Draft Terrorist Asset-Freezing Bill

JUSTICE response to HM Treasury Consultation Cm 7852

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Introduction

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

2. JUSTICE welcomes the public consultation on the draft Bill. 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.

3. More generally, the draft Bill raises a number of issues with which JUSTICE has long been concerned: human rights and counter-terrorism;[1] the use of secret evidence and the fair administration of justice;[2] the importance of parliamentary oversight of executive measures;[3] and the importance of the UK's obligations under international law.[4]

Q1. Does the draft Bill set out the most effective way of meeting our UN obligations and protecting national security whilst also ensuring sufficient safeguards in respect of human rights?

4. No. In JUSTICE's view, the draft Bill is not the most effective way of meeting the UK's obligations under the relevant UN Security Council resolutions, nor does it adequately respect fundamental rights.

5. First, the draft Bill deals only with the UK's obligations under UNSCR 1373 ('the Terrorism order'). The implementation of UNSCR 1267 ('the Al Qaeda order') has been left to the draft Al Qaida and Taliban (Asset Freezing) Regulations 2010, which the Treasury proposes to make

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[1] See e.g. JUSTICE's reports *Intercept Evidence* (October 2006), *From Arrest to Charge in 48 Hours: Complex terrorism cases in the US post-911* (November 2007), The Future of Counter-Terrorism and Human Rights (2009), and the February 2009 report of the ICJ's Eminent Jurists Panel, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*.

[2] See JUSTICE's report *Secret Evidence* (June 2009).

[3] See JUSTICE's report, *The Constitutional Role of the Privy Council and the Royal Prerogative* (January 2009).

[4] See e.g. JUSTICE's interventions in *Al Jedda v SSD* [2007] UKHL 58 before the House of Lords and *Al Jedda v United Kingdom* (App No 27021/08) and *Al Saadoon v United Kingdom* (App No 61498/08), both pending. *Al Jedda v UK* will be heard by the Grand Chamber of the European Court of Human Rights on 9 June 2010.

under section 2(2) of the European Communities Act 1972.[5] We think it would be 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*:[6]

> 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.

6. Secondly and more generally, the Treasury consultation paper envisages that the provisions of the draft Bill will operate alongside the existing terrorist financing provisions of Part 3 of the Terrorism Act 2000, the asset-freezing powers of Parts 1 and 2 of the Anti-Terrorism Crime and Security Act 2001 and the financial restriction provisions of Parts 5 and 6 of the Counter-Terrorism Act 2008. Since the consultation paper was published in February, however, the coalition government has committed itself to a 'wider review of counter-terrorist legislation, measures and programmes'.[7] This is something that JUSTICE has long argued for – most recently in the February 2009 recommendation of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights that:[8]

> States should undertake comprehensive reviews of their counter terrorism laws, policies and practices, including in particular the extent to which they ensure effective accountability, and their impact on civil society and minority communities. States should adopt *such changes as are necessary to ensure that they are fully consistent with the rule of law and the respect for human rights, and to avoid all over-broad definitions which might facilitate misuse.*

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

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[5] Treasury consultation paper, para 1.9.

[6] Paras 220 and 223.

[7] *The Coalition: Our programme for government* (May 2010), p24.

[8] See n1 above, p164. Emphasis added.

piecemeal fashion. In the circumstances, we think it would be unwise for the Treasury to proceed with partial legislation on the issue of terrorist financing until the conclusions of the broader governmental review of counter-terrorism laws have been made public.

8. Thirdly, it is plain that, by retaining the 'reasonable suspicion' test of the original Terrorism Order quashed by the Supreme Court in *Ahmed*, the draft Bill goes significantly further than what is required by UNSCR 1373. As the President of the Court, Lord Phillips of Worth-Matravers held:[9]

> 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 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:[10]

> 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

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

[10] Ibid, para 58. Emphasis added.

> '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.

