



Terrorist Asset Freezing (Temporary Provisions) Bill

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The *Terrorist Asset Freezing (Temporary Provisions) Bill* was published on 5 February 2010 and is due to be debated on 8 February 2010.

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1 Introduction

On 27 January 2010 the Supreme Court announced that it had upheld the appeal in the case of *HM Treasury v Ahmed and Others*, which concerned the UK's implementation of United Nations obligations to freeze the assets of terrorists by way of two Orders in Council made under section 1 of the *United Nations Act 1946*. The Orders had been made to give effect to United Nations Security Council Resolutions requiring States to freeze the assets of those suspected of supporting terrorism.

The Court quashed the *Terrorism (United Nations Measures) Order 2006* and provisions in the *Al-Qaida and Taliban (United Nations Measures) Order 2006* because it considered that both exceeded the powers granted by their parent Act. The Government announced its intention to introduce primary legislation to re-instate the asset-freezing regime.

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2 The United Nations' anti-terrorist measures

2.1 Escalating terrorist attacks

There has been a series of UN Security Council Resolutions (SCRs) demanding that states should take action, including asset-freezing, against terrorism. Until the 1990s these Resolutions involved sanctions and controls on transactions between states. The 1999 attacks on the US embassies in Kenya and Tanzania increased the urgency of action to prevent such attacks, and suggested that Resolutions concerning state actions alone were not enough and that international action against individuals or specific organisations was necessary.

In response to the attacks on 9/11, the UN Security Council passed a further set of Resolutions requiring States to take greater steps to freeze the assets of those involved in international terrorism, and specifically Osama bin Laden, the Taliban and their associates. The Security Council established a list of persons whose assets member states were obliged to freeze.¹

2.2 Security Council Resolutions²

SCR 1267 (1999) on the situation in Afghanistan provided for the freezing of funds and other financial resources derived from or generated from property owned or controlled by the Taliban or by any undertaking owned or controlled by them.³ It also provided for a centralised list of persons and entities to whom the restrictions should apply, to be decided by a committee of the Security Council, consisting of all its members.

SCR 1333 (2000) on the situation in Afghanistan took this process a step further.⁴ It provided by paragraph 8(c) that all states should freeze funds and other financial assets of Osama bin Laden and individuals and entities associated with him to ensure that no funds were made

¹ For the list associated with SCR 1267, see [The Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them](#).

² Analysis in this section is based largely on the Supreme Court judgment [\[2010\] UKSC 2](#), paras 17-22

³ [UN SCR 1267 \(1999\)](#), para 4(b)

⁴ [UN SCR 1333 \(2000\)](#)

available for the benefit of any person or entity associated with him, including the al-Qaeda organisation.

On 28 September 2001, as part of its response to 9/11, the Security Council broadened its approach to the problem still further. It decided that action required to be taken against everyone who committed or attempted to commit terrorist acts or facilitated their commission. It adopted SCR 1373 (2001) on threats to international peace and security caused by terrorist acts.⁵ The preamble to this Resolution recognised the need for states to complement international co-operation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism. In paragraph 1, it states that the Security Council has decided that States shall:

“(a) Prevent and suppress the financing of terrorist acts; (b) Criminalize the wilful provision or collection ... of funds by their nationals or in their territories with the intention that the funds should be used ... to carry out terrorist acts; (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; of entities owned or controlled ... by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities...; [and] (d) Prohibit their nationals or any persons and entities within their territories from making funds, financial assets or economic resources or financial or other related services available ... for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled ... by such persons and of persons and entities acting on behalf of or at the direction of such persons.”⁶

Unlike SCR 1267 (1999), SCR 1373 (2001) does not provide for a centralised list of persons and entities to which resolution 1373 applies. The Security Council left States to determine for themselves who such persons and entities are. A further series of Resolutions requiring action against terrorism followed. According to the *Scotsman* newspaper, more than 50 people living in Britain are believed to be on the United Kingdom’s sanctions list.⁷

SCR 1822 (2008) was the most recent of these Resolutions at the time of the appeal in question. Its preamble declared that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and stressed that terrorism could only be defeated by a sustained and comprehensive approach involving the active collaboration of all states. In paragraph 1 it required States to take all the measures previously imposed by previous Resolutions with respect to al-Qaeda, Osama bin Laden and the Taliban

...and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to Resolutions 1267 (1999) and 1333 (2000) (the ‘Consolidated List’), including,

(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons’ benefit, or by their nationals or by persons within their territory.⁸

⁵ [UN SCR 1373 \(2001\)](#)

⁶ [UN SCR 1373 \(2001\)](#), Para 1

⁷ ‘Supreme Court rules freezing bank accounts of terror suspects is illegal’, *Scotsman*, 28 January 2010

⁸ [UN SCR 1822 \(2008\)](#), Para 1

It was followed and reaffirmed by SCR 1904 (2009), which was adopted on 17 December 2009.

