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Liberty and JUSTICE Joint Briefing for Second Reading on the Terrorist Asset-Freezing etc. Bill in the House of Commons

November 2010

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

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Introduction and summary

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

> *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.*

2. In January, the UK Supreme Court struck down the asset-freezing regime established by two terrorism orders made by the Treasury under the United Nations Act 1946. The Supreme Court struck down the orders because it held that the Treasury's orders went much further than was required by UN Security Council resolutions 1267 and 1373. As one Justice of the Supreme Court put it:[2]

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

3. When first introduced in the House of Lords in July, the current Bill essentially set out the same asset-freezing regime the Supreme Court had described as 'draconian' in January. Just prior to Committee Stage in the Lords, the government introduced a set of amendments that it said showed that it '*took seriously the civil liberties concerns that had been raised about the terrorist asset-freezing regime*',[3] changing the test for the making of an Executive Order from 'reasonable suspicion' to 'reasonable belief' and providing for appeal rather than judicial review.

4. Despite these amendments, however, Liberty and JUSTICE believe that the asset-freezing regime proposed under the revised Bill remains very much at odds with respect for fundamental rights and the rule of law. In particular, no person should

[1] See *Ahmed v HM Treasury* [2010] UKSC 2 at para 39 per Lord Phillips.
[2] Ibid, para 192.
[3] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 120 per The Commercial Secretary to the Treasury (Lord Sassoon).

have their assets indefinitely frozen on the basis of untested suspicion or belief alone.

5. In particular, we believe the revised Bill:

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

   - makes those designated by the Executive, in the words of the Deputy President of the Supreme Court, 'effectively prisoners of the state';[4]

   - goes much further than is required by UN Security Council Resolution 1373, a resolution which the UN's own Special Rapporteur on Terrorism, Counter-Terrorism and Human Rights has said 'cannot be seen as a proper response to a specific threat to international peace and security';[5]

   - fails to address the UK's separate asset-freezing obligations under UN Security Council Resolution 1267, recently criticised by the General Court of the European Union as 'particularly draconian';[6]

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

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

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[4] Ahmed, para 11 per Lord Hope of Craighead. This description of the asset-freezing regime was adopted by the General Court of the European Union in *Kadi (No 2).*

[5] Sixth Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN General Assembly, A/65/258: 6 August 2010), para 52.

[6] *Yassin Abdullah Kadi v European Commission* (T-85/10, 30 September 2010).

- is inconsistent with the Coalition government's promise to 'reverse the substantial erosion of civil liberties' under the previous government.[7]

6. Liberty and JUSTICE do not suggest that freezing the assets of people who are actually involved in terrorist financing is unlawful. On the contrary, we believe that – used correctly – asset-freezing can be an invaluable tool in the fight against terrorism and the protection of fundamental rights. But it is of fundamental importance that we also have an asset-freezing regime that does not sweep up the innocent with the guilty, or one that makes it impossible for the innocent to actually prove their innocence. As the President of the Supreme Court, Lord Phillips noted recently, respect for these basic rights is a 'vital part' of the fight against terrorism:[8]

> *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.*

Background

7. Shortly after the 9/11 attacks, the UN Security Council passed UN Security Council Resolution 1373, one of a series of resolutions aimed at preventing the financing of terrorism.[9] In particular, UNSCR 1373 directed UN member states to:[10]

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[7] *The Coalition: Our Programme for government* (May 2010), p11.
[8] Lord Phillips of Worth-Matravers, Gresham Lecture, 8 June 2010, pp 37-38. Emphasis added.
[9] See also e.g. UNSCR 1267 (1999), 1333 (2000) and 1371 (2001).
[10] UNSCR 1373 (2001), para 1(c).

> Freeze without delay funds and other financial assets or economic resources of persons *who commit, or attempt to commit*, terrorist acts or participate in or facilitate the commission of terrorist acts

8. It is important to note, however, that resolution 1373 did *not* require UN member states to freeze the funds of persons it merely *suspected* might be involved in financing terrorism. And, indeed, most western countries have implemented resolution 1373 in a way that does not involve freezing the assets of people suspected of involvement in terrorism, without their first being charged or convicted of criminal offences linked to terrorism.

