Terrorist Asset-Freezing Etc Bill [HL] 2010-11: Committee Stage Report

Standard Note: SN/IA/5789

Last updated: 3 December 2010

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Section International Affairs and Defence Section

The United Kingdom is required by the UN to freeze the assets of persons who commit terrorist acts. In a case that raised "fundamental questions about the relationship between Parliament and the executive" the Supreme Court quashed in January 2010 the UK legislation that allowed the Treasury to freeze the assets of those suspected of involvement in terrorism.

Immediately afterwards, the legislation was temporarily re-instated, but the *Terrorist Asset-Freezing (Temporary Provisions) Act 2010* expires on 31 December 2010. This Bill seeks to replace that Act with a permanent legislative framework.

Significant government amendments were made to the Bill during its passage through the House of Lords. The Bill's Second Reading in the House of Commons took place on 15 November 2010 and the Commons Committee Stage was held on 23 November. A further day and a half had been scheduled for the Committee Stage but no amendments were made and the Committee stage was completed quickly, with the support of the Opposition.

The Bill's remaining stages are due to take place on 14 December.

Contents

1 Introduction

This note is supplementary to Research Paper 10/70, which covers the UN resolutions behind the legislation, the Supreme Court case that led to the original Orders in Council being quashed, the temporary legislation that reinstated the regime and the present Bill's passage through the House of Lords.[1]

At Committee Stage in the House of Lords, the Government tabled important amendments to the Bill, which went some way to addressing continuing concerns about the protection of civil liberties. The Government raised the legal threshold for final designation as a person whose assets should be frozen from "reasonable suspicion" to "reasonable belief", and created a new provision, the interim designation, which would last for a maximum of 30 days and where the lower legal threshold of "reasonable suspicion" would still apply. Secondly, amendments were made so that challenges to Treasury designations would be heard by the courts under an appeal rather than a judicial review procedure. According to the Government, this would ensure a robust, in-depth review of decisions by the courts.

No amendments were made to the Bill in the House of Commons Committee Stage. The most significant amendments proposed were those recommended by the Joint Committee on Human Rights (see below). They concerned: raising the legal threshold for final designations from "reasonable belief" to "balance of probabilities"; a requirement on the Treasury to provide as much information as possible to the designated person, and the appointment by Parliament of the independent reviewer. All these proposals had been made at other stages of the Bill's passage through Parliament, and all of the proposed amendments were withdrawn.

2 Joint Committee on Human Rights

The Joint Committee on Human Rights published an interim report on the Bill, on 22 October, in time for the Bill's Report Stage in the Lords. The interim report was published, unusually, before the Committee had received answers to questions it had put to ministers.

On 12 November the Joint Committee on Human Rights published its final report on the Bill.[2] The committee suggested:

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1 *Terrorist Asset-Freezing Bill [HL] [Bill 102 of 2010-11],* 10 November 2010

2 Human Rights Joint Committee, *Legislative Scrutiny: Terrorist Asset-Freezing etc Bill (Second Report); and other Bills* , HC 598, 2010-11;HL 53, 2010-11

- a higher standard of proof than "reasonable belief" could be required for final designations, but still lower than the standard required to charge the person with a criminal offence

- requiring the Treasury to give written notice of designation with as much information about the reasons for designation as possible, consistent with the public interest in non-disclosure

- that the findings of the House of Lords Appellate Committee in the case of *Home Office v AF*, might well apply to the asset-freezing regime as well as the control orders regime[3]

- that the reviewer of the legislation should be appointed by Parliament and report directly to Parliament.

The committee proposed five amendments to the Bill to give effect to these recommendations.

3 Commons Second Reading

The Bill's Second Reading in the House of Commons took place on 15 November 2010. Financial Secretary to the Treasury **Mark Hoban** made introductory comments on behalf of the Government. He denied that the Bill was being rushed through Parliament and mentioned the additional human rights safeguards that had been added to the Bill by way of Government amendments during the Lords Committee Stage.