2.3 Powers under which the Orders were made

The Supreme Court pointed to a number of pieces of anti-terrorist legislation through which the UK Government had set up an asset-freezing regime. Part 2 of the *Anti-terrorism, Crime and Security Act 2001* (the 2001 Act) provides for such a regime,⁹ which the Supreme Court described as non-onerous and attended by reasonable safeguards.¹⁰ The *Counter-Terrorism Act 2008* introduced a procedure for setting aside financial restrictions decisions taken by the Treasury, but this procedure was not available to the appellants in this case.

Instead of using the powers specifically designed for the purpose by the 2001 Act, the Treasury made a series of Orders under to Section 1 of the *United Nations Act 1946* (the 1946 Act), which gives a general authorisation to Ministers for the making of such Orders in Council as are 'necessary or expedient' to give effect to Security Council Resolutions.¹¹ Had the 2001 Act been used, the resulting system would have been less onerous system and one with a mechanism for setting designations aside.

3 The Orders

The *Terrorism (United Nations Measures) Order 2006* was made to give effect to SCR 1373 (2001) and SCR 1452 (2002).¹² It repealed a similar previous Order dated 2001. This is the relevant Order for the purposes of the Supreme Court case, although it has now been replaced by the *Terrorism (United Nations Measures) Order 2009* (SI 2009/1747), which came into force on 10 August 2009. Like the 2001 and 2006 Terrorism Orders, the 2009 Order was made under Section 1 of the 1946 Act to give effect to SCR 1373 (2001) and other SCRs. It revoked the two similar previous Orders.¹³

In response to Security Council Resolution 1452 (2002) and others instructing states to take action against al-Qaeda, the Taliban and Osama bin Laden, the Treasury made the *Al-Qaida and Taliban (United Nations Measures) Order 2006* (this revoked a similar Order from 2002).¹⁴

Subsequent to the hearing in this case, the Treasury revoked the designations of the appellants under the *Terrorism (United Nations Measures) Order 2006* and issued new designations under the terms of the *Terrorism (United Nations Measures) Order 2009*.

The Government undertook in 2006 to make quarterly reports to Parliament on the operation of the counter-terrorism asset freezing regime. The reports give the number of asset-freezing designations made during the period, reviews and de-listings, licenses issued (whereby listed persons are allowed to make or receive payments under controlled circumstances) and the

⁹ [Anti-terrorism, Crime and Security Act 2001](#), Part 2

¹⁰ Judgment in [2010] UKSC 2, para 51

¹¹ [United Nations Act 1946](#), Section 1(1)

¹² The [Terrorism \(United Nations Measures\) Order 2006](#) (SI 2006/2657)

¹³ [Terrorism \(United Nations Measures\) Order 2001](#) (SI 2001/3365); [Terrorism \(United Nations Measures\) Order 2006](#) (SI 2006/2657)

¹⁴ [Al-Qa'ida and Taliban \(United Nations Measures\) Order 2002](#) (SI 2002/11). Full list of the UNSCRs implemented by the Order is given in the Explanatory Note at the end of the Order

amount of money frozen under the regime. The latest such report was given to Parliament on 30 November 2009.¹⁵

4 Criticisms of anti-terrorist legislation

Section 122 of the *Anti-Terrorism, Crime and Security Act 2001* provided for the appointment of a committee of at least seven Privy Counsellors to conduct a review of the Act. The *Privy Counsellor Review Committee into the Anti-Terrorism, Crime and Security Act 2001* (known as the Newton Committee, after its chairman, Lord Newton of Braintree), was appointed in April 2002 and reported in December 2003. One of the issues of concern to the Committee was that of asset-freezing provisions. The Newton Committee called for the powers for making freezing orders to be addressed again in primary legislation.¹⁶

During its passage through Parliament, a clause was added to the *Anti-terrorism Crime and Security Act 2001* providing for the review of certain parts of the Act. In its statutory annual review of the Act in 2004, the Joint Committee on Human Rights referred to the Newton Committee's conclusions about asset freezing orders:

At present, the power under the 2001 Act is not being used, because freezing orders are made under the Terrorism (United Nations Measures) Order 2001, which itself was made under powers conferred by the United Nations Act 1946, section 1. The operation of the freezing orders made under that Order and Act are questionable in human rights terms, because there is no right to appeal against the orders and (despite the Government's contrary view) we consider that judicial review provides only a very limited protection against legislative orders of this kind, except where they contravene European Community law.

