

Chapter 5: United Kingdom

5.0 Introduction

This chapter examines the historical development of counter terrorist financing (CTF) legislation in the United Kingdom (U.K) and identifies the implications of such provisions on the right to a fair trial. The U.K. has a long history of tackling terrorism, and had implemented numerous counter terrorism legislative provisions prior to the terrorist attacks on September 11 2001.¹ Although this legislation was utilised against domestic terrorism, the Terrorism Act 2000 extended its scope to counter international terrorism. The U.K.'s CTF policy² can be divided into three parts: the criminalisation of terrorist financing, the freezing of assets and the use of suspicious activity reports.³ This is comparable with the CTF policies adopted in the United States (U.S.) and Canada. However, the desire to successfully combat terrorism by limiting terrorist's financial resources has had adverse implications for individual's human rights in the U.K. The consequences for citizen's right to a fair trial shall be examined whilst considering what impact non-compliance with such human rights may have on the legality of CTF policy. The chapter begins by identifying and discussing the CTF measures that predate September 2001 and it then moves onto examine how these provisions were extended following the September 11 attacks. The chapter then concentrates on the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001 and the Terrorist Asset Freezing Act 2010 and examines the notion that the right to a fair trial has not received due consideration. Next, the chapter goes on to study the U.K. CTF policy to assess its accordance with international human rights obligations in particular the right to a fair trial. The chapter also discusses the ability of the U.K. government to suspend certain human rights in particular situations and considers the impact of such a power.

¹ Hereinafter September 11.

² This policy has recently been strengthened with the publication of the HM Treasury Action Plan for anti-money laundering and counter-terrorist finance, April 2016.

³ Nicholas Ryder, 'Islamophobia or an important weapon? An analysis of the US financial war on terrorism' [2009] 10(4) *Journal of Banking Regulation* 307-320 at 309. N Ryder, *Financial Crime in the 21st Century - Law and Policy*, (Edward Elgar, 2011) 66-90.

5.1 Pre September 11 2001

In contrast to the U.S, the U.K. had legislated against terrorism for a number of years particularly in relation to troubles in Northern Ireland.⁴ The U.K. has history of dealing with terrorism and counter terrorism provisions have been in place in the U.K. since the 19th century.⁵ Further statutory measures were implemented to tackle terrorism by the IRA⁶, including the Northern Ireland (Emergency Provisions) Act 1973 and the Prevention of Terrorism (Temporary Provisions) Act 1974. Legislation in this area continued to be extended the Prevention of Terrorism (Temporary Measures) Act 1989 saw the introduction of specific measures to deal with terrorism and terrorist financing.⁷ The Prevention of Terrorism (Temporary Provisions) Act 1974 was enacted in a hurried manner following terrorist attacks in Birmingham. The legislation was implemented as a result of an ‘all night sitting’ in the House of Commons and many of the Acts provisions derived from the Prevention of Violence Act 1939 and the Defence of the Realm Act 1914. The arrest and conviction of the perpetrators of the Birmingham Bombings⁸ and those in Guildford,⁹ suggested that counter terrorism legislation had been successful. Indeed, it later emerged that miscarriages of justice in these cases called the effectiveness of counter terrorism provisions into question.¹⁰

Yet, whilst the Prevention of Terrorism Acts proved to be ineffective at times and were subject to regular review, the continued existence of domestic terrorism invariably led to the existing legislation being extended and amended. For example, the enactment of the Prevention of Terrorism (Temporary Measures) Act 1989 saw

⁴ Civil Authorities (Special Powers) Acts 1922-43.

⁵ L Donohue *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press, 2008).

⁶ L Donohue, *Counter-Terrorist Law and Emergency Powers in the United kingdom 1922-2000*, (Irish Academic Press, 2001).

⁷ Section 13, Prevention of Terrorism (Temporary Measures) Act 1989.

⁸ On 21 November 1974, two public houses in Birmingham were bombed killing 21 people and injuring 182. The attack was attributed to the IRA and 6 men were arrested and charged with the acts of terrorism.

⁹ On 5 October 1974, bombs exploded in two public houses in Guildford. The IRA took credit for the bombings and 3 men and one woman were charged and convicted of the bombings.

¹⁰ In the case of the ‘Birmingham Six’ those convicted claimed that they had confessed to the bombings after being beaten by police. After 2 unsuccessful appeals, the Court of Appeal finally quashed their convictions on 14 March 1991. They had been wrongly imprisoned for 16 years. The ‘Guildford Four’ also had their convictions overturned and were released in 1989 after spending 15 years in prison.

the introduction of specific measures to deal with terrorism and terrorist financing. Importantly, Part III of the Act, which was entitled ‘Financial Assistance for Terrorism’, criminalised terrorist financing and allowed the government to seek the forfeiture of any money or other property which, at the time of the offence, the he had in his possession or under his control.¹¹ This acknowledgment of the importance of assets to terrorist groups was not replicated by the U.S. or Canadian governments for some time.

However, the effectiveness of the Prevention of Terrorism (Temporary Provisions) Act 1989 has been questioned with regard to the emergency and temporary nature of the provisions and the low number of successful prosecutions.¹² For example, the Home Office noted that there were only four terrorist financing convictions between 1978 and 1989.¹³ Thus, there was some urgency surrounding the implementation of new and permanent terrorism legislation. The introduction of the Human Rights Act 1998 propounded the need for new counter terrorism legislation that would be in accordance with human rights. The use of such emergency legislation was thought to have had an adverse impact on the U.K.’s international reputation and thus an inquiry was ordered.¹⁴ This inquiry was chaired by Lord Lloyd of Berwick, who was tasked with examining future trends in terrorism to assess whether existing legislation was adequate to deal with potential terrorist attacks.¹⁵ The ‘Inquiry into Legislation against Terrorism’ resulted in a two volume Report in 1996,¹⁶ which considered the U.K.’s obligations to the ECHR and the International Covenant on Civil and Political Rights. This was the first time that a report had been asked to consider the U.K.’s international human rights obligations whilst examining existing terrorist legislation. Donohue claims “this increasing awareness of the international arena stemmed from

¹¹ Prevention of Terrorism (Temporary Provisions) Act 1989, s. 13.

¹² See for example the excellent commentary by Richard Bell ‘The confiscation, forfeiture and disruption of terrorist finances’ [2003] 7(2) *Journal of Money Laundering Control* 105-125.

¹³ Home Office *Legislation against terrorism- a consultation paper* (Home Office: London) 1998b) at paragraph 6.14.

¹⁴ Laura.K. Donohue *Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000* (Irish Academic Press 2001) 259.

¹⁵ *Inquiry into Legislation Against Terrorism*, by the Rt. Hon. Lord Lloyd of Berwick. October 1996 Cm.3420.

¹⁶ *Inquiry into Legislation Against Terrorism*, by the Rt. Hon. Lord Lloyd of Berwick. October 1996 Cm.3420.

cases brought against Britain at the European Court in Strasbourg”.¹⁷ For example, the case of *Ireland v U.K.*¹⁸ challenged the interrogation techniques used by the police and concluded that they constituted torture and inhuman or degrading treatment, which violated the ECHR.¹⁹ Legal challenges such as this resulted in the government’s direction to Lord Lloyd to focus on compatibility with international human rights provisions. Unsurprisingly, one of the findings of Lloyd’s inquiry was that “the existence of emergency legislation has, itself, caused some damage to the UK’s international reputation in the field of human rights”.²⁰ In line with action taken following the September 11 attacks in the U.S, the U.K. government had also allowed temporary and emergency measures to become institutionalized. The U.S. government swiftly adopted legislation that permitted the authorities to exercise extensive powers.²¹ These powers allowed individuals to be listed as terrorists and to have their assets frozen based on suspicion of an involvement in terrorism. The aim of this action was the prevention and detection of the financing of terrorism. These hastily enacted measures discussed in detail in chapter three,²² have become part of the landscape of CTF provisions in the U.S and the U.K. has followed suit. This is a consequence, which Donohue rightly argues stems from the U.K governments desire not to be seen to be weakening its fight against terrorism, and was a state that was permitted to continue until 2000 when counter-terrorist provisions were put on a permanent footing in U.K law by the Terrorism Act 2000.²³ Lloyd concluded that whilst terrorism in Northern Ireland would diminish, the threat of international terrorism was high.²⁴ Donohue notes that he remarked on the U.K’s place in such terrorist activity stating, “the UK...is particularly liable to be caught up in these struggles because of the number of communities of foreign nationals who live, or seek

¹⁷ Laura K. Donohue *Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000* (Irish Academic Press 2001) 259.

¹⁸ (1978) Y.B European Convention on Human Rights at 602

¹⁹ Further challenges claiming a contravention of the ECHR were brought in *Brogan and Others v UK* (1988) 11 EHRR 117, *Brannigan & McBride v UK* (5/1992/350/423-424) E.C.H.R. and *Fox, Campbell and Hartley v UK* (1990) 13 EHRR 157.

²⁰ *Inquiry into Legislation Against Terrorism*, by the Rt. Hon. Lord Lloyd of Berwick. October 1996 Cm.3420 at 10.

²¹ The PATRIOT Act 2001 and Presidential Executive Order 13,224.

²² See section 4.2, chapter 4.

²³ Laura K. Donohue *Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000* (Irish Academic Press 2001) 259.