Keith Vaz asked for clarification of the information contained in the latest quarterly report on the operation of the terrorist asset-freezing regime, which covers the period from July to September 2010.[4] The statement gives data on the number of accounts that are frozen in the UK, how many new directions have been given and how much money is contained in the frozen accounts. It also details the number of licences issued during the period. The minister, David Gauke's, reply was later corrected in a written statement which made clear that at 30 September 2010, a total of 205 accounts containing just under £290,000 were frozen in the UK. Of that £290,000 approximately £140,000 was frozen under the UK's domestic terrorist asset freezing regime, which is mandated by UNSCR 1373 and is the subject of the present Bill. The remaining £150,000 was frozen under the UN al-Qaeda and Taliban asset-freezing regime, whose legislative basis is EC Regulation 881/2002, mandated by UNSCR 1267 and others.[5]

David Hanson, for the Opposition, said that the Labour Party would be supporting the Bill and that the amendments proposed by the Joint Committee on Human Rights (see above) would not necessarily get the support of the Opposition. He asked for clarification of the relationship between the Bill and any conclusions of the Home Office terrorism legislation review.

Other Members raised questions about the new, higher "reasonable belief" threshold of proof required for the final designation as a terrorist suspect liable to asset-freezing. **Julian**

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3 Secretary of State for the Home Department v AF and others, [2009] UKHL 28. AF was subject to a control order but the Law Lords found that AF's right to a fair hearing had been breached because not enough of the secret evidence that led to his control order was released for him to be able to conduct an effective appeal.

4 HC Deb 15 November 2010, c29-30WS

5 HC Deb 23 November 2010, 519 c13WS

Huppert asked whether "reasonable belief" is the same as the "balance of probabilities" threshold used in civil law cases. The minister said that it was a lower threshold than the balance of probabilities. Dr Huppert also raised the possibility that no-one should be designated unless they have been arrested. Mark Hoban responded to this by saying that the Government might want to freeze the assets of people who are overseas.

Dr Huppert also said that it should only be the courts which are empowered to designate; that the Treasury should be required to grant sufficient funds and that sufficient information is released to the designated person to permit an appeal to take place.

Summing up for the Government, **David Gauke**, Exchequer Secretary to the Treasury, said that the powers in the Bill were not intended to be used against organised criminals unless they were also involved in terrorism. He stressed the need for preventive powers, which meant that it was necessary to act early against suspects, perhaps before enough evidence was gathered for an arrest. Responding to calls for the courts to have a role in authorising freezing orders, he said that this was rightly the responsibility of Ministers. On the same point, he also said that in most cases court approval would not help:

> Only a very small minority of asset-freezing cases -- around 10% of current cases -- concern people in the UK who have not been prosecuted for a terrorist offence. The remaining 90% of cases concern either individuals in the UK who have been prosecuted or individuals and groups overseas. Mandatory court approval would therefore add no value in that 90% of cases.[6]

On requiring the Treasury to provide as much written justification to the designated person as possible, consistent with national security, Mr Gauke said that this obligation was covered by the basic principles of administrative law, and that it was not desirable to make the Bill longer and more complicated by including it.

Mr Gauke rejected the suggestion that the conclusions in the judgment in the AF case (the use of secret evidence meant that AF was deprived of a fair hearing) should apply in asset-freezing as well as control order cases. He gave four reasons for the Government's position:

> First, the courts have not considered whether AF applies in asset-freezing cases, and it is not the role of the Government to prejudge what the courts would say. Secondly, the Supreme Court will consider the wider application of AF (No. 3) in January 2011 when it hears the Tariq case. Thirdly, the Government are committed to ensuring that any challenge to a Treasury decision is heard fairly. Finally, the application of AF (No. 3) is part of a wider debate on the use of special advocates and intelligence material, and we have already announced that we will be considering the use of special advocates and closed-source evidence as part of a Green Paper next year.[7]

Lastly, Mr Gauke said that there was no intention to amend the Bill in the light of conclusions of the Home Office review of anti-terrorist legislation.