We therefore endorse the recommendation in the Newton Committee that "freezing orders for specific use against terrorism should be addressed again in primary legislation" and that "freezing orders for other emergency situations, and the safeguards which should accompany them, should be reconsidered on their own merits in the context of more appropriate legislation for emergencies"¹⁷

In 2009, the International Commission of Jurists set up a Panel on Terrorism, Counter-terrorism and Human Rights. The report of the Commission drew attention to what it saw as serious deficiencies in the listing of individuals as terrorists, both at the national and international level, particularly with regard to the right of appeal.¹⁸

5 The appeal

The appeal in the case of *A v Her Majesty's Treasury*, brought by individuals who had been subjected to asset freezes under the 2006 Orders, was heard in High Court in 2008,¹⁹ the Appeal Court in October 2008²⁰ and, on 5 October 2009, the case was heard in the Supreme

¹⁵ HC Deb 30 November 2009, c105-6WS

¹⁶ Privy Counsellor Review Committee, *Anti-terrorism Crime and Security Act 2001 review: report*, HC 100, 2003-04, paras 149

¹⁷ Joint Committee On Human Rights, *Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4*, HC 38/HC 381 2003-04, part 4

¹⁸ International Commission of Jurists, *Assessing Damage, Urging Action*, An initiative of the International Commission of Jurists Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 2009

¹⁹ [2008] EWHC 869 (Admin)

²⁰ [2008] EWCA Civ 1187

Court; the case was deliberately chosen as the Supreme Court's first because of its constitutional significance. Lord Phillips, President of the Supreme Court, said:

It is particularly appropriate that these should be the first appeals to be heard in the Supreme Court of the United Kingdom, for they concern the separation of powers.²¹

In its deliberations over the appeal, the Supreme Court set out to decide the following:

Both Orders

1. Are the Orders ultra vires the 1946 Act by reference to the principle of legality?
2. Are the Orders incompatible with the Convention rights under the Human Rights Act 1998?

The TO [*Terrorism (United Nations Measures) Order 2006*]

3. If it is not ultra vires on one or other of the previous grounds, is the TO ultra vires the 1946 Act because its terms go beyond those required by the SCR?

The AQO [*Al-Qaida and Taliban (United Nations Measures) Order 2006*]

4. Is the AQO ultra vires the 1946 Act because it violates the right of effective judicial review?²²

5.1 Judgment

On 27 January 2010, the Supreme Court announced its judgment,²³ summarised as follows:

The Supreme Court has unanimously held that the TO [*Terrorism (United Nations Measures) Order 2006*] should be quashed as ultra vires s.1(1) of the 1946 Act. It also held by a majority of six to one (Lord Brown dissenting) that Article 3(1)(b) of the AQO [*Al-Qaida and Taliban (United Nations Measures) Order 2006*] must also be quashed as ultra vires. It was noted that if the designations in respect of A, K, M and G imposed subsequent to the hearing pursuant to the TO 2009 had been before the Supreme Court these too would have been quashed.^{24, 25}

One reason for the Court to be particularly vigilant over the severe restrictions imposed by the Orders was the fact that the *United Nations Act 1946* allows Orders in Council to be made without any Parliamentary scrutiny. Having studied the legislative history of the 1946 Act, the Court concluded that Parliament had not intended the 1946 Act to be used to introduce coercive measures which interfere with UK citizens' basic rights.

Giving the leading judgment, Lord Hope said that the Orders:

²¹ [UK Supreme Court blog](#), 2 February 2010

²² Judgment in [\[2010\] UKSC 2](#), para 41

²³ Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants) Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant) R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty's Treasury (Appellant), [\[2010\] UKSC 2](#), 27 January 2010

²⁴ Supreme Court, [Press summary](#), 27 January 2010.

²⁵ Ultra Vires is a Latin term which essentially means "beyond the powers". The Oxford Dictionary of Law indicates that it is usually used to describe an act by a public authority, company, or other body "that goes beyond the limits of powers conferred on it".

...lie wholly outside the scope of Parliamentary scrutiny. This raises fundamental questions about the relationship between Parliament and the executive and about judicial control over the power of the executive.²⁶

Lord Hope went on:

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 [*United Nations Act 1946*] 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.²⁷

Commenting on the necessity of implementing Security Council Resolutions, Lord Hope said:

...these resolutions are the product of a body of which the executive is a member as the United Kingdom's representative. Conferring an unlimited discretion on the executive as to how those resolutions, which it has a hand in making, are to be implemented seems to me to be wholly unacceptable. It conflicts with the basic rules that lie at the heart of our democracy.²⁸

The judgment also pointed out that other states did not find it necessary to give unlimited powers to the executive in order to give effect to Security Council Resolutions:

The regimes that both Australia and New Zealand have introduced by means of primary legislation are exacting. But they contain various, albeit limited, safeguards and in so far as they interfere with basic rights of the individual that interference has been expressly authorised by their respective legislatures.²⁹

Both Australia and New Zealand initially implemented asset-freezing regimes under their respective United Nations Acts, but later replaced these regimes with ones based on primary legislation.³⁰

The Terrorism (United Nations Measures) Order 2006

The relevant Security Council Resolutions did not address the question of the level of proof required for imposing asset freezes. The judgment concludes that in the use of a 'reasonable suspicion' test to identify those whose assets are to be frozen, the Treasury had exceeded the powers granted to it by the *United Nations Act 1946*, and that the measures were therefore unlawful. It explained:

The absence of any indication that Parliament had the imposition of restrictions on the freedom of individuals in mind when the provisions of the 1946 Act were being debated makes it impossible to say that it squarely confronted those effects and was willing to accept the political cost when that measure was enacted.³¹

The Supreme Court came to a unanimous verdict on the first Order.

