**Funding Terrorism**

**Latest Update**

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Terrorism is an expensive operation especially if the group plans a prolonged period of conflict. While the financial cost of carrying out attacks can be relatively inexpensive, the main drain on terrorist groups’ resources is in the running and maintenance costs such as purchasing materials, property and travel arrangements (Donohue 2008 pp. 153-154, Danziger 2012 p.213). While links to terrorist groups being involved in organised criminal activity has been proved to exist (Hesterman 2013), terrorist groups also use legitimate means to fund their activities. With the threat international terrorist groups pose to many states, the United Nations (UN) introduced the 1999 International Convention for the Suppression of the Financing of Terrorism, supported by the UN Security Council issuing Security Council Resolutions (SCR). Although providing a brief overview of the UK’s statutory provisions related to funding terrorism, as they have been the most controversial provisions the main focus of this article will be in the UN measures related to funding terrorism introduced in the UK as statutory instruments, in particular the Terrorism (United Nations Measures) Orders and the Al Qaeda and Taliban (United Nations Measures) Orders. Being the source of most of the judicial decisions on funding terrorism this article will examine how those decisions, in particular the Supreme Court decision in *H.M. Treasury v Mohammad Jabar Ahmed and others* [2010] UKSC 2 resulted in the Terrorism Orders being repealed and replaced by the Terrorist Asset-Freezing Act 2010.

**Overview of the Topic**

1. **Provisions related to funding terrorism under the Terrorism Act 2000** – Part III of the 2000 Act created offences relating to terrorist fund raising (section 15 Terrorism Act 2000) use and possession of property for the purposes of terrorism (section 16 Terrorism Act 2000), becoming concerned in the arrangement of property or money for the purposes of terrorism (section 17 Terrorism Act 2000), money laundering in relation to terrorist property (section 18 terrorism Act 2000) and applying a duty on a person in the course of their employment to disclose information where they suspect a person has committed an offence under section 15 to 18 (section 19 Terrorism Act 2000). Where a person is convicted of an offence under sections 15 – 18 Terrorism Act 2000 the court can make a forfeiture order of any money or property the person had in their possession at the time of the offence that had been used for the purposes of terrorism or was intended for such a purpose (sections 23 and 23A Terrorism Act 2000) with the process of how this is carried out being outlined in Schedule 4 terrorism Act 2000.
2. **Provisions related to funding terrorism under the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) –** Part 2 of the Act is concerned with freezing orders that can be made by H.M. Treasury provided the Treasury reasonably believe the person’s actions will be a detriment to the UK economy or that action constitutes a threat to the life or property of UK citizens (section 4 ATCSA). The order prohibits persons from making funds available to or for the benefit of persons named in the order (section 5 ATCSA). Freezing orders are only exercisable by statutory instrument and must be laid before Parliament to have effect (section 10 ATCSA). ATCSA also contains two schedules concerned with funding terrorism, Schedule 1 is concerned with terrorist cash where paragraph 2 allows and authorised officer to seize any cash they have reasonable grounds for suspecting is terrorist cash. As well as any coins or notes of any currency, cash includes postal orders, cheques, bankers’ drafts and bearer bonds and shares (paragraph 1 Schedule 1 ATCSA). Forfeiture of the cash can be authorised by a court (paragraph 6 Schedule 1 ATCSA).
3. **Provisions related to funding terrorism under the Counter-Terrorism Act 2008 –** Part 5 and Schedule 7 of the Act are concerned with terrorist financing and money laundering. Schedule 7 defines terrorism financing as using funds or making funds available for the purposes of terrorism or the acquisition, possession, concealment, conversion or transfer of funds that are directly or indirectly to be used for the purposes of terrorism (paragraph 2 Schedule 7 ATCSA). Schedule 7 ATCSA allows the Treasury to make a direction that imposes requirements in relation to transactions or business relationships with a person carrying out business in the country, the government of the country or a person resident in or incorporated in the country (paragraph 9 Schedule 7 ATCSA). The direction may require the person named in it to undertake enhanced customer due diligence measure before entering into a transaction or business relationship with a designated person actually doing business with that person (paragraph 10 Schedule 7 ATCSA). Due diligence measures are measures to establish the identity of a designated person and obtain information about that designated person’s business, the source of their funds and to assess the risk of the designated person being involved in relevant terrorist activities (paragraph 10(3) Schedule 7 ATCSA). H.M. Treasury can give such a direction provided the Financial Action Task Force has advised the Treasury that such measures should be taken because of the risk of terrorist financing or money laundering. The Treasury must reasonably believe the there is a risk that terrorist financing or money laundering activities are being carried out and pose a significant risk to the UK’s national interest and the Treasury also reasonably believe the development of nuclear, radiological, biological or chemical weapons or any action is carried out that facilitates the development of such weapons poses a significant risk to the UK’s national interests (paragraph 1 Schedule 7 ATCSA). Regarding where financial restrictions proceedings emanating from UN terrorism orders, Part 2 ATCSA or Schedule 7 of the Counter-Terrorisms Act 2008 are in place on a named person, Part 6 of the Act covers the procedures that person can take in applying to a court to have those decision set aside via judicial review (section 63 Counter-Terrorism Act 2008). The UN orders that section 62 apply to are the Terrorism (united Nations Measures) Order and the Al Qaeda and Taliban (United Nations Measures) Orders or any other related orders that apply under section 1 United Nations Act 1946.
4. **Provisions related to funding terrorism under the Terrorism (United Nations Measures) Orders and the Al Qaeda and Taliban (United Nations Measures) Orders –** These have been the most controversial legal provisions related funding terrorism. The important difference between the provisions in the funding of terrorism in the Acts compared to the Orders is the Acts require a degree of *mens rea.* As mentioned above the provisions in the respective Acts relating to the forfeiture or freezing of assets apply where a person is committing or has committed or has been convicted of terrorist related offences. However, this is not the case with Orders as the persons or groups (entities) are listed by the UN’s Security Council in the SCR. As Lord Hope observed, the effect of the Orders is to deprive the designated persons of any resources whatsoever thereby effectively making them prisoners of the state and they do not just affect the persons designated, but also their spouses and family members (*H.M. Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2 paragraph 4).
5. **How the Orders were derived –** Emanating from article 2 of the 1945 Charter of the United Nations that states to ensure to all its members the rights and benefits of UN membership they, ‘…shall fulfil in good faith all members the obligations assumed by them in accordance with the present Charter’. In the Charter, article 41 states:

‘The Security Council may decide what measures not involving the use of armed force are to be implemented to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures.’

As a result the UK Government passed the United Nations Act 1946 where section 1(1) states that under article 41 of the Charter of the United Nations:

‘…the Security Council of the United Nations call upon His Majesty’s Government of the United Kingdom to apply any measure to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him to be necessary or expedient for enabling those measures to be effectively applied, including … provision for the apprehension, trial and punishment of persons offending against the Order.’

Following the 9/11 attacks by Al Qaeda in the USA the UN Security Council issued Resolution 1373 outlining measures UN Member States should take to deal with international terrorist activity where paragraph 1(c) of the SCR states that all States shall:

‘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 directly or indirectly by such persons; and of persons or entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.’

As a result the UK Government introduced as a statutory instrument the Terrorism (United Nations Measures) Order 2001 regarding the granting of directions that froze assets of those listed by the UN Security Council. The 2001 Order was replaced by the Terrorism (United Nations Measure) Order 2006 (SI 2006/1747) where paragraph 4 granted H.M. Treasury the powers to give directions on persons identified where it considered the direction was necessary for the purpose of protecting the public from a risk of terrorism provided, ‘…the Treasury have reasonable ground for suspecting that the person is or may be…’ a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism, or is a person identified in the UN Council Decision, or a person owned or controlled directly or indirectly by a designate person or is a person acting on behalf or at the direction of a designated person (paragraph 4(2) The Terrorism (United Nations Measures) Order 2006).

1. **Is the wording of paragraph 4 of the Terrorism Order disproportionate and oppressive and consequently ultra vires**? - In *H.M. Treasury v Mohammad Jabar Ahmed and others* [2010] UKSC 2 the claimants stated the Terrorism Order went further that the relevant Security Council Resolution (SCR) required, saying the freezing orders were disproportionate and oppressive and the terms of the freezing orders were uncertain (paragraph 128). The focus of their claim was due to the wording of article 4 of the 2006 Terrorism Order where the Treasury could grant a direction where thy had reasonable suspicion that a person is ***or may be*** involved in acts of terrorism made the Order’s provisions go further than the SCR intended resulting in the provisions being disproportionate and uncertain (*H.M. Treasury v Mohammad Jabar Ahmed and others* [2010] UKSC 2, paragraphs 130-132). This was an issue raised in *A, K, M, Q & G v H.M. Treasury* [2008] EWHC 869 Admin and was considered by the High Court where Mr Justice Collins said having the phrase ‘or may be’ lowered the threshold required when a direction can be ordered by the Treasury adding:

‘While I can see the force of an argument that reasonable suspicion my suffice … to implement the requirement of [the SCR] it is impossible to see how the test could properly be as low as reasonable suspicion that a person may be a person who commits etc. I do not accept … that it is limited to those who are proved by conviction to be committing or attempting to commit acts of terrorism. But it is impossible to see how the test applied in the [Terrorism Order] can constitute a necessary means of applying the resolution’ (paragraph 40).