9. Unlike most other western countries, the UK went much further than UNSCR 1373 actually required. Under the United Nations Act 1946 (which was designed to enable fast-track implementation of security council resolutions, e.g. the emergency imposition of sanctions), the Treasury made a series of executive orders – in particular the Terrorism Order 2006 and the Al Qaeda Order 2006 – that created an entire regime to enable the freezing of assets of any person it 'reasonably suspected' of involvement in terrorism, whether or not there that person had been charged or convicted of terrorist offences or not. In addition, the Treasury orders made no provision for those affected by the financial restrictions to challenge the basis on which they had been suspected of involvement in financing terrorism.

10. In January 2010, the UK Supreme Court quashed the Terrorism Order 2006 and the Al-Qaeda Order 2006 on the basis that both orders went well beyond the terms of the United Nations Act 1946, and violated fundamental rights. The President of the Supreme Court, Lord Phillips, said:[11]

> *[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*

[11] Ibid, para 137.

reasonable suspicion they can last indefinitely, without the question of whether or not the suspicion is well-founded ever being subject to judicial determination.

11. Another Supreme Court Justice, Lord Brown noted that the UK government had gone much further than other common law countries had in implementing resolution 1373:[12]

> *[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.*

12. By imposing freezing the assets of people who had not actually been *proved* to be involved in terrorism, and by preventing them from challenging the evidence on which they were designated, the Supreme Court concluded, 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.

[12] Ibid, paras 199-200.

13. In particular, the Deputy President of the Supreme Court, Lord Hope, described the effect of designation by the Treasury in the following terms:[13]

> *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.*

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*',[14] and concluded that:[15]

> *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.*

14. 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).

15. 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'.[16] The Bill was introduced on 5 February and received Royal Assent on 10 February. At the same time, a draft Bill was also published, followed by a Treasury consultation in March.

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[13] *Ahmed and others v HM Treasury* [2010] UKSC 2 at para 11.
[14] Ibid, para 60.
[15] Ibid, para 6.
[16] Explanatory notes to the Terrorist Asset-Freezing (Temporary Provisions) Bill, para 8.

16. The draft Bill, however, did no more than put the previous asset-freezing regime under the Terrorism Order 2006 on a statutory footing, and – to this extent – was no better than the 2010 Act passed on an emergency basis. Nor was the current Bill, when first published in July, any better. Although it was described as being '*broadly based on the consultation draft'*, this was, if anything, an understatement. In fact, Part 1 of the current Bill was 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 were the slight broadening of the duty of confidentiality in clause 10, inconsequential rewording of the offences in clauses 11 to 15, and an exemption for benefit payments made to family members. In all other respects, the current Bill as it was introduced in July was essentially the same draft Bill that was published in February, containing the same draconian regime that the Supreme Court had quashed.

17. Despite the emergency legislation being introduced in February in order to give the Treasury time to devise a proper legal framework for asset-freezing powers and to '*provide Parliament with the proper time needed to consider and debate permanent legislation in full*',[17] it was not until October that the government tabled amendments aimed at providing safeguards to protect basic rights. As we detail in this briefing, the Bill still remains deficient in this area. Moreover, it fails to consolidate the other asset-freezing powers contained in primary and secondary legislation for the purpose of preventing terrorist financing.

UN criticism of the asset-freezing regime under UNSCR 1373

18. In August 2010, the UN Special Rapporteur on Terrorism, Counter-Terrorism and Human Rights reported to the UN General Assembly,[18] in which he strongly criticised the asset-freezing regime established by the Security Council under UNSCR 1373:

[17] Liam Byrne MP, then Chief Secretary to the Treasury, *Hansard*, House of Commons, 8 February 2010, column 663.
[18] Sixth Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN General Assembly, A/65/258: 6 August 2010).

the Special Rapporteur considers that whatever justification the Security Council may have had in September 2001 for the adoption of resolution 1373 (2001), its continued application nine years later cannot be seen as a proper response to a specific threat to international peace and security. The implementation of resolution 1373 (2001) goes beyond the powers conferred on the Council and continues to pose risks to the protection of a number of international human rights standards.