²⁶ Judgment in [\[2010\] UKSC 2](#), para 5

²⁷ *Ibid.*, para 6

²⁸ *Ibid.*, para 45

²⁹ *Ibid.*, para 50

³⁰ Further information about Australia's system can be found at the Australian Government web page [Australia's Implementation of United Nations Security Council Financial Sanctions](#)

³¹ *Ibid.*, para 61

Al-Qaida and Taliban (United Nations Measures) Order 2006

The judgment on the other Order in question, the *Al-Qaida and Taliban (United Nations Measures) Order 2006*, was different, and one of the Justices, Lord Brown, gave a dissenting opinion. The Court did not consider that this second Order, which did not use a 'reasonable suspicion' test, went beyond the provisions of the relevant Security Council Resolutions. The majority opinion, however, was that the *Al-Qaida and Taliban (United Nations Measures) Order 2006* left designated individuals with no judicial remedy. Lord Hope said: 'There is nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provides for basic procedural fairness'.³² This meant that the relevant provisions (Article 3(1)(b)) in the Order were not lawful and had to be quashed.

The dissenting opinion of Lord Brown was that the relevant Security Council Resolutions were unambiguous about the requirements for action against al-Qaeda and the 1946 Act gave unambiguous powers to give effect to such Resolutions. His concluding remark was:

I content myself with the hope that the view of the majority will not be thought to indicate any weakening in this country's commitment to the UN Charter.³³

In his concluding remark on both appeals, Lord Phillips said:

Nobody should conclude that the result of these appeals constitutes judicial interference with the will of Parliament. On the contrary it upholds the supremacy of Parliament in deciding whether or not measures should be imposed that affect the fundamental rights of those in this country.³⁴

6 The Government's response

On 27 January 2010, the Government issued a Written Statement announcing its intention to introduce primary legislation to re-instate the asset-freezing regime. Treasury Minister Sarah McCarthy-Fry said:

The UK has implemented these obligations through Orders in Council made under Section 1 of the United Nations Act 1946. Section 1 of the UN Act authorises the Government to make an Order in Council to give effect to any decision of the UN Security Council where such provision appears to be "necessary or expedient for enabling those measures to be effectively applied".³⁵

She went on:

The Government made the Orders in Council in good faith based on their belief that section 1 of the United Nations Act was an appropriate legal vehicle and that it provided the most effective and timely way of implementing UN terrorist asset freezing obligations.

The Government are committed to maintaining an effective, proportionate and fair terrorist asset-freezing regime that meets our United Nations obligations, protects national security by disrupting flows of terrorist finance, and safeguards human rights.

³² *Ibid.*, para 80

³³ *Ibid.*, para 206

³⁴ *Ibid.*, para 157

³⁵ HC Deb 27 February 2009, c54WS

In the light of the court's decision and the ongoing significant threat from international terrorism, the Government intend to bring forward fast-track primary legislation to restore the UK's terrorist asset-freezing regime.³⁶

On 3 February, another Written Statement was issued, with which the Government announced its intention to replace the legislation quashed by the Supreme Court. Sarah McCarthy-Fry said:

It is our intention to introduce legislation that effectively reinstates the Terrorism (United Nations Measures) Order 2009, which the Government has in the past used in good faith.

She went on:

Our ambition is to mirror the 2009 Order in the legislation we present to the House.

Despite the fact that the restrictive measures imposed by the regime had been described in the Supreme Court judgment as 'contrary to fundamental principles of human rights',³⁷ the Bill does not alter the substance of these measures.