This was the key legal issue that resulted in Mr Justice Collins finding the power given to H.M. Treasury was *ultra vires* and stating that the Order should be quashed (paragraph 49). In *H.M. Treasury v Mohammad Jabar Ahmed and others* [2010] UKSC 2 the Supreme Court had a similar concern. In relation to the Terrorism Order Lord Hope said by introducing reasonable suspicion as a means of giving effect to the SCR:

‘…the Treasury exceed their powers under section 1(1) of the 1946 Act. This is a clear example of an attempt to adversely affect the basic rights of the citizen without the clear authority of Parliament’ (paragraph 61).

Lord Mance compared the asset-freezing power of the Treasury in the Order to that under Part 2 ATCSA 2001 saying in the ATCSA two pre-conditions limit the ability of the Treasury to give a direction on a person saying:

‘…the first that the Treasury reasonably believe that action to the detriment of the United Kingdom economy or constituting a threat to the life or property of one of more United Kingdom nationals has been or is likely, but the second, critically, that the person taking or likely to take such action is a foreign government or overseas resident’ (paragraph 223).

There are two points that come out of Lord Mance’s judgement. One is that for a freezing order to be applied by the Treasury under ATCSA the freezing order must go before Parliament and be reviewed, provisions which were not in the Order as it was introduced into English law via a statutory instrument (Danziger 2012 p.220). The second is that in essence, as with all of the forfeiture and asset freezing provisions in the terrorism Acts, a greater degree of *mens rea* is required under the ATCSA provisions for a direction to be given on a person thus making it more difficult for a direction to be ordered. In stark contrast with the Acts’ provisions with the Terrorism Orders having the phrase ‘or may be’ added to the reasonable suspicion required by the Treasury significantly lowers the threshold of suspicion required to grant a direction thus making it easier for the state to freeze a person’s assets. This is an important point as the disproportionate and oppressive nature of directions given under the Orders can be seen in *M, A, MM v H.M. Treasury and Secretary of State for Works and Pensions* [2006] EWCH 2328 where the judicial review applicants were housewives responsible for raising several children and received in their own right a number of social security benefits, but they all lived with persons listed un designation granted under a Terrorism Order (paragraph 1). The applicants contended the Treasury was mistaken in concluding the payment of their social security benefits fell within the scope of the direction issued against their respective spouses (paragraph 3) as these funds are made available only to the claimants, not through them for the benefit of any listed person (paragraph 52). The High Court held that such funds did fall within the requirements of the Terrorism Order as Kenneth Parker QC (sitting as Deputy Judge of the High Court) stated that even though the Department of Works and Pensions paid the claimants on a regular basis it can be reasonably expected that they would use the funds for the benefit of their spouses who were listed persons in the Treasury’s direction (paragraph 63) and on that basis dismissed the applicants grounds for judicial review (paragraph 83). Returning to the Supreme Court’s decision in *H.M. Treasury v Mohammad Jabar Ahmed and others* [2010] UKSC 2, in a majority decision it held as the wording of paragraph 4 of the Terrorism Order 2006 provided a lack of legal certainty the 2006 Order was therefore *ultra vires* and the order be quashed (Lord Hope at paragraph 83, Lord Phillips at paragraph 156, Lord Rodgers with Lady Hale agreeing at paragraph 187).