4 Committee Stage

The Bill's Committee Stage took place on 23 November 2010.[8] Despite many calls during the Second Reading debate for the Bill to receive further detailed scrutiny at Committee Stage

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6 HC Deb 15 November 2010, c712
7 HC Deb 15 November 2010, c712
8 Public Bill Committee 23 November 2010, c1-42

and the two days programmed for the Committee Stage debate, the debate only lasted two and a half hours.

On behalf of the Liberal Democrats, **Tom Brake** spoke to amendment 1 to **Clause 2** which sought to change the threshold of proof for final designations from "reasonable belief" to "on the balance of probabilities". **Mark Hoban** set out the Government's reasons for rejecting the amendment: that the lower threshold was necessary for the Treasury to be able to prevent terrorist activity; that it was consistent with best practice as set out by the Financial Action Task Force; and that it is used in other similar UK legislative contexts, such as the *Anti-Terrorism Crime and Security Act 2001* and under schedule 7 to the *Counter-Terrorism Act 2008*.

The amendment was withdrawn.

Mr Brake then spoke to amendment 2 to **Clause 3**, which sought to require the Treasury to provide as much information to the person designated as possible consistent with the public interest in non-disclosure. He said that, in the case of control orders, there were many cases when information was not put in the public domain when it might have been without compromising security.

Mr Hoban replied that there were two separate questions involved in the disclosure of evidence: firstly, how much should be disclosed at the time of designation and, secondly, how much in the event of an appeal. In any appeal, Mr Hoban continued, the Government is bound by the provisions of article 6 of the European Convention on Human Rights to ensure a fair hearing. Complying with that obligation might well entail revealing during an appeal information that could be damaging to national security. Requiring the maximum disclosure of information at the designation stage would not, Mr Hoban argued, change the human rights obligation, nor make an appeal more effective. Administrative law principles meant that the Government is obliged to provide reasons for designation consistent with the public interest, and the Government would continue to do this.

Members expressed concern that the control order regime was controversial, particularly in its restrictions on the information supplied to those subject to the orders. These restrictions had been criticised in the AF case (see above). Mr Hoban reiterated the Government's position that control orders imply a more significant curtailment of a person's human rights than asset-freezing, so the same criticisms did not necessarily apply to the asset-freezing regime. He also pointed out that, unlike control orders, asset-freezing was mandated by the United Nations and that control orders are used against individuals in the UK who cannot be prosecuted or deported. Lastly he said that the majority of asset-freezing designations had been of individuals who had been charged with or convicted of a terrorist offence or who were abroad.

There was a discussion of the provisions, set out in **Clause 54,** for extending the application of the Bill to the Overseas Territories. Mr Hoban assured **Malcolm Wickes** that the Government was fully aware of the importance of Overseas Territories, and that the territories were aware of their obligations and of the international mechanisms that would ensure that the obligations were complied with.

The amendment to Clause 3 was withdrawn.

Next, a group of amendments (numbers 42 to 49) to **Clauses 3, 5, 7 and 8** was taken. **David Hanson** explained that his amendments were broadly supportive of the Government's

approach. The proposed amendments were relatively minor textual changes to clauses relating to publicising designations and the revocation of designations, and the age of the individual designated. Mr Hanson explained that he did not want the Treasury to have a different level of obligation to publicise where designations and revocations of designations were concerned. Mr Hoban assured him that the procedures to publicise designations and variations or revocations of designations were the same.

Amendment 47 was a probing amendment looking for clarification of the phrase "in the interests of justice". The Treasury is required to restrict the publicity given to a designation where this would be in the interests of justice. Mr Hoban explained that, where a person was going to trial, for example, the Treasury would seek the advice of the Crown Prosecution Service as to whether a designation was consistent with the interests of justice, or whether a designation should not be fully publicised.

The amendment was withdrawn.

Mr Hanson then asked for information about the provisions of **Clause 7**, which deals with individuals and institutions that must be notified of a designation. Mr Hanson wondered whether the Treasury is obliged to keep a record of persons who have been notified of a designation, pointing out that any record might be subject to a *Freedom of Information Act* request. Mr Hoban explained that such a record is kept but that it is not put in the public domain. He said that he would write to Mr Hanson on the issue of whether that record could be subject to a freedom of information request.