²⁴ *Inquiry into Legislation Against Terrorism*, by the Rt. Hon. Lord Lloyd of Berwick. October 1996 Cm.3420 10.

sanctuary, here”.²⁵ Donohue suggested that to combat terrorism the U.K. needed a single consolidating piece of permanent legislation.²⁶

In 1998 the U.K. government published a series of consultation papers, which reviewed the U.K.’s legislative policy towards terrorism.²⁷ In relation to terrorist financing, the Consultation Paper concluded that Part III of the Act 1989 contained several weaknesses. For example, one criticism was the low number of successful convictions for fund-raising for terrorist purposes, which according to the Home Office, amounted to only four between 1978 and 1989.²⁸ However, the Home Office acknowledged that “there is also evidence to suggest that the existence of the offences in sections 9 to 11 of the Prevention of Terrorism Act and the vigorous use made by the police of their Schedule 7 powers to obtain information has deterred some, and made it much more difficult for others, to raise money here and transfer it to those intent on using it to fund terrorist activities”.²⁹ Therefore, the Home Office recommended that the scope of the offences created by the 1989 Act should be extended to fund-raising for all terrorist purposes.³⁰ The Terrorism Act 2000 amended the law relating to the criminalisation of terrorist financing.³¹ From this, the U.K. government devised a counter terrorism and CTF strategy.³²

5.2 U.K. Counter Terrorist Finance Strategy

The U.K. CTF strategy aims to lessen the threat of terrorism in the U.K. and its interests overseas.³³ This policy includes preventing terrorists from acquiring funds or using the U.K. financial system to move money within the U.K. and out of the U.K. By reducing terrorist organisations’ access to funds, their ability to carry out terrorist

²⁵ Laura K. Donohue, *Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000* (Irish Academic Press 2001) 262.

²⁶ *Ibid.*

²⁷ Home Office *Legislation against terrorism – a consultation paper* (Home Office: London, 1998).

²⁸ *Ibid* at paragraph 6.14.

²⁹ Home Office above, n 11.

³⁰ *Ibid* at paragraph 6.15.

³¹ c.11

³² HM Treasury *Combatting the financing of terrorism, A report on UK action, 2002*

³³ HM Treasury have recently published *The U.K Action Plan for anti-money laundering and counter terrorist-finance*. This three part plan highlights the need for the current policy to be strengthened with the addition of “aggressive new legal powers”; reform of the supervisory regime and; improved cooperation with international groups such as G20 and FATF to counter terrorist financing and money laundering overseas. These changes are due to be made over the next few years (HM Treasury Action Plan for anti-money laundering and counter-terrorist finance, April 2016).

attacks is diminished, as is their ability to operate. Terrorist organisations need funds to support recruitment, training, propaganda etc and the lack of such funds makes it more difficult for them to operate. The CTF strategy includes the employment of financial intelligence to support counter terrorism investigations and the use of asset freezing to prohibit anyone from dealing with the funds or economic resources of a designated person.

The success of CTF policy is largely dependent on financial intelligence. This information alerts authorities to suspicious financial behaviour allowing the financing of terrorism to be detected, managed and ultimately prevented. To this end, the SAR's regime is critical. Any suspicion is reported to the National Crime Agency (NCA) for further investigation. If it is believed that the person concerned poses a terrorist threat, they may be designated and their assets frozen. This action may have a negative impact on many human rights including the right to privacy,³⁴ the right to property³⁵ and the right to a fair trial.³⁶ Detriment to such human rights occurs as the result of the CTF process to which SAR's form an important ingredient. The SAR's regime shall be discussed in further detail later, for now this chapter turns to a discussion of pertinent legislation in the criminalisation of terrorist financing.

5.2.1. The Criminalisation of Terrorist Financing

5.2.1.1 Terrorism Act 2000

This Act provided for the law relating to terrorism to be placed on a permanent statutory basis meaning that it is now on the same footing as the ordinary criminal law. Whilst some of the provisions of the Prevention of Terrorism Acts were carried forward, the area of counter terrorism was significantly amended and extended. The Terrorism Act 2000 created five terrorist financing offences. Section 15 makes it a criminal offence for a person to solicit, or to receive, or to provide money or property

³⁴ Article 8, ECHR stipulates that "Everyone has the right to respect for his private and family life, his home and his correspondence".

³⁵ Article 1, Protocol 1 of the ECHR states "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

³⁶ Article 6 ECHR states "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

on behalf of terrorists if the person knows or has reasonable suspicion that such money may be used for the purpose of terrorism.³⁷ By virtue of section 16 a person commits an offence if he uses money or other property for terrorist purposes.³⁸ Furthermore, the person commits an offence if he possesses money or other property and he intends that it should be used, or has reasonable cause to suspect that it will be used for the purposes of terrorism. Section 17 provides that a person commits an offence if he enters into or becomes concerned in an arrangement in which money or property is made available to another and the person knows or suspects that it may be used for terrorism.³⁹ A person breaches section 18 if he enters into or becomes concerned in an arrangement which facilitates the retention or control by or on behalf of another person of terrorist property by concealment, by removal from the jurisdiction, by transfer to nominees or in any other way.⁴⁰ It is a defence for a person charged under section 19 to prove that they either did not know, or had reasonable cause to suspect that the arrangement was associated to terrorist property.

The TA 2000 also provides further investigative powers in relation to terrorist financing. Under Schedule 6 of this Act, law enforcement authorities may make use of financial information and account monitoring orders.⁴¹ Such a provision, allows law enforcement agencies to monitor an account for the purposes of a terrorist investigation. Once an order has been made, the police are able to ask financial institutions to provide information in relation to the customer. The purpose of this

³⁷ Terrorism Act 2000, s.15. See *R.v Saleem (Abdul Rehman)* [2009] EWCA Crim 920 (CA (Crim Div)).

³⁸ Terrorism Act 2000, s.16. See *O'Driscoll v Secretary of State for the Home Department* [2002] EWHC 2477 (QB); [2003] A.C.D. 35 (QBD).

³⁹ Terrorism Act 2000, s. 17. See *Menni (Nasserdine) v HM Advocate* [2013] HCJAC 158; 2014 S.C.L. 191; 2014 G.W.D. 1–10 (HCJ), *Secretary of State for the Home Department v AT* [2009] EWHC 512 (Admin) (QBD (Admin)) and *Secretary of State for the Home Department v U* [2009] EWHC 49 (Admin) (QBD (Admin)).

⁴⁰ Terrorism Act 2000, s. 18. See *Menni (Nasserdine) v HM Advocate* [2014] HCJAC 54; 2014 S.C.L. 552; 2014 S.C.C.R. 430; 2014 G.W.D. 20–380 (HCJ), *R. v Allpress (Sylvia)* [2009] EWCA Crim 8; [2009] 2 Cr. App. R. (S.) 58; [2009] Lloyd's Rep. F.C. 242; [2009] Crim. L.R. 363 (CA (Crim Div)) and *R. (on the application of Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin); [2008] 4 All E.R. 403; [2008] E.M.L.R. 19; [2008] U.K.H.R.R. 1151 (DC).

⁴¹ Under Schedule 6 TA 2000, an application for an account monitoring order must be made by a police officer (at least at the rank of superintendent), before a circuit judge (Schedule 6, paragraphs 2 and 3) who must be satisfied that the order is sought for the purposes of a terrorist investigation, the tracing of terrorist property is desirable for the purposes of the investigation, and the order will enhance the effectiveness of the investigation (Schedule 6, paragraph 5). The ATCSA 2001 however amended the provision for account monitoring orders which may now be granted by a Crown Court judge providing that the same requirements in Schedule 6, paragraph 5 TA 2000 are satisfied.

provision is to enhance the success of a terrorist investigation.⁴² Moreover the TA 2000 provides for the proscription of organisations believed to be connected to terrorism. By virtue of Part II, the Secretary of State may proscribe an organisation when he believes that it is; committing or participating in acts of terrorism⁴³; preparing for terrorism⁴⁴; promoting or encouraging terrorism⁴⁵; or otherwise concerned in terrorism.⁴⁶ Organisations, which are proscribed, are included on a list under Schedule 2 TA 2000 and it becomes a criminal offence to belong to or invite support for; arrange a meeting in support of; or carry articles which arouse reasonable suspicion that an individual is a member or supporter; of the proscribed organisation.

It is difficult to comment on the efficacy of these provisions of the TA 2000 alone as the Act was in existence for a short period of time before it was amended by the ATCSA 2001. However, it stands as “the cornerstone of the UK’s CTF strategy”⁴⁷ and Blair praised its provisions commenting that, “it has proved a vital tool in the fight against terrorism with powers to seize terrorist cash at borders”.⁴⁸ The then Home Secretary, Jack Straw MP, justified its necessity as “simply protecting democracy”.⁴⁹ Whilst the powers it affords authorities are extensive, the results have been limited. For instance between 11 September 2001 and 31 December 2007, only 74 CTF related charges were made in Great Britain.⁵⁰ Further to this, between September 2001 and June 2014, just 17 people were convicted under sections 15-19 of the Terrorism Act 2000.⁵¹ Thus, whilst the TA 2000 introduced extensive powers in relation to terrorism and CTF, the lack of prosecutions and the complete overhaul of the Act just months after its introduction suggest that the legislation was inadequate. The September 11 attacks illustrated the urgent need for new legislation

⁴² In line with counter terrorism policy in the U.S. and Canada, the U.K. has also implemented the power under Part 2 of the TA 2000 to proscribe terrorist organisations. This implies that the Home Secretary may proscribe an organisation if he/she believes that it is concerned in terrorism.

⁴³ S.3 (5)(a) TA 2000

⁴⁴ S.3 (5)(b) TA 2000

⁴⁵ S. 3(5)(c) TA 2000

⁴⁶ S.3 (5)(d) TA 2000

⁴⁷ Karen Harrison and Nicholas Ryder *The Law Relating to Financial Crime in the United Kingdom*, (Ashgate Publishing 2013) 48.

⁴⁸ Home Office, Hazel Blear’s speech to the Royal United Services Institute, The Tools to Combat Terrorism.

⁴⁹ Counter-terrorism Powers: Reconciling Security and Liberty in an Open Society: a Discussion Paper, Cm.6147, Feb 2004.

⁵⁰ Peter Sproat, ‘Counter-Terrorist Finance in the UK: A Quantitative and Qualitative Commentary Based on Open-Source Materials’ (2010) *Journal of Money Laundering Control*, 315-335, at 320.

