

TERRORIST ASSET-FREEZING (TEMPORARY PROVISIONS) BILL

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Terrorist Asset-Freezing (Temporary Provisions) Bill as introduced in the House of Commons on 5th February 2010. They have been prepared by the Treasury in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND

3. United Nations Security Council Resolution 1373 (“resolution 1373”) was adopted on 28th September 2001 and includes a requirement that Member States of the United Nations must (a) prevent the financing of terrorist acts, including the freezing of funds and economic resources of persons who commit or attempt to commit terrorist acts or participate in or facilitate such acts, and (b) prohibit their nationals and those within their territories from making funds, financial services or economic resources available to such persons.
4. United Nations Security Council Resolution 1452 (“resolution 1452”) introduces exemptions to prohibitions on making funds, financial assets or economic resources available to permit payments necessary to meet basic humanitarian needs, such as payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, public utility charges and legal fees and expenses) and necessary for extraordinary expenses.
5. Obligations under resolution 1373 and resolution 1452 have been implemented by the Treasury by a number of Orders in Council made under section 1 of the United Nations Act 1946 (the “UN Act”). Under section 1 of the UN Act, there is a power to make an Order in Council to give effect to any decision of the UN Security Council where such provision appears “necessary or

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expedient for enabling those measures to be effectively applied”.

6. The Terrorism (United Nations Measures) Order 2001 (the “2001 Order”), the Terrorism (United Nations Measures) Order 2006 (the “2006 Order”) and the Terrorism (United Nations Measures) Order 2009 (the “2009 Order”) were made under section 1 of the UN Act for this purpose. In these Notes, those Orders are referred to collectively as the “UN Terrorism Orders”. The 2006 Order replaced and revoked the 2001 Order save that directions designating persons under article 4 of the 2001 Order, which remained in force on the date the 2006 Order came into force, continued to apply and the provisions of the 2001 Order continued to apply to such directions. Similarly, the 2009 Order replaced and revoked the 2006 Order save that directions under article 4 of the 2006 Order and 2001 Order which remained in force on the date the 2009 Order came into force continued to apply and the provisions of the previous Orders continued to apply to such directions.
7. On 27th January 2010 the Supreme Court handed down judgment in which it decided that the 2006 Order was *ultra vires* the UN Act. The Treasury sought a stay from the Court of the order to give effect to the judgment. The Supreme Court refused to suspend the operation of the judgment and on 4th February 2010 made an order that the 2006 Order was quashed. The Supreme Court did not rule upon the lawfulness of the 2001 Order or the 2009 Order but both Orders are liable to be quashed on the same grounds as the 2006 Order.
8. The purpose of the Bill is to provide for the temporary validity of the UN Terrorism Orders 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. There are 20 persons in the United Kingdom subject to an asset freeze under the 2001 or 2009 Orders and approximately £135,000 is frozen. In addition, there were 13 persons subject to an asset freeze under the 2006 Order and approximately £16,000 was frozen as at 4th February 2010.

TERRITORIAL EXTENT AND APPLICATION

9. The Bill extends to England and Wales, Scotland and Northern Ireland.
10. The Bill deals only with reserved matters in respect of Scotland and excepted matters in respect of Northern Ireland. It does not confer any functions on the National Assembly for Wales, and applies to Wales in the same way as it applies to England.
11. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of

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the Scottish Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

12. The Bill does not contain any provisions that would require a legislative consent motion in Northern Ireland.

FAST-TRACK LEGISLATION

13. The Government intend to ask Parliament to expedite the Parliamentary progress of this Bill. In their report on *Fast-track Legislation: Constitutional Implications and Safeguards*¹, the House of Lords Select Committee on the Constitution recommended² that where a Bill is to be fast-tracked, Parliament should be provided with the following information.

Why is fast-tracking necessary? What is the justification for fast-tracking each element of the Bill?