Mr Hanson moved amendment 48 to **Clause 8**. This amendment sought to shorten the length of an interim designation from 30 days to 28 days. Mr Hanson said that period of 28 days was the norm in other areas, such as the possible length of detention without charge. Mr Hoban said that the two regimes were not really comparable.

The amendment was withdrawn.

On **Clause 13,** which deals with making funds available for the benefit of a designated person, a question was raised by **Kerry McCarthy** as to the meaning of "significant financial benefit". The phrase does not appear in **Clause 12**, which covers providing funds directly to a designated person. Mr Hoban explained that the difference arose because a third party may make small payments to a designated person without a licence, under Clause 13. The Minister gave the example of the payment of a small utility bill for a designated person. In Clause 12, all direct payments to the designated person are covered.

Ms McCarthy also asked about **Clause 19**, which deals with the reporting obligations of financial institutions. She wondered what would happen if a junior member of staff of one of these institutions suspected that an individual had been designated, but that message did not find its way to those responsible for freezing accounts. Mr Hoban said that it was the institutions' responsibility to have effective procedures to deal with this.

Amendment 3 to **Clause 28** was then moved. This would make an amendment to section 67 of the *Counter-Terrorism Act 2008*, to require the court rules to ensure that the Treasury would release enough information to enable designated persons to give effective instructions to the special advocate in the event of an appeal. The amendment was proposed by the Joint Committee on Human Rights.

In view of the Law Lords' judgment in the AF case on the disclosure of information in a control order case, **Tom Brake** asked whether the Government had made any assessment of the likelihood of litigation, given the similarities (which the Government disputes) between the control orders regime and the asset-freezing regime, as regards the disclosure of information to those who appeal against designation.

Mark Hoban reiterated the Government's opposition to the amendments, which are similar to ones moved and withdrawn in the House of Lords stages of the Bill. The matter was also discussed at Commons Second Reading (see page four, above). Mr Hoban did not respond to the specific question as to whether an assessment of the likelihood of litigation had been made.

The amendment was withdrawn.

Mr Brake then moved amendment 5 to **Clause 31** (grouped with amendments 7, 8 and 9) proposed by the Joint Committee on Human Rights. The group of amendments was related to Parliamentary accountability, and would ensure that the appointment of the reviewer of the asset-freezing regime should be approved by Parliament, and that the reports of the reviewer would be made to Parliament rather than to the Treasury. Mr Hoban reiterated the Government's opposition to the amendments, which were similar to amendments moved in the House of Lords. He said that the normal practice was for Ministers to appoint such reviewers and to be responsible to Parliament for those whom they appoint. He said that Ministers needed to review reports to make sure that no sensitive security or *sub judice* information was being inadvertently released and gave an assurance that reports would not be changed for political reasons. He also rejected the proposal in amendment 9 to give the reviewer a fixed five-year term, explaining that there might be valid reasons why the reviewer should stay longer than that.

The amendment was withdrawn.

Mr Hanson then asked about the practicalities of the reviewer's appointment: salary, method of appointment, including how the post would be publicised, and whether the posts of reviewer of terrorism legislation (who reports to the Home Office) and the reviewer of the asset-freezing regime would in due course be merged in the interests of saving money.

Mr Hoban replied that these matters had not been decided yet, although the appointment would be made quickly because the first report was due nine months after the coming into force of the Bill. On the question of **merging the two reviewer posts,** the Minister neither ruled it in nor ruled it out.

The committee then returned briefly to the matter of Overseas Territories, as dealt with in **Clause 54**, which provides for an Order in Council to be made to extend any of the provisions of part 1 of the Bill to the Channel Islands, the Isle of Man or any other British Overseas Territory. **Malcolm Wickes** again asked for detail from the Government on how the provisions in the Bill would be applied to the Overseas Territories.

Mr Hoban said that the Government would make sure that the legislation is extended to the territories and that there are appropriate mechanisms in place to ensure monitoring of compliance.