9. 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. Nonetheless, the consultation paper states that:[11]

> 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).*

We are at a loss to understand this statement. The Supreme Court has made clear that a 'reasonable suspicion' test is not required in order to implement UNSCR 1373.[12] The Treasury consultation paper 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.

10. Fourthly, we think it plain that – by following very closely the regime introduced by the Terrorism Order – the provisions of the draft Bill are highly likely to be held incompatible with

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[11] Para 4.5. Emphasis added.

[12] Among other things, Lord Brown noted the more stringent tests applied by the Australian, Canadian and New Zealand legislation on terrorist financing: see paras 199-200: '[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 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'.

Convention rights. As Lord Hope noted in *Ahmed*, 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'.[13] The consultation paper claims that the Supreme Court 'did not condemn the Terrorism Order 2006 on wider grounds of incompatibility with fundamental rights'.[14] 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.[15] 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.[16] 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'.[17] As the Deputy President, Lord Hope, said:[18]

> 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.

In the circumstances, we believe the judgment of the Supreme Court in *Ahmed* raises serious doubts about the compatibility with fundamental rights of any primary legislation modelled upon the Terrorism Order. Specifically, the power of the Treasury to designate a person as liable to have their assets frozen for extensive periods of time on the basis of reasonable suspicion alone is likely to be held to breach the right to respect for family and private life under article 8 and the right to property under article 1 of Protocol 1 ECHR.

11. The consultation paper refers to various safeguards, including (i) the fact that designations must be renewed annually (clause 4); (ii) the right of those designated to apply to a court for the designation to be set aside (clause 22); (iii) the use of special advocates to represent the interests of claimants in any closed proceedings concerning designation (clause 23); (iv) quarterly reporting to Parliament (clause 24) and (v) the prospect of independent review of the operation of the Bill (clause 25). In our view, however, such safeguards are unlikely to be

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[13] Para 60.

[14] Para 4.3.

[15] Para 201.

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

[17] 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.

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

sufficient to prevent a finding of incompatibility with Convention rights, for the reasons set out below.

Designation on the basis of reasonable suspicion by the Treasury

12. 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.[19] The Treasury has repeatedly cited the need to implement UNSCR 1373 as its justification for legislating. 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':[20]

> 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:[21]

> 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.

Given the clear terms of the Supreme Court's conclusions 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

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[19] 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.

[20] Para 174.

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

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*:

> 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.

Use of special advocates and intercept material

13. The Treasury consultation paper makes much of the fact that the Counter-Terrorism Act 2008 now makes provision for the use of special advocates in applications against designation, and that the draft Bill would enable the use of intercept material in closed proceedings. While this is undoubtedly an improvement over the previous regime under the Terrorism Order 2006, 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*[22] and the House of Lords in *AF and others v Secretary of State for the Home Department (No 3),*[23] 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.

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[22] (2009) 49 EHRR 29.

[23] [2009] UKHL 28.

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 consultation paper claims that special advocates are 'bound by the ethical standards of the Bar Council'.[24] 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 professionally responsible to those whom they represent,[25] it is extremely difficult to see the relevant professional standards of England and Wales or Scotland would apply. Indeed, as we noted in our 2009 report, 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 refer 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.

14. The consultation paper also notes that, following the 2008 Act, 'intercept material may now be relied upon in proceedings to challenge a Treasury position' (clause 23(2)(b)).[26] 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.[27]

Quarterly reports to Parliament and independent review

15. The provision for quarterly reporting by the Treasury to Parliament on the operation of the asset-freezing regime (clause 24) is welcome, as is the provision for an independent reviewer to report annually (clause 25). However, 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

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[24] Para 4.20.

[25] 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'.

[26] Para 4.19.

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

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.[28] Reports to Parliament and independent reviews may perform a useful function but they generally do little to overcome the defects of incompatible legislation.

Q2. Do you have any views on the current operation of the UK's asset freezing regime?

16. Yes. We consider it highly unfortunate that the Terrorist Asset Freezing (Temporary Provisions) Act 2010 has done no more than put the old asset-freezing regime under 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:[29]

> 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*.

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

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