6.1 Suspension

The Government had asked for the effect of the Supreme Court's decision to be suspended, to allow for replacement legislation to be passed. Having considered a partial suspension, the Court announced on 4 February that it would not grant this delay:

The ends sought by Mr Swift might well be thought desirable, but I do not consider that they justify the means that he proposes. This court should not lend itself to a procedure that is designed to obfuscate the effect of its judgment. Accordingly, I would not suspend the operation of any part of the court's order.³⁸

6.2 Retrospective provision

The Government therefore decided to include a retrospective provision in the Bill. Sarah McCarthy-Fry said:

This legislation includes a provision backdated to today's judgment, providing legal authority to banks and those covered by the existing orders to ensure asset freezes can be maintained without a gap.³⁹

The Treasury would contact banks to inform them of the legal situation. In a notice to banks, the Treasury said:

This legislation will ensure a continued freeze on the assets of those persons designated under these Orders. Once enacted, it will also have the effect of validating retrospectively any actions taken by persons (other than the Treasury) under or in reliance on those Orders. Financial institutions and others will be protected from challenges if they maintain asset freezes in accordance with the Orders in the interim period until this Act comes into force. It is intended that the Bill will pass through all its

³⁶ HC Deb 27 February 2009, c54WS

³⁷ Judgment in [\[2010\] UKSC 2](#), para 203

³⁸ [Judgment in \[2010\] UKSC 5](#), 4 February 2010, para 8

³⁹ HC Deb 4 February 2010, c21WS

Parliamentary stages early next week. We expect financial institutions to maintain all asset freezes under the 2001, 2006 and 2009 Terrorism Orders.⁴⁰

The present Bill is only an interim measure, intended to maintain the existing asset-freezing regime until a longer-term legislative solution is found. The provisions of the Bill will last until 31 December 2010, in line with the recommendations of the House of Lords Constitution Committee on fast-track legislation (see below).

As well as implementing the Security Council Resolutions mentioned above, the *Al-Qaida and Taliban (United Nations Measures) Order 2006* also provided for the implementation of the European asset-freezing requirements under Regulation (EC) 881/2002 of 27th May 2002,⁴¹ as amended by a series of subsequent Council Regulations. The *Al-Qaida and Taliban (United Nations Measures) Order 2006* was not quashed in its entirety, and the Government decided to replace its enforcement provisions with regulations, as explained in the Statement:

The Government also intend to bring forward affirmative procedure regulations under section 2(2) of the European Communities Act 1972 to ensure that enforcement provisions are in place to implement fully EC Regulation 881/2002 in respect of measures against al-Qaeda and the Taliban.⁴²

6.3 The Bill

On 5 February 2010, the Bill was published. Clause 1(2) of the Bill reads:

The following Orders—

(a) the Terrorism (United Nations Measures) Order 2001 (S.I. 2001/3365),

(b) the Terrorism (United Nations Measures) Order 2006 (S.I. 2006/2657),

and

(c) the Terrorism (United Nations Measures) Order 2009 (S.I. 2009/1747),

are deemed to have been validly made under, and every provision of those

Orders is deemed to be within the power conferred by, section 1 of the United

Nations Act 1946.⁴³

To minimise the gap appearing in the asset-freezing regime, the Bill would offer ‘Protection of things done or omitted in interim period’:

(1) The following provisions have effect in relation to things done or omitted in the period beginning with 4 February 2010 and ending with the coming into force of this Act.

(2) Anything done or omitted by a person other than the Treasury that would be valid, lawful or effectual if-

(a) the Terrorism (United Nations Measures) Order 2001 (S.I. 2001/3365),

⁴⁰ See HM Treasury, *Financial Sanctions Notice*, 4 February 2010

⁴¹ [Regulation \(EC\) 881/2002](#) of 27th May 2002 (OJL 139, 29.5.2002, p.9)

⁴² HC Deb 27 February 2009, c54WS

⁴³ [Terrorist Asset-Freezing \(Temporary Provisions\) Bill](#), Clause 1 (2)

(b) the Terrorism (United Nations Measures) Order 2006 (S.I. 2006/2657), and

(c) the Terrorism (United Nations Measures) Order 2009 (S.I. 2009/1747),

had been validly made under, and every provision of those Orders had been within the power conferred by, section 1 of the United Nations Act 1946, is deemed to be valid, lawful or effectual as if those Orders had been so made and every provision of them had been within that power.⁴⁴

As recommended by the House of Lords Select Committee on the Constitution, the Explanatory Notes contain an explanation of why the fast-track procedure is necessary in this case.⁴⁵

Also on 5 February 2010, the Treasury published the draft of the Terrorist Asset-Freezing Bill,⁴⁶ which is intended to replace the current Bill in due course.

7 Commentary

Alison Macdonald, of Matrix chambers, highlighted the significance of the case:

The judgments of the majority in this case amount to an emphatic reminder to the executive that, if it wants to interfere with fundamental rights, it must do so openly and through the Parliamentary process, not through the shadowy route of Orders in Council. This is so even when the interference with fundamental rights is said to be required by the UK's international obligations.⁴⁷

The Swiss parliamentarian Dick Marty, who belongs to the ALDE (liberal) European party grouping, is rapporteur of the Parliamentary Assembly of the Council of Europe (PACE) committee on UN and EU anti-terrorist blacklists. He welcomed the Court's decision:

I congratulate Britain's recently-established Supreme Court for recognising, in one of its first judgments, that human rights take precedence over executive decisions founded on international law, including those originating from the United Nations Security Council. International law cannot be a round-about means of bypassing citizens' most basic fundamental rights.