14. It is necessary that the Bill in its entirety is fast-tracked for three reasons. First, there is a risk that, in the absence of a replacement asset-freezing regime, assets currently subject to restrictions will be released and may be diverted for terrorist purposes. In the event of all the UN Terrorism Orders being quashed, over £150,000 currently frozen will be released. However, the release of previously frozen assets would not be the only consequence. In the absence of legal restrictions to limit the use that can be made of the financial system by designated persons, it may be easier for such persons to access new funds made available to them and to use their accounts as conduits for the movement of funds, raising the risk of such funds being used to finance terrorism.
15. Second, if there is any significant period of time when there is no asset-freezing regime in place, the UK would not be able to make new designations and freeze funds should it be necessary to do so.
16. Finally, all of the provisions in the Bill relate to the central purpose of imposing financial restrictions for the purposes of preventing terrorism. It would not be possible to omit any of the provisions without compromising the effectiveness of the regime.

What efforts have been made to ensure the amount of time made available for Parliamentary scrutiny has been maximised?

¹ 15th report of Session 2008-09.

² Paragraph 186 of the report.

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17. The Treasury have introduced this Bill at the earliest possible opportunity following the quashing of the 2006 Order, and it is intended that it will receive urgent Parliamentary scrutiny. This is necessary in order to ensure that there is no significant gap in the asset-freezing regime.

To what extent have interested parties and outside groups been given an opportunity to influence the policy proposal?

18. In light of the pressing need to put in place primary legislation to preserve the asset freezes in place under the UN Terrorism Orders, the Treasury have not had an opportunity to consult external stakeholders specifically about the Bill.

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?

19. The effect of the provisions contained in clause 1 of the Bill are expressly limited to operate only until 31st December 2010, after which the provisions of the Bill will cease to have any effect. Given the Government's intention to bring forward further primary legislation in relation to the asset-freezing regime, the Bill does not make any provision for the renewal of the provisions of this Bill on the expiry of the sunset provision. The provisions of clause 2 of the Bill are only to have effect during the period beginning with 4th February 2010 and ending with the coming into force of the Bill.

Are mechanisms for effective post-legislative scrutiny and review in place? If not, why do the Government judge that their inclusion is not appropriate?

20. Given the temporary nature of the Bill, it is not necessary to include post-legislative scrutiny and review provisions. The purpose of the Bill is to secure the effectiveness of the asset-freezing regime contained in the UK Terrorism Orders until 31st December 2010 to allow time for a full Bill to be brought forward and considered by Parliament.

Has an assessment been made as to whether existing legislation is sufficient to deal with any or all of the issues in question?

21. No existing legislation is in place which would have the effect of saving temporarily the UN Terrorism Orders, or providing comparable powers to make asset freezes.

Have relevant Parliamentary committees been given the opportunity to scrutinise the legislation?

22. No.

COMMENTARY ON CLAUSES

Clause 1 – Temporary validity of certain Orders in Council

23. *Subsection (1)* specifies that the provisions of clause 1 of the Bill have effect for the period beginning when the Bill comes into force and ending at midnight on 31st December 2010.
24. *Subsection (2)* provides that, during that period, the UN Terrorism Orders are deemed to have been validly made under the UN Act and that every provision of those Orders is deemed to be within the power conferred by section 1 of the UN Act. This ensures the continued validity of the UN Terrorism Orders notwithstanding the judgment of the Supreme Court and the quashing of the 2006 Order.
25. *Subsection (3)* makes clear that as a consequence of *subsection (2)*, all directions which have previously been made or licences previously granted under the UN Terrorism Orders have legal effect. Further directions can be made and licences granted under the authority of those Orders during that period. Finally, this subsection ensures that, during that period, the prohibitions and obligations imposed by those Orders have legal force and criminal liability may be incurred by a person who fails to comply.