In particular, the UN Special Rapporteur reminded the General Assembly of the more general obligation that:

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law.

It is important to bear in mind, therefore, that the UK government's obligations to give effect to its international obligations under UNSCR 1373 are not absolute. They are subject to the broader requirement of UN Member States to comply with international human rights standards, including the right to a fair hearing. As the preamble to the UN Charter itself states, the United Nations was founded:

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

This larger obligation should remind us that it is not for the government to dictate to Parliament *how* a UN Security Council resolution should be implemented in UK law, especially when the government's interpretation is at odds with that of the Supreme Court and of other western democracies. Instead, it is for Parliament itself to determine how such resolutions should be implemented in a way that is compatible with the fundamental rights and freedoms that are its duty to protect.

Overlap with other terrorist asset-freezing measures

19. The UK's current asset-freezing regime is not limited to what is provided by the Terrorist Asset-Freezing (Temporary Provisions) Act 2010. In fact, that Act is just

part of a range of primary and secondary legislation aimed at preventing terrorist financing, including:

- Part 3 of the *Terrorism Act 2000* which provides police, customs and immigration officials with the power to seize and detain any cash, bank drafts, postal orders, travellers cheques, and other monetary instruments specified by the Secretary of State where there is reasonable suspicion that it is either being used for the purposes of terrorism, the resources of a proscribed organisation, or part of the proceeds of an act of terrorism;[19]

- 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*[20] 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[21] (such listed persons are those deemed to be members of Al-Qaida or the Taliban as well as the groups themselves); and

- 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);[22]

20. In his judgment in *Ahmed and others,* Lord Mance remarked on the 'patchwork' nature of the current law on terrorist asset-freezing:[23]

[19] Sections 24-31 of the 2000 Act.
[20] SI 2010/1197 made 7 April 2010 under section 2(2) of the *European Communities Act 1972*.
[21] See Council Regulation (EC) No. 881/2002 of 27 May 2002 (as amended).
[22] Note also Part 3 of the *Terrorism Act 2000* which contains a series of measures relating to terrorist financing.
[23] Paras 220 and 223.

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 ....

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.

21. Despite the opportunity created by the Supreme Court judgment for Parliament to rationalise the law in this area, the current Bill makes no attempt to bring these other asset-freezing powers within a single legal framework. Indeed, to read the Bill's explanatory notes, Members of Parliament 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. Liberty and JUSTICE think it is extremely undesirable for the law relating to terrorist financing to be further fragmented in this way.

22. In particular, clause 1(2) of the Bill provides that any person, group or entity included on an EU Council Regulation[24] list will automatically have their assets frozen. The EU list implements UN Security Council resolution 1373 (2001) which requires the assets to be frozen of persons '*who commit, or attempt to commit, participate in or facilitate the commission of terrorist acts*'. 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*'.[25] 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*'.[26] 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:

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[24] See Council Regulation (EC) No 2580/2001 of 27 December 2001.
[25] 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.
[26] Ibid.

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.[27]

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, Parliament must ensure that the terrorist asset-freezing regime established pursuant to UNSCR 1373 is as fair and transparent as possible.

Impact of a terrorist asset-freezing order

23. 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.

24. As Lord Brown noted in *Ahmed,* there is an obvious parallal between asset-freezing orders, on the one hand, and the use of control orders on the other:

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

[27] 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.

> *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.*[28]

25. Lord Hope agreed with Sedley LJ in the Court of Appeal, that people designated in this way "*are effectively prisoners of the state*".[29] 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. In addition, for any small business owners, a freezing order will effectively shut down the business. The effect on a person's spouse or partner is also likely to be huge as joint assets are targeted in the same way as individually owned assets – a factor that undoubtedly would heavily impact on personal relationships.

26. 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,[30] 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.[31] 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...*
>
> *…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*

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[28] *Ahmed* at [192].
[29] See *Ahmed* at [4].
[30] See *Ahmed* at [37].
[31] See Ahmed at [31}.