Pending a real reform of the Security Council's procedures to ensure greater respect for human rights, I can but hope that other national courts will follow the example of the British Supreme Court and the European Court of Justice, which last year issued similar rulings in cases concerning European Union blacklists. I also call on national parliaments to exert pressure on their governments, as the Swiss Senate has done, so that these international sanctions are applied in accordance with minimum standards of respect for fundamental rights.⁴⁸

Eric Metcalfe, of Justice, the law reform and human rights group, said:

⁴⁴ *Ibid.*, Clause 2 (1) and (2)

⁴⁵ Treasury, *Terrorist Asset-Freezing (Temporary Provisions) Bill, Explanatory Notes*, 2010

⁴⁶ Treasury, *Publication in draft of the Terrorist Asset-Freezing Bill*, Cm 7806, February 2010

⁴⁷ [UK Supreme Court blog](#), 2 February 2010

⁴⁸ 'Dick Marty welcomes British court ruling that United Kingdom must not apply UN Security Council anti-terrorist sanctions where they violate basic rights', *States News Service*, 28 January 2010

It is right that the Government takes action to prevent the financing of terrorism. But it was wrong for the Treasury to do so by side-stepping Parliament and violating basic rights.⁴⁹

Liberal Democrat home affairs spokesman Chris Huhne said:

Hot on the heels of the control orders embarrassment, another dubious government measure has been deservedly slapped down by our courts. The government's desperation to circumvent parliament is creating bad laws, legal defeats and hefty bills for the taxpayer. It has to stop.⁵⁰

Shadow Chancellor George Osborne was reported as saying:

This is massive incompetence by the Government. The law they used to stop terrorism suspects having access to money has been ruled illegal, and they are desperately searching for a plan B. I spoke to the Chancellor this morning and we will help the Government pass emergency legislation, but as we speak there is no law in place to prevent terror suspects from accessing frozen assets. That is not a risk Britain should be running, and the blame lies with Gordon Brown, who was warned six years ago about this and refused to listen.⁵¹

8 The fast-tracking of legislation

The *Terrorist Asset Freezing (Temporary Provisions) Bill 2009-10* is the second bill to be fast-tracked since the House of Lords Constitution Committee report on fast-tracking legislation was published.⁵² On 15 December 2009, the day the *Video Recordings Bill 2009-10* was introduced into the House of Commons, the Government announced in a written ministerial statement that a full explanation of the reasons for the expedition of the Bill, in line with a recommendation from the Committee, would be given in the Explanatory Notes. The Government also announced that such a practice would be followed whenever legislation was expedited in future. The Government announced that the explanation would describe:

- (a) Why is fast-tracking necessary?
- (b) What is the justification for fast-tracking each element of the Bill?
- (c) What efforts have been made to ensure the amount of time made available for parliamentary scrutiny has been maximised?
- (d) To what extent have interested parties and outside groups been given an opportunity to influence the policy proposal?
- (e) Does the Bill include a sunset clause (as well as any appropriate renewal procedure)? If not, why do the Government judge that their inclusion is not appropriate?
- (f) Are mechanisms for effective post-legislative scrutiny and review in place? If not, why do the Government judge that their inclusion is not appropriate?
- (g) Has an assessment been made as to whether existing legislation is sufficient to deal with any or all of the issues in question?

⁴⁹ 'Judges throw out measures to freeze assets of terror suspects', *Times*, 28 January 2010

⁵⁰ 'Supreme Court rules freezing bank accounts of terror suspects is illegal', *Scotsman*, 28 January 2010

⁵¹ 'Terror asset freezing orders lifted by Supreme Court' *BBC News Online*, 4 February 2010

⁵² Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards*, 7 July 2009, HL 116-I 2008-09

(h) Have relevant parliamentary committees been given the opportunity to scrutinise the legislation?⁵³

8.1 The introduction of a procedure for fast-tracked legislation

Constitution Committee proposals

The Constitution Committee of the House of Lords undertook an inquiry into fast-track legislation in the 2008-09 Session. The Committee described it as an inquiry into “constitutional issues that may arise when there is resort to emergency legislation”, and in particular, “situations where bills receive an expedited passage through Parliament”.⁵⁴ In its inquiry, it used a definition of fast-track legislation based on the evidence provided by the Clerk of the House of Commons: “bills ... which the Government of the day represents to Parliament must be enacted swiftly ... and then uses its power of legislative initiative and control of Parliamentary time to secure their passage”.⁵⁵

The Committee identified eleven problems and issues that arose as a result of fast-tracking legislation, such as:

- Constrained parliamentary scrutiny
- Does fast-tracking of legislation lead to bad legislation?
- Executive dominance of the fast-track process⁵⁶

When a bill is to be fast-tracked, the Committee recommended that, in the House of Lords, an oral ministerial statement should be made on introduction and an explanation of the reasons for it to be set out in the explanatory notes. The Committee set out a list of issues that the explanation should address. The Government accepted the principle of this recommendation and listed the same issues as the Committee – they are set out in the written ministerial statement above.