Clause 2 – Protection of things done or omitted in interim period

26. *Subsection (1)* specifies that the provisions of clause 2 of the Bill have effect in relation to things done or omitted in the period beginning with 4th February 2010 (that is, the day on which the 2006 Order was quashed) and ending with the coming into force of the Bill. The provisions of clause 2 therefore have retrospective effect.
27. *Subsection (2)* provides that anything done or omitted by a person other than the Treasury during that period is to be treated as valid, lawful or effectual as if those Orders had been validly made and their provisions were within the scope of the UN Act. This subsection is designed to protect for example financial institutions who continue to comply with the restrictions in the Orders applying to a designated person between the date of the quashing of the 2006 Order and the date the Bill comes into force, ensuring that their actions during that period are not rendered unlawful by virtue of the judgment of the Supreme Court.
28. *Subsection (3)* specifies that actions taken by persons during that period in reliance on or in consequence of something done or omitted by the Treasury are protected. So a person who acted in reliance on a direction given by the Treasury under one of the UN Terrorism Orders will be treated as having acted

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lawfully.

29. *Subsection (4)* ensures that clause 2 does not affect the bringing of any legal challenges on a ground independent of the question whether those Orders were validly made under the UN Act.
30. Paragraph (a) of *subsection (5)* provides that clause 2 does not affect any liability of the Treasury in respect of an act or omission which would be unlawful if this clause were not enacted. Paragraph (b) of *subsection (5)* ensures that no criminal liability attaches to any acts or omissions by persons during the retrospective period. Criminal liability may arise in respect of acts or omissions which occur after Royal Assent in accordance with clause 1.

Clause 3 – Short title, commencement and extent

31. *Subsection (1)* sets out the short title of the Bill, *subsection (2)* provides that the Bill comes into force immediately it is passed and *subsection (3)* provides that the Bill extends to England and Wales, Scotland and Northern Ireland.

FINANCIAL EFFECTS OF THE BILL

32. The Bill seeks to preserve the provisions of the UN Terrorism Orders on a temporary basis such that reporting requirements placed on relevant institutions under those Orders continue in force. Relevant institutions will already have systems in place in respect of obligations arising under the 2006 Order, Regulation (EC) 2580/2001 (on specific measures directed at certain persons and entities with a view to combating terrorism) and other EC regulations imposing financial restrictions on persons. These systems are also required to meet other obligations arising under money laundering legislation, notably the Proceeds of Crime Act 2002. The Bill does not therefore impose any new obligations or remove any obligations on relevant institutions, so the financial effect of the Bill will be neutral.

PUBLIC SECTOR MANPOWER

33. There are no public sector manpower implications arising from the Bill.

SUMMARY OF IMPACT ASSESSMENT

34. The impact assessment is published with the Bill. Members of Parliament can obtain a copy of the impact assessment from the Vote Office.

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35. The benefits are not quantifiable. The Government's policy objective is to help prevent terrorist attacks by preventing frozen funds becoming unfrozen and used for terrorist purposes. Disrupting terrorist-related activities contributes to national security and preventing the UK financial sector from being unknowingly used to facilitate terrorism-related activities.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

36. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act).
37. The Chief Secretary to the Treasury, Liam Byrne MP, has made the following statement under section 19(1)(a) of the Human Rights Act 1998: "In my view the provisions of the Terrorist Asset-Freezing (Temporary Provisions) Bill are compatible with the Convention rights."
38. The Bill has the effect of maintaining the validity of the UN Terrorism Orders on a temporary basis and of retrospectively validating things done or omitted under them between 4th February 2010 and the date the Bill comes into force (save for the provisions which attach criminal liability to breaches of the prohibitions during that interim period). The saved provisions of the UN Terrorism Orders raise a number of ECHR issues which are dealt with in turn. In each clause where ECHR issues are engaged the Treasury consider that an appropriate balance between ECHR considerations and the public interest purpose behind the provisions has been struck.

Protocol 1, Article 1 (protection of property)

39. Article 1 of the First Protocol ("A1/P1") of the Convention provides that every person (natural or legal) is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
40. The effect of a direction designating a person is that the person's funds and economic resources are frozen. Further provisions prohibit making funds, economic resources or financial services available to or for the benefit of a designated person. These provisions can include restrictions on the enjoyment of the property of others (notably in relation to the household benefits of members of a designated person's household).