⁵¹ HM Treasury UK national risk assessment of money laundering and terrorist financing, Home Office, October 2015 at 90.

to tackle international terrorism and in particular the financing of terrorism. Thus, despite the U.K.'s longstanding experience in dealing with terrorism, the provisions enacted to combat terrorist attacks were not regarded as wholly sufficient. For example, the then Deputy Assistant Commissioner Peter Clarke commented on this point stating,

“Colleagues from around the world often say to me that the long experience that we have in the United Kingdom of combating a terrorist threat must have stood us in great stead. That the experience gained during some 30 years of an Irish terrorist campaign would have equipped us for the new challenges presented by Al Qaeda and its associated groups. To an extent that is true- but only to an extent. The fact is that the Irish campaign actually operated within a set of parameters that helped shape our response to it”.⁵²

However, the then Home Secretary David Blunkett MP claimed that such practice in dealing with terrorism led the U.K. to have “some of the most developed and sophisticated anti-terrorist legislation in the world”.⁵³ If the September 11 attacks exposed shortcomings in counter terrorism law then Clarke was accurate in his summation and Irish terrorism had led to a legislative reaction from the U.K. government, which was limited and was not equipped to deal with the kind of international terrorist attack, which occurred on September 11 2001. The Cabinet Office supported this point stating that terrorist legislation in place prior to 2001 was “designed to counter the threat from terrorism on a very different scale”.⁵⁴ Furthermore, some CTF provisions in the TA 2000 are in conflict with the right to a fair trial. This point is crucial and shall be discussed in more detail below. As a result of inadequacies in CTF legislation prior to the September 11 attacks, it was thought necessary by the U.K. government to extend and strengthen the legislation especially with regards to terrorist financing. Whilst the U.K. government were fairly unique in the fact that they had long recognised the importance of blocking terrorist access to their assets, it was the attacks 2001 that affirmed its significance. With this in mind,

⁵² Peter Clarke, ‘*Learning from Experience- Counter Terrorism in the UK since 9/11*’, Colin Cramphorn Memorial Lecture, 24 April 2007.

⁵³ *Counter-terrorism Powers: Reconciling Security and Liberty in an Open Society: a Discussion paper*, Cm.6147, February 2004.

⁵⁴ Cabinet Office, *The UK and the Campaign against International Terrorism- Progress Report* (Cabinet Office: London, 2002) at 11.

the ability to promptly freeze the assets of suspected terrorists gained huge value and following the lead of the UN discussed in chapter 3, the UK strengthened their asset freezing regime.

5.2.2. The Freezing of Assets

Legislation that is relevant to the freezing of assets in the U.K, is now discussed and examined in chronological order.

5.2.2.1 Anti-terrorism, Crime and Security Act 2001

Heightened attention on the ability to freeze terrorist funds resulted in the implementation of the Anti-terrorism, Crime and Security Act 2001.⁵⁵ This new focus came as a result of the ‘Financial War on Terror’, as discussed in chapter four, and was instigated after September 11 2001 by implementing the provisions of United Nations Security Council Resolution 1373,⁵⁶ which required states to freeze the assets of suspected terrorists. The ATCSA 2001 was enacted less than three months after the terrorist attacks on September 11 and it introduced a wealth of CTF powers for authorities to use. For example, the ATCSA 2001 allows the seizure of terrorist cash anywhere in the U.K,⁵⁷ the freezing of funds at the start of an terrorist-related investigation,⁵⁸ the monitoring of suspected accounts,⁵⁹ the imposition of requirements on people working within financial institutions to report where there is reasonable suspicion that funds are intended for terrorism and to permit HM Treasury to freeze assets of foreign individuals and groups. Part II of the Act concerns freezing orders, which have the effect of blocking the use of monies by the person concerned. Furthermore, HM Treasury is authorised to freeze the assets of overseas governments of residents who have taken or are likely to take action, which threatens the life or property of a U.K. national or resident. Any freezing order imposed must be the subject of review by HM Treasury⁶⁰ and the Order shall cease to have effect after 2

⁵⁵ c.24. Hereafter ATCSA 2001

⁵⁶ S/RES/1373 (2001). Hereafter UNSCR 1373.

⁵⁷ Anti-terrorism Crime and Security Act 2001, Sch. 1, Part 2.

⁵⁸ Anti-terrorism Crime and Security Act 2001, ss. 4-16.

⁵⁹ Anti-terrorism Crime and Security Act 2001, Sch. 1, Part 1.

⁶⁰ Anti-terrorism Crime and Security Act 2001, Part 2, s.7.

years.⁶¹ These powers have led to the freezing of assets of individuals and organisations suspected of involvement in terrorism. Ryder comments that prior to 2001, HM Treasury froze \$90 million worth of assets, which is credited to the fall of the Taliban in Afghanistan in 2002.⁶² HM Treasury reported that following the September 11 attacks and the implementation of the ATCSA 2001, this figure rose to \$100 million.⁶³ However, following this early success, HM Treasury reported that they had only been able to freeze a further £10 million.⁶⁴

The U.K. government claimed that whilst public disclosure had to be limited “the United Kingdom’s armoury of measures places us in a leading position to tackle terrorist financing”.⁶⁵ Furthermore, whilst these figures illustrate an initial success, it is impossible to argue the true extent of the effectiveness of the measures. Whilst a significant amount of assets frozen may have made ‘media friendly’ figures at the time of their introduction,⁶⁶ these measures are meant to be preventative suggesting that possibly their implementation had the effect of preventing terrorist assets from ever entering the financial system. If this is indeed the case, the provisions have achieved some success. The Cabinet Office supports such a notion arguing that the strengthening of provisions “is tough, but necessarily so and the measures it

⁶¹ Anti-terrorism Crime and Security Act 2001, Part 2, s.8.

⁶² Nicholas Ryder ‘A false sense of security? An analysis of the legislative approaches towards the prevention of terrorist finance in the United States of and the United Kingdom’ (2007) 8 *Journal of Business Law* 821-850, at 843.

⁶³ HM Treasury *Combating the Financing of Terrorism, a Report on UK action* (HM Treasury: London, 2002) at 9.

⁶⁴ HM Treasury *Combating the Financing of Terrorism- a Report on UK Action* (HM Treasury: London, 2002) at 27. Currently the amount of assets being frozen is much more modest with around £117,000 of assets frozen on 31 December 2014. (HM Treasury *Operation of the UK’s Counter-Terrorist Asset Freezing Regime: Quarterly Report to Parliament*, 1 September 2014 to 31 December 2014). As at 31.03.16, there were 84 accounts frozen in the U.K. under the Tafa regime and the EU Reg (EC) 2580/2001 and ISIL-AQ Regime, EU Reg 881/2002. (HM Treasury *Operation of the UK’s Counter-Terrorist Asset Freezing Regime, Quarterly Report to Parliament* 1 January 2016 to 31 March 2016).

⁶⁵ HM Treasury *Combating the Financing of Terrorism- a Report on UK Action* (HM Treasury: London, 2002) at 5. Bell supports such a notion stating that the TA 2000 and the ATCSA 2002 has left the U.K, “both in terms of the terrorist finance offences and the investigative powers, arguably among the strongest in the world”. (Richard Bell ‘The confiscation, forfeiture and disruption of terrorist finances’ (2003) 7(2) *Journal of Money Laundering Control* 105-125 at 121).

⁶⁶ This is a point which is supported by Ryder, “and though the headline figure thus generated is doubtless politically satisfying to some, it is not a measure of effectiveness”.(Nicholas Ryder ‘A false sense of security? An analysis of the legislative approaches towards the prevention of terrorist finance in the United States of and the United Kingdom’ (2007) 8 *Journal of Business Law* 821-850, at 844).

introduced have had a deterrent and disruptive effect”.⁶⁷ However, the impact of such precautionary measures is impossible to quantify.

These powers were until recently utilised by the HM Treasury Asset Freezing Unit. In March 2016, the U.K. powers were transferred to the newly created Office of Financial Sanctions Implementation (OFSI). The OFSI oversees the implementation and enforcement of financial sanctions in the U.K. The former Chancellor of the Exchequer, George Osborne MP, announced that the “OFSI will be a centre of excellence for financial sanctions, raising awareness and providing clear guidance to promote compliance with financial sanctions, providing a professional service to the public and industry, and working closely with other parts of government to ensure that sanctions breaches are rapidly detected and effectively addressed”.⁶⁸ The OFSI are charged with ensuring that financial sanctions make “the fullest possible contributions to the UK’s foreign policy and national security goals”.⁶⁹ Departments such as this are hugely important as in the interests of international co-operation, it is also crucial that the U.K. government are compliant with the international regulations regarding CTF. As discussed in chapters three and four, the cornerstone of the international effort to tackle terrorist financing is the International Convention for the Suppression of the Financing of Terrorism,⁷⁰ UNSCR 1267⁷¹ and UNSCR 1373. In order to ensure conformity with UNSCR 1373, the U.K. government swiftly implemented the Terrorism (United Nations Measures) Order.⁷² This Order also allows for the enforcement of EC Regulation,⁷³ which permits for the designation of people within this regulation for such measures that relate to, *inter alia*, the freezing of funds, financial assets and economic resources.⁷⁴

⁶⁷ Cabinet Office *The UK and the Campaign against International Terrorism*, 2002 at 15.

⁶⁸ HM Treasury Press Release *Office of Financial Sanctions Implementation created to help UK businesses comply with financial sanctions*, 31 March 2016, OFSI. Available at: <https://www.gov.uk/government/news/new-body-to-support-financial-sanctions-implementation-launched> (accessed 08.12.16).

⁶⁹ HM Treasury Press Release *Office of Financial Sanctions Implementation created to help UK businesses comply with financial sanctions*, 31 March 2016, OFSI. Available at: <https://www.gov.uk/government/news/new-body-to-support-financial-sanctions-implementation-launched> (accessed 08.12.16).

