



**Terrorist Asset-Freezing
(Temporary Provisions) Bill**

Briefing for House of Commons (All Stages)

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Summary

- UN Security Council resolution 1373 obliges the UK government to take action to 'prevent and suppress the financing of terrorist acts' and 'freeze without delay funds or other financial assets ... of *persons who commit or attempt to commit* terrorist acts'.
- However, there is nothing in UN Security Council resolution 1373 that requires the UK government or Parliament to legislate to freeze the assets of persons merely suspected of involvement in financing terrorism.
- Equally, there is nothing in resolution 1373 that requires the UK authorities to deny those whose assets have been frozen the opportunity to challenge the basis on which they have been suspected of financing terrorism.
- In its judgment on 27 January, the UK Supreme Court held that – because it had gone further than resolution 1373 required – the Treasury had exceeded its powers under the United Nations Act 1946 in making the Terrorism Order 2006.
- The effect of this Bill would be to give retrospective legal validity to the orders that were quashed – orders whose effect the Supreme Court described variously as 'draconian', 'oppressive' and 'paralysing'. This includes retrospective criminal liability for any breach of the quashed orders.
- JUSTICE believes that the various powers available under the existing UK counter-terrorism legislation (including the Terrorism Act 2000 and the Anti-Terrorism Crime and Security Act 2001) already gives sufficient effect to the UK's obligations under resolution 1373.
- For this reason, JUSTICE disagrees with the government's claim that it is necessary to introduce this Bill as a temporary measure to maintain the existing asset-freezing regime in order to give effect to the government's obligations under resolution 1373.
- It is particularly unwelcome to use emergency legislation to continue in force measures which violate fundamental rights, even on a temporary basis.
- The constitutional validity of the 'deeming' provisions in clause 2 is also particularly doubtful.
- Even if Parliament thought it necessary to maintain the quashed orders as a stop-gap measure, JUSTICE believes that continuing the existing regime in force as late as December 2010 is too long, given the sweeping nature of the restrictions involved. Parliament should insist that any replacement legislation is in place by October 2010 at the very latest.

Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. JUSTICE has a particular interest in this Bill, having intervened in *Ahmed and others v HM Treasury* before the UK Supreme Court by way of both oral and written submissions. Among other things, the Court accepted JUSTICE's submission that the threshold of 'reasonable suspicion' under the Terrorism Order 2006 was not required by UN Security Council 1373.
3. More generally, the Bill raises a number of issues with which JUSTICE has long been concerned: human rights and counter-terrorism;¹ the use of secret evidence and the fair administration of justice;² the importance of parliamentary oversight of executive measures;³ emergency legislation;⁴ and the importance of the UK's obligations under international law.⁵

Background

4. The Bill is the government's response to the Supreme Court judgment in *Ahmed and others v HM Treasury*, handed down on 27 January.
5. The judgment concerned five men who had been designated under the Terrorism Order 2006 and the Al-Qaeda Order 2006, on the basis that the Treasury suspected them of involvement in financing terrorism. Under Part 3 of the Terrorism Act 2000, it is a criminal offence to finance terrorism, punishable by up to 14 years imprisonment. However, none of the men had been charged or convicted of terrorist financing.

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

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

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

⁴ See e.g. JUSTICE's oral and written evidence to the House of Lords Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (July 2009: HL 116).

⁵ See e.g. JUSTICE's interventions in *Al Jedda v SSD* [2007] UKHL 58 before the House of Lords and *Al Jedda v United Kingdom* (App No 27021/08) and *Al Saadoon v United Kingdom* (App No 61498/08), both pending. *Al Jedda v UK* will be heard by the Grand Chamber of the European Court of Human Rights on 9 June 2010.

6. The Terrorism Order 2006 and the Al-Qaeda Order 2006 were both made under the United Nations Act 1946, which allows for the fast-track implementation of UN Security Council resolutions without the need for primary legislation.
7. The government maintained that it was necessary to make the Terrorism Order 2006 in order to give effect to its obligations under UN Security Council resolution 1373. This was adopted on 28 September 2001 and obliged all member states of the UN to take action to 'prevent and suppress the financing of terrorist acts' and 'freeze without delay funds or other financial assets ... of *persons who commit or attempt to commit terrorist acts*'.
8. However, resolution 1373 made no mention of freezing the assets of those only suspected of involvement in financing terrorism.
9. Under the Terrorism Order 2006, sweeping financial restrictions could be imposed on any person whom the Treasury reasonably suspected of involvement in financing terrorism. The order also 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. The Deputy President of the Supreme Court, Lord Hope, described the effect of designation under the 2006 Order in the following term:⁶

It is no exaggeration to say ... that designated persons are effectively prisoners of the state [T]heir freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating.

