 4

20. This clause requires a person to be given notice of the fact that a designation is sought 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 4 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.

New clause 5

21. Proposed new clause 5 sets out the period by which a designation remains in effect. This will differ according to the type of designation. Clause 5 provides that a designation of an organisation can last for up to one year (and can be renewed). 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. In relation to those arrested of 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. And 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.

New clause 6

22. This clause allows a court to vary or revoke a designation if the Treasury or designated person applies for variation or revocation and the court considers it appropriate to do so.

Briefing

23. Under proposed clauses 2-6 currently in the Bill the Treasury would be able to designate anyone simply on the basis of suspicion that the person is or has been involved in terrorist activity. This is an extremely low threshold. There does not have to be any factual basis for this assessment of risk. Even if the suspicion is based on wholly inaccurate and misleading information, all that is required is that the suspicion of the Treasury be reasonable according to what is presented to it. Additionally, a person can be subjected to the regime if they are on an EU list – and they can be on such a list on the basis that a country (including any that may have its own political reasons to include a person on the list) has nominated that person as one that it considers has 'committed or attempted to commit' a terrorist act.

24. Indeed, this low threshold is not even required as a result of the UNSC resolutions. The Terrorist Asset-Freezing etc. Bill is said to "*give effect in the United Kingdom to resolution 1373 (2001) adopted by the Security Council of the United Nations on 28th September 2001*".[26] However, resolution 1373, as referred to above, requires member states of the UN to prevent the financing of terrorist acts, including freezing the funds of those who "*commit or attempt to commit*" acts of terrorism. As Lord Phillips in the Supreme Court pointed out:

> *what the [UN] 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*

[26] See Explanatory Memorandum to this Bill, paragraph 3.

would make the long term freezing of assets dependent upon conviction of the relevant criminal offence to the criminal standard of proof.

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.[27]

Yet, clause 2 of the Bill gives the Treasury the power to designate a person as someone whose assets can be frozen if there are merely "*reasonable grounds for suspecting*" they have been involved in terrorist activity – not that they have actually committed an act of terrorism. This is a lower test than that required by the UN resolution and will inevitably capture more people, including those who are innocent of any wrong-doing. As Lord Phillips said:

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.[28]

25. Under the Bill the designation of such a person will be done either at the initiative of the Treasury or as a direct result of inclusion on the EU list. The person made subject to it has no ability to make any representations at the time such a designation is made.

26. We believe that the entire system of terrorist asset-freezing in respect of individuals needs to be reviewed. As the Bill currently stands its provisions are, we submit, contrary to Article 6 (right to a fair trial), Article 8 (right to a private and family life) and Article 1 of Protocol 1 (right to property) of the *Human Rights Act 1998*.[29] We believe this is particularly the case given it cannot be said to be necessary to

[27] See *Ahmed* at [136]-[137] (emphasis added).
[28] See *Ahmed* at [137].
[29] Articles 6, 8 and Article 1 of Protocol 1 to the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

enact the provisions in their current form in order to comply with the UN Security Council resolutions. In the amendments above we propose an entirely different system which gives the power to make these intrusive orders to the courts and away from the Executive. We have proposed a two-tier system depending on whether the person being designated is an organisation or an individual.[30]

27. 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,[31] we believe banning such 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 2 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.

28. 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, terrorist asset-freezing measures undermine 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.

29. UNSC resolution 1373 (2001) requires a state to impose asset-freezing measures on those who "*commit, or attempt to commit, terrorist acts or who*

[30] 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.

[31] 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

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 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 3 would allow a court to designate anyone convicted of a terrorism offence (which is defined as being an offence such as murder, explosions etc which has a terrorist connection or any of the other specific terrorist offences). It would also apply where a person has been arrested or charged with a terrorist offence, to cover the situation 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 type of designation that currently occurs. 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*".[32] 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.

30. Clause 3 of the Bill as it is currently drafted provides 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. We have not suggested replicating this procedure given if designation is by the Court the Court can determine according to its own rules and powers how much information is to be disclosed. Clause 6 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. In most cases, however, the fact that an individual or organisation has been designated should generally be made public. It would be particularly onerous for a designated

[32] 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

person to be prohibited from disclosing the fact of his or her designation to family or friends given the severe effect such designations can have on their lives.

Amendment 3 – Clause 13: Licences

Clause 13, page 6, line 19, leave out "Treasury" and insert "court".

Clause 13, page 6, after line 19 insert–

"( ) On an application under section 3 the Treasury must submit a draft licence to the court in respect of the designated person.

( ) On making a designation under section 3 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 3 to have access to such funds as is reasonably necessary for travel and subsistence, including of any dependants of the designated person.