⁷⁰ United Nations Resolution 54/109 1999.

⁷¹ UNSCR implemented a targeted sanctions regime against the Taliban including an obligation on member states to freeze the funds of members of the Taliban.

⁷² S.I 2006/2657.

⁷³ 2580/2001.

⁷⁴ 27 December 2001, on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

By virtue of Article 4 of the Order, HM Treasury is able to designate a person as a terrorist supporter provided four conditions are met. HM Treasury has reasonable grounds to suspect that a person is or may be (a) a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism; (b) a person named in the Council Decision; (c) a person owned or controlled, directly or indirectly, by a designated person; or (d) a person acting on behalf of or at the direction of a designated person. However, under Article 5 of the Order, HM Treasury is required to make appropriate measures to publicise the direction or to notify specific people and to inform the person identified in the direction. Furthermore, under Article 7 of the 2006 Order, a person is prohibited from “dealing with funds, financial assets and economic resources of anyone who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism; designated persons; anyone owned or controlled by them or anyone acting on their behalf of or at their direction”. Any contravention of this prohibition is a criminal offence. Article 8 of the Order forbids making funds, financial assets, economic resources or financial services available to anyone in respect of whom article 7 applies. A contravention of this prohibition is also a criminal offence.

However, these powerful sanctions are controversial especially with regard to the lack of procedural protection in CTF law. Of huge importance here is the case of *Ahmed and Others v H.M. Treasury*.⁷⁵ This case is of great constitutional significance in the area of designation and asset freezing in the UK and illustrates the juxtaposition between the human rights and the prevention of terrorism. *Ahmed* concerned the imposition of asset freezing orders on five men suspected of involvement in terrorism. The men concerned were informed between 2006 and 2007 that HM Treasury had listed them as designated persons under Article 4 of the Terrorism Act 2006. The TO 2006 gave effect to UNSCR 1373, and the AQO 2006, and allowed for the application of UNSCR 1267. Pursuant to this, the applicants in *Ahmed* were denied access to their funds and by virtue of the designation all parties were prohibited from having financial dealings with the men.⁷⁶ Due to the asset freezing orders the men were

⁷⁵ [2008] EWHC 869.

⁷⁶ Two of the suspects (Mohammed al-Ghabra and Hani El Sayed Sabael Youssef) were also added to the 1267 Committee’s Consolidated List.

denied access to their bank accounts and welfare benefits, the only money available to them was a small amount that covered basic expenditures. The appellants challenged the lawfulness of the asset freezing orders and sought to have them quashed by the court. Collins J. concluded that the asset freezing orders should be set aside, against five of the applicants, for three reasons. Firstly, parliamentary approval should have been sought for the asset freezing orders.⁷⁷ Secondly, it was impossible to determine how the ‘reasonable suspicion’ test adopted by HM Treasury fulfilled the application of UNSCR 1373.⁷⁸ Thirdly, the lack of legal certainty of the legislation. Collins J. opined that the TO 2006 created criminal offences that went beyond what was reasonably required and breached the principle of legal certainty. The wide definition of ‘economic resources’ meant that it was not clear what action amounted to a breach of the asset freezing order, this was especially so in relation to the family members of the designated individual. Collins J remarked that it would have been impossible for them to know when they required a licence from HM Treasury.⁷⁹

HM Treasury petitioned the Court of Appeal who examined the four issues.⁸⁰ Firstly, the court considered the lawfulness of the TO 2006 and questioned whether it should be quashed. Secondly, what is the effect of the lack of procedural safeguards in the TO 2006. Thirdly, they looked at whether the principles of legal certainty and proportionality were satisfied with regard to the criminal offences created under the TO 2006. Fourthly, whether the Al-Qaeda and Taliban (UN Measures) Order 2006 was unlawful due to the absence of an appeal mechanism for a person who has been designated by the UN Sanctions Committee. Whilst the Court of Appeal held that the reasonable ground test applied by HM Treasury did not go beyond the scope of UNSCR 1373, they found that applying the Order to those who ‘may be’ involved in terrorism was outside the scope of the Resolution. With this in mind, the Court of Appeal concluded that the orders made in this case by HM Treasury should be quashed. While it further found that the licensing system under the TO 2006 was proportionate and legally certain, the Court of Appeal expressed their view that the courts should ensure that those persons subjected to the TO 2006 Order have

⁷⁷ *A v HM Treasury* [2008] EWHC 869 at para. 37.

⁷⁸ *A v HM Treasury* [2008] EWHC at para. 40.

⁷⁹ *A v HM Treasury* [2008] EWHC 869 at para. 42.

⁸⁰ *A and Ors v HM Treasury* [2008] EWCA 1187 at para 24.

sufficient procedural protection. The Al-Qaeda and Taliban (UN Measures) Order 2006 was held to be lawful.

As a response to the challenges made by *Ahmed and Others*, the government implemented the Terrorism (UN Measures) Order 2009,⁸¹ which states that a direction will cease to have effect 12 months after it was made; although HM Treasury have the power to renew a direction after this time lapse. This Order also made changes to the prohibition, so that they now only apply if the ‘designated’ person obtains, or is able to obtain, a significant financial benefit. A further welcome amendment relates to those who may provide economic resources to a designated person. A defence has now been added if they did not know, and had no reasonable cause to suspect that the financial resources which they provided to the designated person was likely to be used or exchanged for funds, goods or services. Whilst, these amendments go some way to ensuring that the asset freezing regime is more favourable, serious implications for human rights continue to exist.⁸² This is especially so in relation to the right to a fair trial and is a point which will be discussed in further detail below.

The matters raised in *Ahmed* reached the Supreme Court where the men concerned sought to challenge the legal basis behind the Terrorism Order 2006 and the Al Qaida Order 2006.⁸³ These Orders were enacted by means of the United Nations Act 1946, which permits the executive to make “such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied”.⁸⁴ This meant that statutory instruments could be implemented without exposure to any parliamentary debate. The powers conferred by these Orders came under intense scrutiny in the case of *Ahmed*. The Terrorism Order 2006 was found to be exercising procedures, which lacked parliamentary scrutiny and were therefore contrary to the rule of law. There had been no opportunity for Parliamentary approval of these powers and consequently Lord Hope declared that allowing the executive to have infinite discretion in how to apply Resolutions was totally unacceptable and argued that such a situation “conflicts

⁸¹ S.I. 2009/1747.

⁸² The Financial Services Secretary to the Treasury, Lord Myners viewed the changes as positive, noting that “these changes will improve the operation of the asset-freezing regime, ensure that it remains fair and proportionate and help facilitate effective compliance by ensuring that prohibitions are more tailored and clearer in how they apply” (HC Debates 15 July 2009: Column WS96).

⁸³ Hereafter AQO.

⁸⁴ Section 1 United Nations Act 1946 c.45

with the basic rules that lie at the heart of our democracy”.⁸⁵ Subsequently, a panel of seven judges unanimously concluded that HM Treasury had acted *ultra vires*, exceeding their powers under s. 1(1) of the United Nations Act 1946. Commenting on the stark contrast between the Orders and the ATCSA, Lord Hope⁸⁶ identified that the asset freezing provisions under Part 2 of the ATCSA, are the subject of review by HM Treasury,⁸⁷ are approved by both Houses of Parliament⁸⁸ and furthermore asset freezing orders under this legislation have a 2 year time limit.⁸⁹ These measures go some way to ensuring that the asset freezing regime under the ATCSA can be considered legitimate.

The judges in *Ahmed* also criticised the lack of procedural safeguards in the asset freezing scheme. The AQO did not provide those subjected to designation under this law with any means of recourse. The men were not privy to the evidence against them and were not given any opportunity to appeal the designation. Lord Hope opined, “there is nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provides for basic procedural fairness”.⁹⁰ Consequently, Article 3(1)(b) of the AQO was declared to be *ultra vires*. Clubb contends that the TO 2006 “is an example of the executive drawing on exceptional measures to enact legislation to tackle terrorism, the action justified by the perception of terrorism as an exceptional threat”.⁹¹ The outcome of this case reaffirms the importance of achieving a balance between security and international obligations and the rights of an individual. Furthermore, it has served as a reminder that observance of the rule of law is paramount in any democratic state.

Following the judgement in this case, asset freezing powers were deemed unconstitutional and the Terrorism United Nations Measures Order 2006⁹² and the Al-Qaeda Order 2006 were quashed. Emergency legislation was fast tracked through

⁸⁵ *Ahmed and Others v United Kingdom* [2010] UKSC 2 at para. 45.

⁸⁶ *Ahmed and Others v United Kingdom* [2010] UKSC 2 at para. 5.

⁸⁷ S.7 ATCSA 2001

⁸⁸ S.10 ATCSA 2001.

⁸⁹ S.8 ATCSA 2001.

⁹⁰ *Ahmed and Others v United Kingdom* [2010] UKSC 2 at para. 69.

⁹¹ Karen Clubb The Terrorist Asset Freezing etc Act 2010: Harassing proportionality to secure prevention without punishment, [2014] 1 *Covert Policing, Terrorism and Intelligence Law Review*, 32-51 at 33.

⁹² (SI2006/2657).