41. The prohibitions on the designated person constitute a control of the use of their property. The Treasury consider that (a) the interference is lawful because the prohibitions are sufficiently accessible and certain, (b) the interference pursues a legitimate aim which is in the general interest, namely the disrupting of persons suspected of involvement in terrorist activity from financing such activity, whether in the UK or abroad, and (c) a fair balance has been struck between the public interest and the interests of the property owner, in particular by means of a licensing system which allows controlled access to funds.
42. Claims arising from the order of the Supreme Court that the 2006 Order is *ultra vires* may constitute 'property' for the purposes of A1P1. The Bill interferes with the potential for such claims in clause 2 by not permitting the exercise of this claim in relation to persons other than the Treasury in the period from 4 February 2010 until Royal Assent. The interference and the proportionality of this provision are discussed below at paragraph 48.

Article 8 (respect for privacy and family life)

43. The UN Terrorism Orders include a number of provisions which interfere with a person's right to respect for private and family life. Any interference by a public authority must be justified as being in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
44. The collection of personal information is an interference with the right to respect for private life. The disclosure of information – such as the fact of a direction – by a public body will also involve an interference with the right to respect for private life.
45. The Treasury consider that there is a clear national security or public safety basis for such interferences and that they are in accordance with the law on the basis that they are clear and foreseeable. The decisions include clear rights to challenge decisions involving interferences and the Treasury believe that these provisions offer adequate and effective safeguards against arbitrary interference.

Article 6 (right to a fair trial)

46. Article 6(1) of the Convention entitles an individual to a fair and public hearing in the determination of his civil rights or obligations or any criminal charge against him. A designation made under the UN Terrorism Orders is likely to be a decision which impacts upon civil rights and obligations (notably the interference with rights to free enjoyment of property). Whilst not

expressly set out as a qualified right, the courts, both domestically and in Strasbourg, have acknowledged some need for qualification. Challenges to decisions under the UN Terrorism Orders would not constitute criminal hearings and therefore the express minimum standards in Article 6(3) do not apply.

47. Certain provisions of the Counter-Terrorism Act 2008 apply to proceedings brought in respect of decisions of the Treasury under the UN Terrorism Orders. Those provisions (similar to provisions in the Prevention of Terrorism Act 2005) were enacted in respect of challenges to asset freezes made under the UN Terrorism Orders. The provisions are directed in part at the use of “closed material” in proceedings and set up a procedure for the appointment of special advocates. The issue of the compatibility of the use of closed material and special advocates with Article 6(1) has been considered a number of times in the UK and in Strasbourg, particularly in connection with control orders. The House of Lords in *Secretary of State for the Home Department v AF (No 3)*³ following the decision of the Grand Chamber of the European Court of Human Rights at Strasbourg in *A v United Kingdom*⁴, referred to the Grand Chamber’s decision that the controlled person had to be given sufficient information about the allegations against him to be able to give effective instructions to the special advocate in respect of the controlled person, but that “*provided that requirement was satisfied, there could be a fair trial notwithstanding that he was not provided with the detail or sources of the evidence forming the basis of the allegations*” (para 59). Provision in section 67(6) of the Counter-Terrorism Act 2008 provides that the special advocate procedure should not be applied where to do so would be inconsistent with Article 6.
48. An effect of clause 2 is that it would deny potential litigants access to a court to make a claim for damages or other remedy against persons other than the Treasury for the period between 4th February 2010 and the coming into force of the Bill. The Treasury believe that this provision is necessary to ensure as far as possible that those assets currently frozen remain frozen. The Treasury believe that there is a clear public interest to be taken into account, and that when this is considered together with the limited duration of the provisions and the availability of damages claims before that period, the interference is proportionate.
49. The Treasury therefore believe that the provisions in this Bill are compatible with Article 6.

³ [2009] UKHL 28.

⁴ (Application No 3455/05), ruling 20 February 2009.

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as introduced in the House of Commons on 5th February 2010*

COMMENCEMENT DATE

50. The Bill will come into force on Royal Assent.