The Committee also recommended that the Government put mechanisms in place “to ensure that relevant parliamentary committees and stakeholders are consulted about and given the opportunity to respond to proposed fast-track legislation ahead of Second Reading in the House in which the bill is introduced”. It commented that “this should be possible in all but the most extreme circumstances”.⁵⁷ The Committee further recommended that there should be a presumption in favour of sunset clauses appearing in fast-tracked legislation to ensure that it is subject to parliamentary review;⁵⁸ and that there should be a presumption in favour of early post-legislative review of fast-tracked legislation.⁵⁹

Government Response

The House of Lords debated the report on 10 November 2009,⁶⁰ and the Committee published the Government’s response on 7 December 2009.⁶¹

⁵³ HC Deb 15 December 2009 cc117WS-118WS

⁵⁴ Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards*, 7 July 2009, HL 116-I 2008-09, para 3

⁵⁵ *Ibid*, para 27

⁵⁶ *Ibid*, paras 32-63

⁵⁷ *Ibid*, para 163

⁵⁸ *Ibid*, para 198

⁵⁹ *Ibid*, paras 208-209

⁶⁰ HL Deb 10 November 2009 cc724-750

⁶¹ Select Committee on the Constitution, *Government Response to Fast-track Legislation: Constitutional Implications and Safeguards*, 7 December 2009, HL 11 2009-10

The Government believed that Parliament was “entitled to a full explanation of why a piece of legislation is being proposed for fast tracking”.⁶² In the debate, Baroness Royall of Blaisdon, the Chancellor of the Duchy of Lancaster and the Leader of the House of Lords, responded for the Government. She agreed to pursue the suggestion that “the Explanatory Memorandum to the Bill could—perhaps should—include a statement about the need for fast-tracking”.⁶³

In its response to the Committee, the Government argued that the use of a sunset clause would be approached on a case-by-case basis. On post-legislative scrutiny it re-affirmed the commitment it had given in *Post-legislative scrutiny – The Government’s Approach*⁶⁴ to review within three to five years. In the debate, Baroness Royall reiterated the Government’s response on the sunset clauses and on post-legislative scrutiny.⁶⁵

Further information on the Constitution Committee’s proposals is given in the Library Standard Note, *Fast-track legislation*.⁶⁶

⁶² *Ibid*

⁶³ HC Deb 10 November 2009 c748

⁶⁴ Office of the Leader of the House of Commons, *Post-legislative scrutiny – The Government’s Approach*, March 2008, Cm 7320, ; 17 HC Deb 20 March 2008 c74WS

⁶⁵ HC Deb 10 November 2009 cc748-749

⁶⁶ House of Commons Library Standard Note, *Fast-track legislation*, SN/PC/5256, 22 December 2009

Annex 1: Legislative history of the Terrorism Order

- [05.02.2010 The Terrorist Asset-Freezing Bill](#)
Introduction of the Terrorist Asset Freezing (Temporary Provisions) Bill and a draft Terrorist Asset Freezing Bill
- [10.08.2009 The Terrorism \(United Nations Measures\) Order 2009 \(SI 2009/1747\)](#)
Replaced and revoked the Terrorism (United Nations Measures) Order 2006, save that directions made under Article 4 of that Order or under Article 4 of the Terrorism (United Nations Measures) Order 2001 (which are continued in effect by provisions in the 2006 Order), which remain in force on 10 August 2009 continue to apply until 31 August 2010 unless revoked sooner, and the provisions of the 2006 Order or the 2001 Order will continue to apply to such directions
- [12.10.2006 The Terrorism \(United Nations Measures\) Order 2006 \(SI 2006/2657\) \(PDF 84KB\)](#)
Replaced and revoked the Terrorism (United Nations Measures) Order 2001 (SI 2001/3365) save that in any case where a direction has been made under article 4 of that Order, the provisions of that Order continue to apply. Also revoked other instruments and provisions amending the 2001 Order.
- [29.06.2005 The Terrorism \(United Nations Measures\) Order 2001 \(Amendment\) Regulations 2005 \(SI 2005/1525\) \(PDF 41KB\)](#)
Amended the Terrorism (United Nations Measures) Order 2001 (SI 2001/3365) to take account of Council Decision 2005/221/CFSP.
- [28.09.2004 The Terrorism \(United Nations Measures\) Order 2001 \(Amendment\) Regulations 2004 \(SI 2004/2309\) \(PDF 43KB\)](#)
Amended the Terrorism (United Nations Measures) Order 2001 (SI 2001/3365) to take account of Council Decision 2004/306/EC.
- [20.09.2003 The Terrorism \(United Nations Measures\) Order 2001 \(Amendment No 3\) Regulations 2003 \(SI 2003/2430\) \(PDF 36KB\)](#)
Amended the Terrorism (United Nations Measures) Order 2001 (SI 2001/3365) to take account of Council Decision 2003/646/EC.
- [19.09.2003 The Terrorism \(United Nations Measures\) Order 2001 \(Amendment No 2\) Regulations 2003 \(SI 2003/2209\) \(PDF 36KB\)](#)
Amended the Terrorism (United Nations Measures) Order 2001 (SI 2001/3365) to take account of Council Decision 2003/480/EC.
- [04.06.2003 The Terrorism \(United Nations Measures\) Order 2001 \(Amendment\) Regulations 2003 \(SI 2003/1297\) \(PDF 35KB\)](#)
Amended the Terrorism (United Nations Measures) Order 2001 (SI 2001/3365) to take account of Council Decision 2002/974/EC.
- [10.10.2001 The Terrorism \(United Nations Measures\) Order 2001 \(SI 2001/3365\) \(PDF 62KB\)](#)
Prohibited the making available of funds and financial services to terrorists, and provided HM Treasury with powers to freeze accounts of suspected terrorists, pursuant to UNSCR 1373 (2001).