1. **European Court of Justice decision influential in the Supreme Court decision** – Council Regulation (EC) No 881/2002 was issued following the 9/11 Al Qaeda attacks on the US related to ensuring EU Member States imposed certain specific restrictive measures against persons and entities associated the Osama Bin Laden, the Al Qaeda network and the Taliban. The Regulation strengthened the member States’ ability to impose flight bans and the freezing of funds and other financial resources in respect of the Taliban in Afghanistan. Article 2 of the Regulation states that all funds and economic resources belonging to, or owned, or held by a person group or entity be frozen. Article 2 is specific in stating that no funds or economic resources should be made available to the person, group or entity either directly or indirectly. In *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (2005) Case T-306/01 the EU’s Court of First Instance (CFI) examined the provisions of Regulation No 881/2002 and on three grounds found the freezing of funds under this Regulation did not infringe the fundamental rights of person:
2. The SCR against Bin Laden, Al Qaeda and Taliban was important in the fight against international terrorism and enhanced the legitimacy of the protection of the UN against actions of terrorist organisations;
3. Freezing of funds is a precautionary measure that unlike confiscation did not affect the substance of the rights to their property, only the use of the assets; and
4. The SCR did provide a means of review as persons affected could present their case to the Sanctions Committee through the Member State of their nationality or where they resided (paragraph 8)

The CFI added that is was not for them to review if the SCR was compatible with fundamental rights protected by the EU’s legal order and key in that decision was the fact the CFI thought a person’s interest in having a court hear their case is not enough to outweigh the public interest in the maintenance of international peace and security (paragraph 9). However the position of the EU’s judiciary changed significantly in *Kadi v Council of the European Union* (Joined cases C-402/05P and C-415/05P) [2009] AC 1255 where the European Court of Justice (ECJ) examined once more the asset freezing under SCR on Osama Bin Laden, Al Qaeda and the Taliban and EU Regulation No 881/2002. Advocate General Maduro noted that Kadi had not had the opportunity to make a submission whether the sanctions against him were justified and if they should be kept in force, all of which centred on the de-listing procedure a designated person can apply through. The problem Advocate General Maduro saw with this process was even though the request can be submitted through the Sanctions Committee, it was only governmental departments that considered the applications and there was no judicial scrutiny or protection within the process (paragraphs 51-55). Challenging the finding of the CFI in *Yusuf*, an important principle of EU law is that it is based on the rule of law and that an international agreement could not affect the autonomy of the Community’s legal system and according to settled case law fundamental rights formed an integral part of the general principles the ECJ followed (paragraphs 281-283). He said:

‘It follows … that the obligations by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which includes the principles that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty’ (paragraph 285).

Adding that judicial review of United Nations’ legal orders was not excluded (paragraph 287). Gearty sees this decision as ‘heroic’ (2012 p.41) saying that the CFI was wrong to genuflect to the UN as by not including a procedure for communicating the evidence justifying the of the names of the persons affected by the listing thereby not respecting the right to an effective judicial review, Regulation No 881/2002 was fatally flawed and Advocate General Maduro was right to insist on the protection of fundamental rights (2012 pp44-45).