Parliament and The Terrorist Asset-Freezing (Temporary Provisions) Act 2010 was implemented but was due to lapse later in that year. Importantly, despite the government's contention that this legislation was paramount, other legislation existed which made provision for freezing assets.⁹³ Nevertheless, further permanent legislation was introduced in December 2010.⁹⁴

5.2.2.2. The Terrorist Asset Freezing Act 2010

The Terrorist Asset Freezing Act 2010 implements the obligations of the U.K. under UNSCR 1373 and Council Regulation (EU) No 2580/2001 and provides the power to freeze the assets of individuals suspected of “the commission, preparation and instigation or facilitation of terrorist acts”.⁹⁵ The Act creates the power to make interim⁹⁶ and final designations.⁹⁷ An interim designation can be made when HM Treasury reasonably suspects that a person is or has been involved in terrorist activity;⁹⁸ or that the individual is owned or controlled by the suspect;⁹⁹ or that the individual is acting on behalf of or at the direction of the suspect.¹⁰⁰ The suspect must be notified of the interim designation, which will only last for 30 days and may not be renewed. At this time, a person can be subjected to a final designation by virtue of s.2 TFAFA 2010. However, HM Treasury is required to hold a reasonable belief that the person has been involved in terrorist activity;¹⁰¹ or that they are owned or controlled by such a person;¹⁰² or that the individual is acting on behalf or at the direction of the suspect.¹⁰³ Action can be taken to apply a final designation where these conditions are

⁹³ The Terrorist Asset Freezing Act 2010 operates alongside Part 2, ATCSA 2001, Part 3, TA 2000, Parts 5 & 6 of the Counter Terrorism Act 2008 and the Al-Qaida and Taliban (Asset Freezing) Regulations 2010. The Al Qaida (Asset Freezing) Regulations 2011 impose the criminal penalties for breaching the UN Al Qaida asset freezing regime (that is given effect by EC Regulation 881/2002). This includes circumventing or assisting someone to circumvent their asset freeze, or providing false information for the purpose of obtaining a licence from HM Treasury.

⁹⁴ The Terrorist Asset- Freezing Act 2010.

⁹⁵ K Clubb *The Terrorist Asset Freezing etc Act 2010: Harassing proportionality to secure prevention without punishment*, [2014] 1 *Covert Policing, Terrorism and Intelligence Law Review*, 32-51 at 32. It should be noted that the provisions of this Act only have effect in the U.K. (and on U.K. bodies and nationals overseas).

⁹⁶ S.6-9 TFAFA 2010.

⁹⁷ S.2-5 TFAFA 2010.

⁹⁸ Section 6 (1)(a)(i) TFAFA 2010 c.38.

⁹⁹ Section 6 (1)(a)(ii) TFAFA 2010.

¹⁰⁰ Section 6 (1)(a)(iii) TFAFA 2010.

¹⁰¹ Section 2 (1)(a)(i) TFAFA 2010.

¹⁰² Section 2 (1)(a)(ii) TFAFA 2010.

¹⁰³ Section 2 (1) (a)(ii) TFAFA 2010.

met and HM Treasury consider that in order to protect the public from terrorism, financial restrictions should be applied in relation to the person.¹⁰⁴ HM Treasury is required to give notice of the designation to the person concerned and the designation can last for up to one year at which point it can be renewed. If on review, the conditions in s. 2(1) TFAFA 2010 continue to exist then a designation can be continually renewed. Therefore, whilst action to make a final designation requires a higher standard of suspicion, an interim designation can be made based on broad speculation as was the case with designation and the freezing of assets under the TO 2006.¹⁰⁵ Thus, although it was decided in *Ahmed* that the wording of the UNSCR 1373 does not suggest that the Security Council had a “reasonable suspicion”¹⁰⁶ test in mind before exercising an asset freeze, it appears that lessons have not been learned. The impact of an asset freeze, if temporary or permanent, on an individual cannot be underestimated. Lord Hope noted that, taking the amendments offered to the regime by the Terrorism (UN) Measures Order 2009 into consideration, the impact of a freezing order is “just as paralysing”.¹⁰⁷ The effect of designation and freezing orders needs further examination and shall be looked at later with regard to the implications it poses for the right to a fair trial.

In line with the provisions of the TA 2000, the TA 2006¹⁰⁸ and TPIMA 2011,¹⁰⁹ the TFAFA includes a stipulation that the HM Treasury is required to provide quarterly reports to Parliament on the operation of the asset freezing system.¹¹⁰ There has been modest use of TFAFA 2010 provisions in the U.K and by March 2016, just £15,000 was frozen under TFAFA 2010. In total £75,000 was frozen across 84 accounts of those designated under the UK’s domestic TFAFA regime, the UN AQ regime and the EU CP931 regime.¹¹¹ The amount of designations of individuals and entities as terrorists has recently declined.¹¹² Anderson viewed the steep decline in the number of

¹⁰⁴ Section 2 (1)(b) TFAFA 2010.

¹⁰⁵ By virtue of S.4 TO 2006.

¹⁰⁶ *Ahmed and Others v United Kingdom* [2010] UKSC 2 at paragraph 225.

¹⁰⁷ *Ahmed and Others v United Kingdom* [2010] UKSC 2 at paragraph 38.

¹⁰⁸ Section 36 TA 2006

¹⁰⁹ Section 20 TPIMA 2011

¹¹⁰ Section 31 TFAFA 2010

¹¹¹ HM Treasury Quarterly Report to Parliament, January to March 2016, OFSI. 13 September 2016.

¹¹² Anderson notes that there were 162 designations at the start of 2008 and this number had reduced to 38 by September 2011. (HM Treasury *Second Report on the Operation of the Terrorist Asset Freezing Act 2010*, David Anderson Q.C, HM Treasury: London, 2012) at 8). In December 2013, the number of TFAFA designations was still 38.

designations as a positive factor and argued that this illustrates that authorities were careful in their application of measures that are “very intrusive”.¹¹³ Moreover, he contends that the low number of designations is also attributed to the stringent criteria included in the measures in the TAFE 2010 and asserts that in some cases the ‘reasonable belief’ test has not been met and even when ‘reasonable belief’ has been shown, the authorities case falls down at the necessity test.¹¹⁴ Anderson added that the prospect of a legal challenge makes the government even more cautious when deciding whether a designation is necessary and they prefer to use alternative methods to prevent the financing of terrorism.¹¹⁵ This aversion to potential challenge may be an accurate suggestion, as more recently Anderson noticed a trend by the U.K. authorities to avoid contest by de-designating a suspect. He observes, “when decisions to designate are tested on appeal, there has been a persistent tendency to de-designate rather than to defend the decision in court”.¹¹⁶ Such legal challenges can be made by virtue of s. 26 TAFE 2010, which, provides that designated persons have the right, to appeal to the High Court challenging a designation. Furthermore, s. 27 allows a designated person or anyone else affected by a decision of HM Treasury to appeal to the High Court for the decision to be set aside. The inclusion of an appeal mechanism for asset freezes is paramount because as Anderson correctly recognises, “exceptional powers require exceptional safeguards”.¹¹⁷ Whilst the inclusion of an appeals mechanism is welcome, it is suggested here that flaws exist which mean that procedural fairness cannot be guaranteed. This suggestion is examined later alongside the discussion on the impact of CTF legislation on the right to a fair trial.

5.2.2.3. Counter Terrorism Act 2008

In an effort to further strengthen counter terrorist provisions, the government implemented the Counter Terrorism Act 2008.¹¹⁸ This Act provides further powers in

¹¹³ HM Treasury *Second Report on the Operation of the Terrorist Asset Freezing Act 2010*, David Anderson Q.C, HM Treasury: London, 2012) at 12.

¹¹⁴ HM Treasury, *Third Report on the Operation of the Terrorist Asset Freezing Act 2010*, David Anderson Q.C, HM Treasury: London, 2013) at 12.

¹¹⁵ HM Treasury, *Third Report on the Operation of the Terrorist Asset Freezing Act 2010*, David Anderson Q.C, (HM Treasury: London, 2013) at 12.

¹¹⁶ HM Treasury, *Fourth Report on the Operation of the Terrorist Asset Freezing Etc. Act 2010*, David Anderson Q.C, 2015 at 13-14.

¹¹⁷ HM Treasury, *First Report on the Operation of the Terrorist Asset Freezing Etc Act 2010*, David Anderson Q.C, HM Treasury: London, 2011) at 5.

¹¹⁸ Hereafter CTA 2008. This Act gained royal assent on November 26 2008.

relation to CTF where HM Treasury believe that a country outside of the European Economic Area (EEA) poses a significant threat to the UK as a result of the risk of money laundering and terrorist financing. HM Treasury liaise with the Financial Action Task Force (FATF) on these matters and if a threat is thought to exist, Schedule 7 of the CTA 2008 enables HM Treasury to issue a direction to firms in the financial sector. A direction may be made where one or more of the conditions are met in relation to a non-EEA country. These are that the FATF or HM Treasury believes that there is a risk of money laundering or terrorist financing activities being carried out, in the country, by the government of the country or by persons resident or incorporated in the country and that this poses a significant risk to the national interests of the UK. The direction will impose obligations such as ongoing monitoring, systematic reporting, customer due diligence and limiting or ceasing business.¹¹⁹ This direction may only for one year unless it is renewed.¹²⁰ Part 6 of Schedule 7 provides for the use of civil sanctions by the relevant enforcement authority. These sanctions may be applied when a person fails to comply with the requirement imposed by the direction.

The powers provided by Schedule 7 CTA 2008 were utilised in October 2009 when HM Treasury issued a direction to the UK financial sector to cease dealings with two entities in Iran. These designated organisations were Bank Mellat and the Islamic Republic of Iran Shipping (IRISL). HM Treasury believed that the third condition,¹²¹ of this provision was satisfied and “that activity in Iran that facilitates the development or production of nuclear weapons poses a significant risk to the national interests of the United Kingdom”.¹²² Golby comments on the highly detrimental impact of this direction on Bank Mellat and IRISL, she argues, “it is certain that they have suffered and will continue to suffer considerable losses as a result of the direction, so long as it remains in place”.¹²³ Bank Mellat challenged this direction¹²⁴

¹¹⁹ Schedule 7, CTA 2008.

¹²⁰ These powers were used by HM Treasury in 2009 when a direction was made in respect of business relationships and transactions with Bank Mellat and Islamic Republic of Iran Shipping Lines. The direction forbids any business relationships with these two entities. Bank Mellat challenged HM Treasury with regard to this order in 2009 (*Bank Mellat v HM Treasury* [2010] EWHC 1332 (QB)).