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.[32]

27. 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*'.[33]

28. It is also 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*'.[34] This averages out at £1,782 per account.

Executive rather than judicial designation

29. One of the major problems with the terrorist asset-freezing regime as set out in this Bill is that any designation – with all the coercive measures that flow from it – is made by the Executive and not the judicial branch of government. The Government has said that this should be a ministerial decision with the designated person now given the chance to appeal the decision. The Commercial Secretary to the Treasury, Lord Sassoon, said at Committee stage in the House of Lords that this is a matter best left to the Executive as:

actions and decisions to prevent the commission of acts of terrorism … often must be taken under very considerable pressure of time and require fine judgments of operational matters which … involve the intelligence and law

[32] See *Ahmed* per Lord Hope (DP) (with whom Lord Walker and Lady Hale agreed) at [38] and [60].
[33] *Ahmed* at [182].
[34] See written statement by the Financial Secretary to the Treasury (Mr Mark Hoban), *Hansard*, 26 July 2010, Column 56WS-57WS.

enforcement agencies. The combination of the flow of information, the time required and the complexity of decisions is suited to decision making by the Executive, subject to the important safeguards of the courts.[35]

30. The argument that the imposition of such coercive orders is best undertaken by Ministers rather than the courts misunderstands the importance of the separation of powers and the role the courts already undertake. In particular, it ignores the several decades of practical experience of the courts themselves in making *ex parte* asset-freezing orders in a wide range of civil and criminal proceedings. As Lord Lloyd of Berwick has pointed out in his submission to the Home Office on this Bill, it was the courts themselves who invented freezing orders in the first place.[36]

31. Indeed, British judges have been making asset-freezing orders in highly complex commercial cases involving multiple jurisdictions, week-in and week-out for some thirty-five years. And ever since Parliament passed the Proceeds of Crime Act 2002, they have been exercising an even broader range of powers – including confiscation, restraint, cash seizure, civil recovery and property freezing – in criminal investigations. London's reputation as capital of international trade and finance would surely grind to a halt if these judges did not exercise due care and diligence in making asset-freezing orders.

32. As regards national security, it seems highy implausible that the judges who sit in the specially-constituted division of the High Court to hear financial restriction cases under Part 6 of the Counter-Terrorism Act 2008 would somehow be less capable than their colleagues in the Commercial division of hearing an emergency application for a freezing order.

33. Freezing orders are, indeed, just one of many kinds of orders that the courts are much better-placed than the executive to make, because of their particular expertise in assessing the necessity and proportionality of interferences with fundamental rights. An ancient example of this is the search warrant. English magistrates have for several centuries been authorised to decide whether the

[35] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at columns 160-161 per The Commercial Secretary to the Treasury (Lord Sassoon).

[36] The 'Mareva' injunction was a common law development which freezes assets in civil proceedings where there is reason to believe the defendant might dispose of assets to frustrate a later court judgment. This was named after *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

executive has made out its case that a person's home can be searched for the purposes of a criminal investigation. If the courts can cope with the '*very considerable pressure of time'* and *'fine judgments of operational matters'* involved when deciding whether to grant a search warrant or a freezing order in a complex drug importation case, for instance, they can most certainly cope with similar pressures in cases of suspected terrorist financing.

34. As the late distinguished jurist Lord Bingham pointed out in the Belmarsh case:

> *It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament, it is the function of the courts and not of political bodies to resolve legal questions*.[37]

The decision whether or not to make a designation is one that rests on the particular facts in each individual case. It does not require a political decision to be made, or any determination of public policy. It is a decision that is particularly suited to the judicial process. A court is able to make provision for evidence to be heard in closed court if it cannot be made public on national security grounds, the courts can also respond rapidly (with out-of-court sessions regularly taking place when required) and as for the "*complexity of decisions*" there is certainly no reason why highly learned judicial officers are not best placed to consider complex evidence and adjudicate accordingly.