1. **The international judicial response to lack of judicial scrutiny of asset freezing SCR’s** - The lack of judicial supervision in relation to SCR’s is a legal issue that is not unique to the UK and the EU. In *Abdelrazik v The Minister of Foreign Affairs* [2009] FC 580 the Federal Court of Canada found that Abdelrazik’ who had been listed on the SCR had his rights under the Canadian Charter of Rights and Freedoms breached and Mr Justice Zinn was scathing about the SCR saying there was nothing in the listing or de-listing procedure that recognised the principles of natural justice or that the SCR made provisions for basic procedural fairness saying the SCR could not meet the requirement of independence or impartially adding, ‘The accuser is also the judge’ (paragraph 51). In *Kindhearts for Charitable Humanitarian Development Inc v Timothy Geithner et al* 3:08CV2400 18th August 2009 the District Court of the Northern District of Ohio Western Division found that Kindhearts’ assets being frozen by the US Treasury violated their fourth amendment rights (right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures). Even though a blocked person can obtain a post-blocking judicial review, the Court found the power of the US Treasury to block (asset freeze) had no in-built limitation thereby curtailing executive discretion and putting individuals on notice their assets were being frozen. What is a cause of concern in all of these cases is the lack of judicial involvement or supervision in the issuing of directions on persons freezing their funds and assets. As seen, this is a global concern.
2. **UK’s Terror Asset-Freezing Act 2010 (TAFA) –** As a result of the Supreme Court’s decision in *H.M. Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2 the UK Parliament introduced TAFA that repealed the previous Terrorism Orders. In outlining HM Treasury’s powers to make a final designation of a person to freeze their assets, in section 2 TAFA the Treasury can still reasonably believe a person is or has been involved in terrorist activity. However the words ‘or may be’ have been removed. Section 26 TAFA clearly specifies that a person who has had a designation placed on them can appeal to the High Court against any decision made by the Treasury. Also other than regarding a decision to which section 26 applies, section 27 allows, a person affected by a Treasury decision to apply to the High Court to have that decision set aside with the court being allowed to grant any relief that can be given in the judicial review proceedings. While there were similar provisions to found in the UK’s terrorism legislation, TAFA has placed all of the relevant provisions in one statute. The effect of TAFA is it increases the threshold of reasonable suspicion the Treasury must have before placing a designation on a person to freeze their assets. While there is no judicial supervision in the granting of a designation, it places on a statutory footing the procedure for person to access the court for a judicial review of the Treasury’s decisions. The Act also ensures compliance with section 1 United Nations Act 1946 in ensuring that SCR’s are introduced through UK legislative provisions. With the introduction of TAFA we are seeing the state balancing the needs of not just of national, but also international security against the needs of an individual’s rights. As seen above, it is important to consider that asset freezing can have a dramatic effect on the domestic finances of a family where a member of the family listed. Getting the balance right is important, especially through the use of asset freezing procedures as the funding terrorism offences are rarely used by the state. As Anderson found, between April 2008 – March 2012 only one person was charged in the UK with offences under sections 15-19 Terrorism Act 2000. Under section 23A Terrorism Act 2000 where when a person is convicted of a terrorism offence a court can order the forfeiture of any money or property that was in their possession at time. The question whether the family of home of a convicted terrorist can be seized as property in their possession was examined by the High Court in May 2014. The Court held the family home of a convicted terrorist cannot be seized, with Sir Richard Henriques QC saying it would have an adverse effect on the innocent members of the family (BBC News 2014). What we see in these cases related to funding terrorism is how far the state is prepared to go in applying draconian measures related to terrorist activity that can be oppressive and disproportionate. To counter this we also see the judiciary performing its important role within the separation of powers by applying the legal principles of the rule of law related in assessing if the state’s powers are *ultra vires* and natural justice to ensure the law is applied equitably. By doing so as seen in *H.M. Treasury v Mohammad Jabar Ahmed and others* [2010] UKSC 2 the court’s decisions resulted in the UK Parliament amending the law.

**Key Acts**

Terrorism Act 2000

Anti-Terrorism, Crime and Security Act 2001

Counter-Terrorism Act 2008

Terrorist Asset-Freezing Act 2010

United Nations Act 1946

**Key Subordinate Legislation**

The Terrorism (United Nations Measures) Order 2006 (SI 2006/2657)

The Al-Qaida and Taliban (United Measures) Order 2006 (SI 2006/2952)

The Terrorism (United nations Measures) Order 2009 (SI 2009/1747)

The Al-Qaida and Taliban (Asset-Freezing) Regulations 2010 (SI 2010/1197)

**Key Quasi-legislation**

United Nations International Convention for the Suppression of the Financing of Terrorism (1999)

**Key European Union Legislation**

Council Regulation (EC) No 881/2002

**Key Cases**

*Abdelrazik v The Minister of Foreign Affairs* [2009] FC 580 (Federal Court of Canada)

*Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (2005) Case T-306/01

*H.M. Treasury v Mohammad Jabar Ahmed and others* [2010] UKSC 2

*Kindhearts for Charitable Humanitarian Development In v Timothy Geithner et al* 3:08CV2400 18th August 2009 District Court of Ohio Western Division

*M, A, MM v H.M. Treasury and Commissioners for Her Majesty's Revenue and Customs* [2006] EWCH 2328 (Admin)

*A, K, M, Q 7 G v H.M. Treasury* [2008] EWHC 869

*Kadi v Council of the European Union* (Joined cases C-402/05P and C-415/05P) [2009] AC 1255

**Key Texts**

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Danziger, Y. (2012) Changes in methods of freezing funds of terrorist organisations since 9/11: a comparative analysis Journal of Money Laundering Control 15(2) 210-236

Ryder, N. (2007) A false sense of security? An analysis of legislative approaches towards the prevention of terrorist finance in the United States and the United Kingdom Journal of Business Law November 821-850

**Further Reading**

BBC News ‘Police fail to seize terror inmate Munir Farooqi’s home’ 23rd May 2014 retrieved from <http://www.bbc.co.uk/news/uk-england-manchester-27540945> [accessed 7th July 2014]

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HM Treasury (2007) *The financial challenge to crime and terrorism* London: HMSO