¹²¹ S.1(4) Part 1, Schedule 7 CTA 2008.

¹²² Explanatory Memorandum to the Financial Restrictions (Iran) Order 2009, No. 2725 at para. 4.1

¹²³ Goldby, M. (2010), ‘The Impact of Schedule 7 of the Counter-Terrorism Act 2008 on Banks and their Customers’, *Journal of Money Laundering Control*, 13(4), 351-371 at 352.

¹²⁴ *Bank Mellat v HM Treasury* [2010] EWHC 1332 (QB).

and the Supreme Court concluded that the directions permitted by HM Treasury under Schedule 7 breached Article 6 of the European Convention of Human Rights and the rules of natural justice.¹²⁵ The outcome of this case is important to the notion that on challenging an asset freeze, an individual or entity should be entitled to learn the details of the case against him by virtue of Article 6 ECHR and thus is considered in further detail later on in the chapter. In order for an asset freeze to be implemented, there first needs to be a suspicion of terrorist involvement of an individual or entity. To this end, the regulated sector of the U.K. is charged with identifying any suspicious financial activity and reporting it to the National Crime Agency (NCA). This information can be crucial to any terrorist financing investigation that follows. It is to these Suspicious Activity Reports (SARs) which discussion now turns.

5.2.3. Reporting Requirements

The filing of SAR's is at the centre of the U.K.'s CTF three-pronged strategy along with the criminalisation of terrorist financing and the freezing of assets. Like its U.S. and Canadian counterparts, the U.K. government have put financial intelligence at the top of the agenda for countering terrorism and believe that starving terrorists of their funds will prevent terrorist acts. With this in mind financial transactions linked to terrorism need to be recognised promptly and investigated.¹²⁶ In order to achieve this, the regulated sector is charged with identifying suspicious transactions and reporting¹²⁷ them to the NCA.¹²⁸ This information is referred to as a Suspicious Activity Report (SAR) and it is the role of the U.K. Financial Intelligence Unit

¹²⁵ *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 38.

¹²⁶ The introduction of the Criminal Finances Bill looks set to improve the current situation as regards information sharing in the regulated sector. Clause 29 of this Bill provides for disclosure orders in association with investigations into terrorist financing offences. These orders allow the police to apply to the court for an order, which would compel an individual to answer questions and provide any information thought relevant to progressing a terrorist finance investigation. Ryder opines that this Bill "proposes to make a number of small but important changes to the UK's terrorist financing legislation" (Professor Nicholas Ryder, *The Criminal Finances Bill*, 14th November 2016. Crest Research. One such change is the power of the regulated sector to share information between themselves and thereby advancing investigations into terrorist financiers.

¹²⁷ Persons in the regulated sector are required under Part 7 of the Proceeds of Crime Act 2002 (POCA) and the Terrorism Act 2000 to submit a SAR in respect of information that comes to them in the course of their business if they know, or suspect or have reasonable grounds for knowing or suspecting, that a person is engaged in, or attempting, money laundering or terrorist financing.

¹²⁸ The NCA became operational in October 2013 and replaces the Serious Organised Crime Agency (SOCA). The NCA is at the centre of tackling major organised crime including drug and people trafficking, international fraud and cyber crime.

(UKFIU) within the NCA¹²⁹ to analyse such financial intelligence. The requirement for the submission of such reports is contained in the ATCSA 2001, which inserted s. 19 into the TA 2000 and created the offence of failure to disclose for the regulated sector.¹³⁰ A person commits an offence under this section if “he believes or suspects that another person has committed an offence under any of sections 15 to 18, and bases his belief or suspicion on information which comes to his attention, in the course of a trade, profession or business, or in the course of his employment (whether or not in the course of a trade, profession or business)”¹³¹ A person commits an offence if he fails to disclose his belief or suspicion, as soon as is reasonably practicable”.¹³²

Section 21ZA was inserted into the TA 2000¹³³ and allows people to undertake unlawful acts provided there is consent by an authorised officer and its aim is to facilitate the discovery of offences. The amendments also aim to protect shield disclosures after disclosures are made after entering into such arrangements. Section 21ZC provides a defence of reasonable excuse for not disclosing. An individual or organisation who suspects that an offence has been committed under the TA 2000 is required to complete a SAR, which is then sent via a Money Laundering Reporting Officer to the NCA for processing.¹³⁴ Lord Carlile, commented that, “there are concerns in the business sector about difficulties of compliance and the serious consequences that may flow from this”.¹³⁵ A 2003 study by KPMG highlighted a number of inadequacies with reporting requirements and made suggestions for reform.¹³⁶ Whist it was noted in the 2005 Lander Review that improvements had been

¹²⁹ This agency replaces the Serious Organised Crime Agency (SOCA) and was launched in October 2013 by virtue of the Crime and Courts Act 2013. It tackles serious and organised crime including fraud, cyber crime and terrorist financing.

¹³⁰ The Money Laundering Regulations 2007 define the ‘regulated sector’ to include, “(a) credit institutions; (b) financial institutions; (c) auditors, insolvency practitioners, external accountants and tax advisers; (d) independent legal professionals; (e) trust or company service providers; (f) estate agents; (g) high value dealers; (h) casinos” (Part 1.3 Money Laundering Regulations 2007, No. 2157).

¹³¹ S.19 Terrorism Act 2000 (as amended).

¹³² S. 19 (1A) (a) Terrorism Act 2000 (as amended).

¹³³ Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 SI 2007/3398.

¹³⁴ Section 7(1) of the Crime and Courts Act 2013 allows you to disclose information to the NCA, provided the disclosure is made for the purposes of discharging the NCA’s functions of combating serious, organised and other kinds of crime.

¹³⁵ Home Office above, n 106 at 19-20.

¹³⁶ KPMG, *Money Laundering: Review of the Reporting System* (London:KPMG, 2003), 14 at para. 2.3. 1.

made, Fleming argued that SARs “still remained under-utilised”.¹³⁷ In 2005 the Lander Review noted that “in 2005, just under 2,100 of the total SARs (1%) were judged by the FIU terrorism team to be of potential interest in a terrorist context, of which about 650 were passed on to the NTFIU for more detailed investigation. As is discussed in chapter four and chapter six, this situation is the same in the U.S. and Canada; only a small percentage of SARs actually prove useful to counter terrorism efforts. In the U.K, there was a slight peak of reports of interest following the events of 7 and 21 July 2005”.¹³⁸ This number has continued to rise steadily and in 2015 1,899 SARs were identified and disseminated to the NTFIU and CTU network for further investigation. According to the NCA, this growth is due to a general increase in SARs reported and “the refinement of the UKFIU’s identification of SARs of potential relevance to CT investigations”.¹³⁹ However, the effectiveness of the SAR’s regime has been called into question for being too costly and burdensome with limited results. Indeed, one of the major criticisms of the SAR’s regime is the lack of subsequent CTF convictions. For example over a 10 year period (up until March 2011) only 37 people were arrested and charged with terrorist fundraising offences, significantly, 34 of these occurred before April 2008 and there were no charges of this nature brought between April 2009 and March 2011.¹⁴⁰ Up until September 2015, and since 2001, only 62 persons have been charged under terrorism legislation with terrorist fundraising offences.¹⁴¹ Furthermore, Donohue claims that the SAR’s “now flood the systems making it difficult to separate the wheat from the chaff”.¹⁴² If this is the case, then the most crucial of SARs may be buried beyond insignificant ones.¹⁴³

¹³⁷ M.H. Fleming, *UK Law Enforcement Agency Use and Management of Suspicious Activity Reports: Towards Determining the Value of the Regime* (London: Home Office, 2005 at v).

¹³⁸ Serious Organised Crime Agency *Review of the Suspicious Activity Reports Regime* (London: Serious Organised Crime Agency 2006) at 13.

¹³⁹ National Crime Agency *Suspicious Activity Reports (SARs) Annual Report 2015* at 31.

¹⁴⁰ *The Terrorism Acts in 2011, Report of the Independent Reviewer on the operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, David Anderson Q.C, London: The Stationery Office, 2012 at 60.

¹⁴¹ Home Office Criminal Finances Bill Factsheet- Part 2- Terrorist Financing. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/564477/CF_Bill_-_Factsheet_8_-_Terrorist_Finance.pdf (accessed 15.12.16). However, HM Treasury claim that terrorist financing convictions are not indicative of the total number of instances of terrorist financing that have been exposed. They claim that suspects may have been charged with more serious crimes such as murder (Home Office UK national risk assessment of money laundering and terrorist financing, October 2015, HM Treasury at 89).

¹⁴² L.K. Donohue, *Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000* (Irish Academic Press 2001) 307.

¹⁴³ Indeed this was the case with a Currency Transaction Report (CTR) in relation to the financing of the September 11 2001 attacks in the U.S.

However, it is interesting to note that although the criticisms of the SAR regime in the U.K. are comparable to those in the U.S. the figures are vastly different. For example between October 2014 and September 2015, there were 381,882¹⁴⁴ SARs recorded in the U.K, whilst for 2015 the number of SARs filed in the U.S. was 916,709.¹⁴⁵ Such a remarkable number in the U.S. must make the ‘needle in the haystack’ argument even more pertinent than in the U.K where numbers are relatively low. However, it would seem that the number of SARs filed might be of no consequence when terrorist groups and activities can be sustained with small amounts of money.¹⁴⁶ Lennon and Walker opined that, “the monitoring and reporting of suspicious transactions in the traditional sector has also created significant bureaucratic costs with uncertain beneficial impacts in terms of the prevention of terrorism and crime”.¹⁴⁷ Such an argument is relevant in light of the fact that some terrorist attacks have only required very little sums of money.¹⁴⁸ Indeed, HM Treasury have observed that terror attacks carried out in the U.K. “have required minimal finance”.¹⁴⁹ An example of such cheap terrorism occurred on July 7th 2005 with bombings in London which cost between £100-£200.¹⁵⁰ Any financial transaction relating to funding of these terrorist attacks would have failed to alert any suspicion. The recent spate of terrorist attacks in Europe, as discussed in chapter three, further indicate how a terrorist attack can be carried out for a small amount of funds and can be executed by a single person or small cells operating autonomously. For instance, in 24 July 2016 Mohammed Daleel, detonated a rucksack of explosives outside a music festival in Ansbach, Germany.¹⁵¹ In December 2016, a truck was driven into a Christmas Market in Berlin killing 12

¹⁴⁴ National Crime Agency *Suspicious Activity Reports (SARs) Annual Report 2015* (National Crime Agency: London, 2015) at 6.