Source: HM Treasury web page, [Terrorism and terrorist financing](#)

Annex 2: Legislative history of the Al-Qaida Order

- [16.11.2006 The Al-Qaida & Taliban \(United Nations Measures\) Order 2006 \(SI 2006/2952\) \(PDF 81KB\)](#)

Updated the provisions in the domestic legislation giving effect to the UNSCRs from 1267(2002) to 1617(2005) relating to Al-Qaida, Usama bin Laden and the Taliban including, amongst other things, provision to give effect to an asset freeze, including a prohibition on the making available of funds and economic resources to individuals and entities designated by the UN sanctions Committee or by the UN Security Council, and provided for breaches of the Order to be criminal offences. Amended certain provisions in the Al-Qaida and Taliban (United Nations Measures) Order 2002 (S.I. 2002/111) and revoked the Al-Qaida and Taliban (United Nations Measures)(Amendment) Order 2002 (S.I. 2002/251).

Provides that in any case where a direction has been given under article 8 of the 2002 Order, the provisions of that Order continue to apply. Also, where a licence has been granted under article 7 of the 2002 Order to a person designated by the sanctions Committee, the licence will continue in force as if it had been granted under this Order. The provisions in the 2002 Order which gave effect to financial sanctions in a number of UNSCRs are superseded by the provisions in this Order.

- [14.02.2002 The Al-Qa'ida and Taliban \(United Nations Measures\) \(Amendment\) Order 2002 \(SI 2002/251\) \(PDF 32KB\)](#)

Amended the Al-Qa'ida and Taliban (United Nations Measures) Order 2002 (SI 2002/111).

- [25.01.2002 The Al-Qa'ida and Taliban \(United Nations Measures\) Order 2002 \(SI 2002/111\) \(PDF 88KB\)](#)

Implemented the restrictive measures in UNSCR 1390 (2002) in the UK and provided that breaches of the Order be criminal offences. Revoked the Afghanistan (United Nations sanctions) Order 2001 (SI 2001/396) and the Afghanistan (United Nations sanctions)(Amendment) Order 2001 (SI 2001/2557).

- [20.07.2001 The Afghanistan \(United Nations sanctions\) \(Amendment\) Order 2001 \(SI 2001/2557\) \(PDF 40KB\)](#)

Amended the Afghanistan (United Nations sanctions) Order 2001 (SI 2001/396).

- [16.02.2001 The Afghanistan \(United Nations sanctions\) Order 2001 \(SI 2001/396\) \(PDF 95KB\)](#)

Implemented the restrictive measures in UNSCR 1333 (2000) in the UK in addition to those in UNSCR 1267 (1999) and provided that breaches of the Order be criminal offences.

Revoked the Afghanistan (United Nations sanctions) Order 1999 (SI 1999/3133).

- [26.11.1999 The Afghanistan \(United Nations sanctions\) Order 1999 \(SI 1999/3133\) \(PDF 62KB\)](#)

Implemented the restrictive measures in UNSCR 1267 (1999) in the UK and provided that breaches of the Order be criminal offences.

Annex 3: Further reading

Clive Walker, *Blackstone's guide to the Anti-Terrorism Legislation*, Oxford, 2009

The chapter 'Terrorist funding and property' gives a thorough account of the legislation on terrorist funding.