Clause 13, page 6, line 28, leave out "Treasury" and insert "court".

Clause 13, page 6, line 33, leave out "Treasury consider" and insert "court considers".

Effect

31. This will amend clause 13 to ensure that a licence enabling living expenses to be made available to a designated person and his or her children must be made by the court when a designation is made under new clause 3 (note this will not apply to organisations subject to designation).

Briefing

32. 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".[33] This is 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 13 of the Bill as currently drafted maintains this discretionary role for the Treasury. We believe it is essential that every individual subjected to designation should be given access to enough funds for daily subsistence and travel. We do not believe it is appropriate for this to be left at the discretion of the Executive. 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 purposes. 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.

Amendment 4 – Clause 16: provision of information to Treasury

Clause 16, page 8, leave out lines 1-4. Clause 16, page 8, line 5, leave out "or (2)".

Effect

33. This will remove clause 16(2) and any consequential reference to it.

Briefing

34. Clause 16(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*".[34]

[33] Ibid at paragraph 5.10.
[34] *Ahmed* at paragraph 39.

35. 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 18: Self-Incrimination

Clause 18, page 9, after line 29 insert–

"(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 Administration Act;

(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

36. This will amend clause 18 to insert new subsections (3) – (5).

Briefing

37. Under proposed clauses 16 and 17 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 18 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*[35] provides the right to a fair trial which includes the privilege against self-incrimination. The proposed amendments above (modelled on provisions in existing legislation) continue to require a person to submit such information but any such evidence which is self-incriminatory should not be admissible in any criminal proceedings against that person.

Amendment 6 – Clause 19: Power of Treasury to disclose information

Clause 21, page 10, leave out lines 28-29.

Effect

38. This will remove clause 21(1) of the Bill.

Briefing

39. Clause 21(1) of the Bill as currently drafted provides that nothing done under these 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 to act in accordance with any laws, both statutory and common law, when using their terrorist asset-freezing powers. 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, this still seeks to exempt Treasury officials and their

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

actions from the *Human Rights Act 1998*, common law principles of negligence and defamation and any other statutory requirement. The Explanatory Memorandum gives no reason for this broad and sweeping exemption. The Government must explain why they consider this exemption to be necessary, and particularly why such a broad exemption is necessary. At the very minimum, this exemption must not include a failure to act in accordance with the *Human Rights Act 1998*.

Amendment 7 – Clauses 22 and 23: Review of decisions

Page 11, line 7, leave out clause 22.

Clause 23, page 11, line 24, leave out "section 22" and insert "sections 2 or 3".
Clause 23, page 11, line 25, leave out "review of decisions by the court" and insert "court's power to make designations".

Clause 23, page 11, line 32, leave out "section 22" and insert "sections 2 or 3".
Clause 23, page 11, line 33, leave out "review of decisions by the court" and insert "court's power to make designations".

Effect

40. This will remove clause 22 from the Bill (review of decisions by the court) and amend clause 23 to make reference to applications made to the court under proposed new clauses 2 and 3 (rather than applications made under clause 22).

Briefing

41. These amendments are consequential on the earlier amendments being made which requires a court to make a designation rather than Treasury officials. Clause 22, as it currently stands, provides for review of a Treasury decision by way of judicial review. This review under clause 22 as drafted 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. It also provides only for judicial review of the decision to make the order. If Amendment 2 proposed above is successful the designation itself should be by the court (with all the usual methods of appeal) 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 22.

Amendment 8 – Clause 23: Special rules of court, special advocates etc.

Clause 23, page 12, leave out lines 1-7.

Effect

42. This will remove subclause 23(4) from the Bill.

Briefing

43. Subclause 23(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.[36] 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. Unless amendments are made to ensure fair hearing rights are respected we do not believe these special rules of court should be applied.

[36] See sections 66-68 of the *Counter-Terrorism Act 2008.*

Amendment 9 – Clause 24: Treasury report

Clause 24, page 12, line 12, leave out “on them”.

Effect

44. This will remove the words “on them” from subparagraph 24(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

45. 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 10 – Clause 26: Penalties

Clause 12, page 12, line 40, leave out “6 or”.

Effect

46. This will remove reference to section 6 in the list of offences for which penalties apply.

Briefing

47. This is a consequential amendment if Amendment 2 proposed above is accepted as it proposes removing clause 6.

Amendment 11 – clause 36: Interpretation

Clause 36, page 18, after line 26 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

48. This proposed amendment will introduce three new definitions into the general interpretation section of clause 36.

Briefing

49. These interpretations relate to new terms proposed in Amendment 2 – in particular in relation to proposed substituted clauses 2 and 3. 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

50. 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 proof and evidence. 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].