¹⁴⁵ FinCEN SAR Stats Technical Bulletin, October 2015. For the same period in Canada, Suspicious Transaction Reports filed amounted to 92, 531 (FINTRAC Annual Report 2016, at 4).

¹⁴⁶ The U.K. government claim that the 7/7 bombings in London could have cost as little as £8,000 including training and the purchase of materials. (House of Commons, *Report of the Official Account of the Bombings in London on 7th July 2005*. House of Commons, London, 2005 at 23).

¹⁴⁷ G Lennon & C Walker (2009) ‘Hot Money in a Cold Climate’ *Public Law*, Jan, 37-42.

¹⁴⁸ HM Treasury observe, “terrorist attacks in the UK have required minimal finance” (Home Office *UK national risk assessment of money laundering and terrorist financing*, October 2015 at 89).

¹⁴⁹ HM Treasury Terrorist Financing and Money Laundering Risk Assessment, 2015 at 89.

¹⁵⁰ J. Robinson, “Brown’s war just doesn’t add up: you can’t kill terrorists with a calculator”, *The Times*, February 14, 2006. Available at: www.timesonline.co.uk. However, it is important to note that the government claim that including training and the purchase of materials, this figure would be more like £8,000 (House of Commons, *Report of the Official Account of the Bombings in London on 7th July 2005*. House of Commons, London, 2005 at 23).

¹⁵¹ The Independent ‘Ansbach suicide bomber Mohammed Daleel ‘fought for Isis and al-Qaeda’ before coming to Germany’, 27 July 2016 <http://www.independent.co.uk/news/world/europe/ansbach-explosion-germany-isis-suicide-bomber-mohammed-daleel-al-qaeda-a7157961.html>. (accessed 13.03.17).

people and injuring 49.¹⁵² It appears that both attacks would have required little in the way of funds to organise and execute. Ryder refers to other examples of “cheap terrorism” such as the bombings in Madrid and Bali nightclub and argues that; “this is a practice which, I believe, makes it impossible for any government to legislate against”.¹⁵³ Despite such criticism, SOCA¹⁵⁴ has defended the worth of SARs. They state:

“although the numbers continue to be small in proportion to the total numbers of SARs, their value can be significant, as has been demonstrated in previous years in which major terrorist incidents have taken place. All UK counter-terrorism investigations have a financial aspect to them, and the UKFIU Terrorist Finance Team has continued to provide support to these over the year”.¹⁵⁵

The merits of the reporting requirements are debatable but a provision, which obliges financial institutions to look closely at individual’s transactions and to possibly report on such activity, may certainly have implications for human rights. As discussed, the two main aspects of the U.K’s CTF policy are comparable to the U.S. and Canada, the freezing of assets and reporting requirements. However, in line with these countries, U.K. legislation can have an adverse impact on human rights. The filing of a SAR is the first step in the CTF process, which can affect human rights. Following a SAR, if a designation and asset freeze is necessary, the right to property can be adversely affected as the suspect is deprived of his assets.¹⁵⁶ Ultimately, the right to a fair trial is

¹⁵² The Telegraph ‘Everything we know about Anis Amri, the suspected Berlin Christmas market attacker’, 23rd December 2016. Available at: <http://www.telegraph.co.uk/news/2016/12/20/everything-know-suspected-berlin-christmas-market-attacker/> (accessed 30.12.16).

¹⁵³ N Ryder, A false sense of security? An analysis of legislative approaches towards the prevention of terrorist finance in the United States and the United Kingdom [2007] *Journal of Business Law*, Nov, 821-850. David Anderson Q.C. remarked in his 2011 Report that “More recently, the importance of financial measures in reducing the incidence of terrorism has been less confidently asserted. This is partly because of evidence that potentially devastating atrocities can be planned at relatively low cost” (*The Terrorism Acts in 2011*, Report of the Independent Reviewer, David Anderson Q.C. at 61).

¹⁵⁴ SOCA were the former Financial Intelligence Unit.

¹⁵⁵ Serious Organised Crime Agency *The Suspicious Activity Reports Regime Annual Report 2009* (Serious Organised Crime Agency 2010, 17). Sir Stephen Lander further noted that “it would be a mistake to underestimate the importance of SARs to law enforcement” as there have been “some impressive results”. (Lander Review at 15).

¹⁵⁶ Article 1, Protocol 1 of the ECHR states that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”.

impacted on. This is a notion that shall now be discussed in detail in relation to the U.K.'s domestic and international human rights obligations.

5.3 The Impact of Counter Terrorist Finance Legislation on Human Rights Obligations

Whilst human rights have taken years to become firmly established in U.K. legislation, the combating of terrorism may put some of its main ingredients at risk.¹⁵⁷ Cole suggests that the fight against terrorism represents the human right's movement's "greatest test yet".¹⁵⁸ Binning claims that the U.K. along with the U.S. seized the opportunity provided by the events of September 11 2001 to "implement measures targeting a much wider range of criminal activity than terrorism".¹⁵⁹ Furthermore, Binning raises an excellent point with regard to CTF provisions, which were considerably strengthened following the terrorist attacks in the U.S. Whilst such action by the U.K. government was the fulfilment of a legal obligation,¹⁶⁰ it also demonstrated solidarity with the U.S. and illustrated to U.K. citizens that the government would do as much as possible to prevent a terrorist attack in the U.K. Whilst such an aim is commendable and seeks to protect the ultimate human right of the 'right to life', legislation has not been without costs to the public. These costs have centred on movements away from human rights provisions, thus weakening individual's rights. Nonetheless, the U.K. has constantly re-iterated its commitment to protecting human rights and in light of this has taken significant steps to ensure that human rights are an integral part of all implemented legislation. The U.K. was one of the first countries to sign up to the European Convention on Human Rights.¹⁶¹ This Convention sets out the rights that it seeks to protect and the European Court of

¹⁵⁷ In opposition to this, a recent appeal to the European Court shows that human rights obligations are still regarded as highly significant. Two IRA terrorists who were ordered to pay compensation to the families of victims of the Omagh bombing in August 1998 have recently applied to the European Court to have the civil case against them overturned. Their appeal centres upon the claim that their Article 6 ECHR right to a fair trial had been breached by the inclusion of hearsay evidence in the original trial. The decision to allow their appeal to European Court is a controversial one.

¹⁵⁸ D. Cole, Human Rights and the Challenge of Terror in Leonard Weinberg (eds), *Democratic Responses to Terrorism* (Routledge 2008) 157

¹⁵⁹ Binning suggests "in the U.S., as in the United Kingdom and Europe off-shore entities and individuals now have to operate under significantly more scrutiny...an example of this is section 315 of the Patriot Act which expands the list of foreign crimes now considered as specific unlawful activities" Binning, P. (2002) 'In safe hands? Striking the balance between privacy and security - anti-terrorist finance measures' *European Human Rights Law Review*, 6, 737-749 at 740.

¹⁶⁰ UNSCR 1373.

¹⁶¹ Hereafter ECHR.

Human Rights is charged with the guardianship of those rights. In order to ensure compliance with the ECHR, the U.K. brought in the HRA 1998. The human rights protections offered by the HRA 1998 are further bolstered by the U.K.'s signing of the ICCPR and the adoption of the UDHR. The HRA 1998 makes it unlawful for authorities to act in a way that is inconsistent with the ECHR. Ashworth rightly identifies the position of human rights within the hierarchy; he states "their official designation as human or fundamental rights in international and national constitutional documents identifies them as a kind of higher law, with a correspondingly greater claim to respect by citizens and government alike".¹⁶² Despite this standing within the law, the threat of terrorism has encouraged the U.K. government to jeopardize the commitments made in human rights treaties such as the European Convention.¹⁶³ It is the inclusion of 'opt-outs' or 'derogations' from certain rights that has provided the opportunity to water down individual rights and has led to significant controversy, which has been instigated by challenge of these derogations in the courts and shall be discussed in more detail later. In line with the U.S. and Canada, the application of CTF laws has led to great impact on the individual's right to a fair trial.¹⁶⁴ Indeed, Binning claims that such provisions as those found in the ATCSA 2001 illustrate that the U.K. government is willing to fight terrorism "at the expense of privacy, property rights and increased risk of discrimination".¹⁶⁵ This notion is a very significant idea and leads this discussion on to an analysis of the effect that combating terrorist financing in the U.K. can have upon human rights, in particular the right to a fair trial.

5.3.1 Right to a Fair Trial

The U.K. government have constantly re-iterated its commitment to international counter terrorism initiatives whilst promoting respect for individual rights. In the 'Legislation against terrorism' Consultation Paper, the UK government identified the

¹⁶² A Ashworth Security, Terrorism and the Value of human rights in in B Goold and L Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 204

¹⁶³ This is a view which is supported by D. Cole 'Human Rights and the Challenge of Terror in Leonard Weinberg (eds), *Democratic Responses to Terrorism* (Routledge 2008) 166

¹⁶⁴ For further commentary, see section 4.3.1, chapter 4 and section 6.3.1, chapter 6.