35. Indeed, the Government has recognised the importance of the role of the courts in providing for an appeal mechanism. Yet no satisfactory reason has been given as to why the courts cannot be involved at the initial process. An appeal is no substitute for the court making the initial determination. An appeal can only take place after a designation has already been made, and while awaiting the outcome of an appeal the person's assets will be frozen with all the consequent implications this has on their employment, their rights to property as well as a private and family life. Indeed, a person whose assets have been frozen is likely to find it difficult to obtain legal advice in order to challenge the Treasury's decision – having to rely on (and

[37] See *A v Secretary of State for the Home Department* [2005] 2 AC 68 per Lord Bingham at [29]

perhaps apply for) a licence from the Treasury to make the appeal. In Committee in the House of Lords, Lord Wallace of Tankerness for the Government stated that "*the general presumption is that where a licence is requested to pay for legal costs, it will be granted*".[38] This statement demonstrates that the funding and licensing arrangements will certainly be a barrier for a person seeking to appeal a decision given an application will need to first be made simply for the money necessary to bring the appeal itself. And of course this is only a presumption in favour – under the Bill as currently drafted it is open to the Treasury to refuse to make such funds available. Further, setting out an appeal mechanism puts the onus on the affected person to make an application to the court for review of the decision – whereas the onus should be on the Government to make the application to the courts before such coercive measures should be imposed. For those with limited education, and perhaps limited English, proactively accessing the courts can be a difficult and complicated procedure. If principles of civil liberties are truly to be at the heart of this legislation, Liberty and JUSTICE consider it essential that the Bill provide for a judicial, and not a ministerial, process for the imposition of the terrorist asset freezing regime.

Threshold for designation – reasonable suspicion or belief?

36. The Bill as currently drafted allows the Treasury to designate anyone for 30 days on the basis of reasonable 'suspicion', and effectively indefinitely, on the basis of reasonable 'belief' that the person "*is or has been involved in terrorism*". The requirement of 'belief' was made as a late amendment just prior to the Committee stage on this Bill in the House of Lords and was meant to address the civil liberties concerns over the threshold for designation. In a letter from the Commercial Secretary to the Treasury, Lord Sassoon, to the Chair of the Constitutional Reform Committee, the Government's position was described as follows:

> *The reason for retaining suspicion for a maximum 30-day period is to allow freezes to be imposed in cases where there is an immediate threat but the position is not clear, for example <u>where people have been arrested and there is an operational need to freeze assets</u> but the police have not yet had sufficient time to complete their investigations and establish sufficient evidence to charge them for terrorist offences. The 2006 Operation Overt transatlantic plane bomb*

[38] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 174 per The Advocate-General for Scotland (Lord Wallace of Tankerness).

plot is a good example of where being able to freeze assets <u>alongside arrests</u> proved operationally valuable.[39]

During the Committee stage in the House of Lords it was suggested that the threshold for designation could not be set too high because the regime needed to operate in a preventative way, and that there can be cases '*where the nature of each person's role in a plot is not immediately clear*' and it would be too severe a restriction to exclude those '*who might be involved in the broader commissioning, facilitation and support of terrorist activity*'.[40]

37. We agree that it is important to ensure tools are available where a person has been arrested and there is an operational need to freeze someone's assets. The key word here is 'arrest'. If someone has been arrested (or an arrest warrant has been issued) the person has entered the criminal justice system. The threshold for arrest is not high – it is reasonable suspicion. We believe that if an arrest warrant has been issued or a person has been arrested designation by a court can take place for a limited period pending charge. However, to separate it out completely from the criminal justice process, as is set out in this Bill, is to continue the trend of operating outside normal criminal justice norms, in the same way as the control order regime does. There is no reason why this regime cannot be tied to arrest – particularly given the examples given by the Government relate to arrest. We are also concerned, based on the examples given during the House of Lords Committee stage debates, that there is a lack of understanding over the breadth of terrorist offences already available for which a person can be arrested. It is already an offence to encourage terrorism or prepare acts of terrorism,[41] or do anything ancillary to terrorism– and as such, any person suspected of involvement "*in the broader commissioning, facilitation and support of terrorist activity*" can already be arrested, triggering an application for designation.