In particular, 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'.⁷ Another Supreme Court justice, Lord Brown, commented that:⁸

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

11. The 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, which

⁶ *Ahmed and others v HM Treasury* [2010] UKSC 2 at para 11.

⁷ *Ibid*, para 60.

⁸ *Ibid*, para 192.

allows for fast-track implementation of UN Security Council resolutions. The President of the Supreme Court, Lord Phillips, said:⁹

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

12. Lord Brown noted that the UK government had gone much further than other common law countries had in implementing resolution 1373:¹⁰

[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.

13. The Supreme Court concluded, in particular, that the Treasury’s orders violated a number of basic rights including:

⁹ Ibid, para 137.

¹⁰ Ibid, paras 199-200.

- 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;
- The right of access to a court, protected under the common law and article 6 ECHR.

In particular, Lord Phillips noted that ‘access to a court to protect one’s rights is the foundation of the rule of law’.¹¹ The Deputy President Lord Hope concluded that:¹²

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. For these reasons, the Supreme Court quashed the Terrorism Order 2006 and the Al Qaeda Order 2006, on the basis that the Treasury had had no power to make orders broader than required by the UN Security Council resolutions they were implementing.
15. Since the Treasury had no power to make the orders, this meant not only that the orders were no longer valid, but that they had never been valid. On 4 February, the Supreme Court issued a second, supplementary ruling making clear that it would not grant a stay of the execution of its 27 January judgment, and that the orders were immediately void.

The Bill

16. According to the explanatory notes, the purpose of the Bill is 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’.
17. JUSTICE welcomes the government’s commitment to introduce further primary legislation to address its obligations under resolution 1373, rather than seek simply to continue the orders in force indefinitely by way of primary legislation.

¹¹ Ibid, para 146.

¹² Ibid, para 6.

18. However, JUSTICE cannot welcome the measures contained in this temporary Bill, even as a stop-gap measure.

Clause 1 – Temporary validity of certain Orders in Council

19. By virtue of this clause, the 2006 Order quashed by the Supreme Court (as well as the 2001 and 2009 orders made in similar terms) would be deemed to have been made validly. By subclause 1, this will continue in effect to 31 December.

20. This measure seems to us an unnecessary and disproportionate step. There is no need for Parliament to resurrect the quashed orders, even as a temporary measure, in order to implement its international obligations. On the contrary, there are already a great many provisions in UK law that give effect to the government's obligations under resolution 1373. These include sections 14-19 of the Terrorism Act 2000 (criminalising the use of funds or other property for purposes connected with terrorism); Parts 1 and 2 of the Anti-Terrorism Crime and Security Act 2001 (forfeiture of terrorist cash and freezing orders respectively); the Prevention of Terrorism Act 2005 (control orders). Even the provisions of the Proceeding of Crime Act 1998 may be used to seize funds that result from terrorist activity.

21. It is clear from the judgment of the Supreme Court that the terms of the 2006 Order go well beyond what is required by resolution 1373. Therefore, to pass temporary legislation giving legal validity to the quashed orders, Parliament would be continuing in force a series of draconian restrictions that are wholly unnecessary. The Bill would maintain those already designated as 'virtual prisoners of the state' for as much as another ten months.

22. Moreover, by giving retrospective validity to the quashed orders, Parliament would also be enacting retrospective criminal legislation. This is because both Orders create various criminal offences to prevent designated persons from breaching their restrictions: subclause 3(c) would maintain criminal liability for breach. The notion of retrospective criminal legislation is always profoundly suspect in any democracy governed by the rule of law. It is especially suspect when it is given effect to by way of emergency legislation. It is especially troubling that the Bill's explanatory notes, which indicate the government's views on the compatibility of the Bill with the UK's obligations under the ECHR, makes no mention of article 7 of the ECHR, which provides:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

23. In its 2009 report, the House of Lords Constitution Committee identified five core principles relevant to fast-track legislation, including:¹³

The need to ensure that legislation is *a proportionate, justified and appropriate response to the matter at hand* and that *fundamental constitutional rights and principles are not jeopardised*.

24. The proposal that Parliament should give effect to unlawful measures described by the Supreme Court as 'draconian', even on a temporary basis, is surely a breach of the constitutional principle identified above.

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¹³ See n4 above, para 16.