38. While raising the threshold for indefinite designations from 'suspicion' to 'belief' is a marginal improvement it does not address the more fundamental concerns that the designation process be brought within the normal criminal justice

[39] See letter dated 4 October 2010 to Baroness Jay of Paddington from Lord Sassoon (emphasis added), available at: http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/LetterfromLordSasson041009.pdf

[40] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 142 per Lord Sassoon.

[41] See sections 1-2, 5, 6 and 8 of the *Terrorism Act 2006* and Schedule 2 to the *Counter-Terrorism Act 2008*.

system (requiring links to conviction, or as an interim measure, to arrest and charge). Further, the requirement that it be a belief that the person "*is, or has been, involved in terrorism*" demonstrates that this is not a test to determine if a person has actually committed a terrorism offence. The terminology 'involved in terrorism' comes from similar wording in the control order regime. To be put under a control order the Executive needs to consider it necessary to prevent or restrict "*involvement by the individual in terrorism-related activity*".[42] This has been interpreted by the courts as applying even when a person has not been arrested or charged with any terrorism offence and even to those who have been acquitted of such an offence.[43]

39. Further, this low threshold is not even required as a result of the UNSC resolutions. The 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*'.[44] However, UNSC resolution 1373, 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 <u>freezing the assets of those convicted of or charged with the offences in question</u>. 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.*
>
> *The Resolution nowhere requires, expressly or by implication, the freezing of the assets of those who are <u>merely suspected</u> of the criminal offences in question. Such a requirement would radically change the effect of the measures.*[45]

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[42] See section 1(9) of the *Prevention of Terrorism Act 2005*.

[43] See Secretary of State for the Home Department v AY [2010] EWHC 1860 (Admin). "*The fallacy at the heart of the submission advanced on behalf of AY is that a verdict of not guilty on a specific charge equates to a finding that there are no reasonable grounds for suspecting that the subject is or has been involved in terrorism-related activity*" and Secretary of State for the Home Department v MB [2006] EWCA Civ 1140 per Lord Phillips: "*Involvement in terrorist-related activity, as defined by s 1(9) of the PTA, is likely to constitute a serious criminal offence, although it will not necessarily do so. This, of itself, suggests that when reviewing a decision by the Secretary of State to make a control order, the court must make up its own mind as to whether there are reasonable grounds for the <u>necessary suspicion</u>.*"

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

[45] See *Ahmed* at [136]-[137] (emphasis added).

EU List designation

40. Also of great concern is the fact that those designated by the EU (and to whom clause 1 applies) have no right under this legislation 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. Clauses 26 and 27 provide for appeals and judicial review of a decision of the Treasury, but as currently drafted do 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 27 in respect of other terror asset-freezing decisions) is not being amended to enable judicial review for those on the EU list. We presume that the new Coalition Government is intent on respecting traditional common law rights to a fair trial. We 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*.[46] 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).

41. 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.[47] 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.[48] We note, in particular, the criticisms of the 1267 listing regime made in

[46] Article 6 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.
[47] See Article 6 of Council Regulation (EC) No 2580/2001 of 27 December 2001.
[48] 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

August 2010 by the UN Special Rapporteur for Terrorism, Counter-Terrorism and Human Rights:[49]

> *Through the work of the Security Council Committee established pursuant to resolution 1267 (1999), the Security Council has taken on a judicial or quasi-judicial role, while its procedures continue to fall short of the fundamental principles of the right to fair trial as reflected in international human rights treaties and customary international law. For these reasons, the Special Rapporteur considers that sanctions regime to amount to action ultra vires, and the imposition by the Council of sanctions on individuals and entities under the current system to exceed the powers conferred on the Council under Chapter VII of the Charter.*
>
> *As long as there is no independent review of listings at the United Nations level, and in line with the principle that judicial or quasi-judicial decisions by the Security Council should be interpreted as being of a preliminary rather than final character, it is essential that listed individuals and entities have access to the domestic judicial review of any measure implementing the sanctions pursuant to resolution 1267 (1999).*

Conclusion

42. 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

[49] Sixth Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN General Assembly, A/65/258: 6 August 2010), paras 57-58.

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*”.[50] 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.

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