¹⁶⁵ Binning, P. (2002) 'In safe hands? Striking the balance between privacy and security - anti-terrorist finance measures *European Human Rights Law Review*, 6, 737-749

importance of achieving a reasonable and effective response to terrorism that took into account human rights.¹⁶⁶ They stated:

“The Government’s aim is to create legislation which is both effective and proportionate to the threat which the United Kingdom faces from all forms of terrorism- Irish, international and domestic- which is sufficiently flexible to respond to a changing threat, which ensures that individual rights are protected and which fulfils the United Kingdom’s international commitments”.¹⁶⁷

Despite such announcements, human rights have suffered due to the application of asset freezing provisions, in particular the right to a fair trial. With regard to CTF legislation, the right not to be arbitrarily deprived of one’s property without due process and the right to a fair trial are inextricably linked. As discussed, by freezing the assets of an individual on suspicion of involvement in terrorism, an individual’s right to property is directly impacted. In common with the U.S., the U.K. government have argued that on suspicion of involvement with terrorism, it is necessary to act immediately, freezing the assets of the suspected party. HM Treasury argue “the ability to make a freeze pre-emptively, often in tandem or shortly after police arrests (which are also made on a ‘reasonable suspicion’ basis), has been valuable in responding to an emerging terrorist threat”.¹⁶⁸ For example, Operation Overt included the freezing of assets of 19 suspects arrested on suspicion of involvement in a plot to detonate explosives on transatlantic airliners.¹⁶⁹ HM Treasury note that the majority of these suspects who had their assets frozen were subsequently charged and convicted of terrorism offences. This powerful freezing order may be implemented and remain in action without the opportunity of a right to be heard in a court of law.¹⁷⁰ This effectively means that a person is denied access to their funds without learning the details of the case that has been mounted against them. Such a situation potentially

¹⁶⁶ *Inquiry into Legislation Against Terrorism*, by the Rt. Hon. Lord Lloyd of Berwick. October 1996 Cm.3420 at 1.

¹⁶⁷ *Ibid* at 1, Introduction.

¹⁶⁸ House of Lords House of Commons, Joint Committee on Human Rights, *Legislative Scrutiny: Terrorist Asset- Freezing etc. Bill (Preliminary Report)*, Third Report of Session 2010-11 at 29

¹⁶⁹ The head of the terrorist plot, Abdulla Ahmed Ali, had planned to target seven transatlantic airliners with a co-ordinated strike by suicide bombers. The following men were convicted: Abdulla Ahmed Ali, Tanvir Hussain, Assad Sarwar, After retrials, Umar Islam, Arafat Waheed Khan, Waheed Zaman and Ibrahim Savant were also convicted (*BBC News Profiles: Operation Overt* 8 July 2010 (accessed 03.11.14)).

¹⁷⁰ S.2 TAFE 2010.

violates Article 6 of The Convention, which states “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal”.¹⁷¹ Whilst the purpose of this right is clear, it is uncertain whether the freezing of assets constitutes a ‘criminal charge’. It may be argued that being labelled as a person connected with terrorism deems them guilty and cancels out the presumption of innocence. Furthermore, the imposition of an asset freeze effectively punishes that person for their suspected involvement in terrorism.¹⁷² Whilst no criminal charge has been made at this point, severe consequences can ensue for the designee and their family. Despite this, HM Treasury,¹⁷³ along with the Financial Action Task Force,¹⁷⁴ and the UN Sanctions Committee¹⁷⁵ claim that asset freezing regimes are necessary and are meant to be preventative not punitive. Conversely, Anderson highlighted that the powers do not appear to be merely preventative but are sometimes punitive in their effect. The Court of Appeal shared its view on this matter in *Secretary of State for the Foreign and Commonwealth Office v Maftah and Khaled*.¹⁷⁶ Here, Sedley LJ opined:

“... the nature and purpose of freezing orders can themselves be legitimately described as both a step in the international struggle to contain terrorism and as a targeted assault by the state on an individual’s privacy, reputation and property”.¹⁷⁷

¹⁷¹ Article 6.1, ECHR.

¹⁷² Fenwick et al agree with such a notion arguing that asset freezing creates “effects equivalent to punishments for criminal offences” (A Tomkins, H Fenwick and L Lazurus ‘Terrorist asset-freezing-Continuing flaws in the current scheme’, *International Review of Law, Computers & Technology*, vol. 25, No. 3, November 2011, 117-128 at 127).

¹⁷³ HM Treasury Draft terrorist asset-freezing bill: summary of responses, HM Treasury: London, 2010, Cm 7888 at 9.

¹⁷⁴ The FATF regards asset freezing and seizure as “necessary to deprive terrorists and terrorist networks of the means to conduct future terrorist activity and maintain their infrastructure and operations” (*FATF IX Special Recommendations*, Interpretative Note to Special Recommendation III, para 2).

¹⁷⁵ The UN Sanctions Committee explained the preventative nature of asset freezing, they state: “The purpose of the assets freeze is to deny listed individuals, groups, undertakings and entities the means to support terrorism. To achieve this it seeks to ensure that no funds, financial assets or economic resources of any kind are available to them for so long as they remain subject to the sanctions measures”. (UN Security Council Sanctions Committee, Asset Freeze: explanation of terms, www.un.org).

¹⁷⁶ [2011] EWCA Civ 350

¹⁷⁷ *Secretary of State for the Foreign and Commonwealth Office v Maftah and Khaled* [2011] EWCA Civ 350, at paragraph 26.

Notwithstanding this, the EU General Court upheld the preventative nature of asset freezes and held in *El Morabit v. Council*¹⁷⁸ that the presumption of innocence does not prevent the imposition of a precautionary measure, such as asset freezing, because such action does not constitute a criminal sanction and does not involve a decision of guilt.¹⁷⁹ Despite the economic hardship connected with designation and the freezing of assets, it is a temporary measure, which is regularly re-assessed by HM Treasury. On examining the idea that asset freezing can be considered a criminal charge, Van den Broek *et al.* concluded that “while not impossible, it is very unlikely that asset freezing will be qualified as a criminal charge. The most important hurdle appears to be the punitive character of asset freezing. Judged by the criteria developed in the case law of the ECtHR it is likely that asset freezing, like confiscation, will be qualified as a preventive measure, and is therefore not seen as a criminal charge”.¹⁸⁰ This implies that despite its penalising nature, asset freezing is not a criminal charge for the purposes of Article 6, ECHR the authorities are not violating human rights. However, it does have all the hallmarks of a criminal charge and it purports to restrict certain financial activity whilst further investigations are underway. Usually action such as this could not be taken until after a charge has been made or indeed a person has been convicted of a crime. Whilst it may be necessary to freeze a person’s assets during an investigation, it does not alter the fact that a designation and imposition of a freezing order is punitive and can have an “oppressive and disheartening” impact on the designee.¹⁸¹ Thus, a person may be punished for something which they are later found to be innocent of or may even just be de-designated without ever learning the full details of the executive’s suspicion.

Further to this, Article 6.3, ECHR, provides that, everyone charged with a criminal offence has the right “to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”.¹⁸² It is suggested here that while asset freezing does not amount to a criminal charge, the right to be made aware of the allegation against a person is an essential component of procedural

¹⁷⁸ [2009] joined cases T-37/07 and T-323/07.

¹⁷⁹ *El Morabit v Council* Ibid at para. 43.

¹⁸⁰ M van den Broek, M Hazelhorst and W de Zanger, Asset Freezing: Smart Sanction or Criminal Charge? *Merkourios, Utrecht Journal of International and European Law*, Vol 27, Issue 72, 18-27 at 27.

¹⁸¹ HM Treasury *Fourth Report on the Operation of the Terrorist Asset Freezing Act Etc. 2010*, March 2015, David Anderson Q.C. at 30.

¹⁸² Article 6.3(a) ECHR

fairness and the rule of law. On designation, an individual is not made privy to the evidence that prompted the suspicion meaning an opportunity to effectively challenge a listing is denied. If a designee does not know the reason behind action taken by HM Treasury, then they will find it almost impossible to offer a defence. This situation, it is suggested, results in a breach of Article 6.2 ECHR. However, in *Gulam Mastafa v HM Treasury*,¹⁸³ the court held that Article 6 ECHR must also apply to proceedings under TFA 2010. This implies that there should be an irreducible minimum of disclosure to the appellant so they can achieve a fair hearing.¹⁸⁴ Armed with at least a minimal amount of information, the individual concerned has some scope to mount a defence. Such an amendment to the operation of asset freezing orders means that the procedure is more open and fair and conforms better to Article 6 ECHR and the rule of law. By complying better with rights under the Human Rights Act and the ECHR, the possibility of legal challenges to the asset freezing regime by designated persons is reduced.

The use of coercive provisions such as these is comparable to the control order regime, which has been heavily criticised for its contravention of human rights. The Prevention of Terrorism Act 2005 provides for the imposition of control orders on individuals who are suspected of being involved in terrorism and therefore represent a threat to public safety. A discussion of these orders is pertinent as it illustrates how the operation of counter terrorism measures in the U.K. can be incompatible with human rights. The PTA 2005 provided for the imposition of two types of control orders, derogating and non-derogating. Under s.1, PTA 2005, a derogating control order calls for a derogation from Article 5 ECHR, as the suspect's liberty may be restricted. This control order imposes obligations on the person concerned which are wide and can include, for example; a restriction on the use of specified articles or substances¹⁸⁵, a restriction in respect of his/her work or occupation¹⁸⁶ or even a restriction on his/her association with specified persons or persons in general.¹⁸⁷ However, this type of control order has never been issued; instead the government have relied upon non-derogating control orders legislated for by s.2 PTA 2005. This

¹⁸³ [2012] EWHC 3578. Departing from an earlier judgement in *R (Bhutta) v HM Treasury* [2011] EWHC 1789 (Admin), Mitting J.

¹⁸⁴ This is the requirement in relation to control orders and TPIM's also.

¹⁸⁵ S. 1 (4)(a) PTA 2005.

¹⁸⁶ S. 1(4)(c) PTA 2005.

¹⁸⁷ S. 1(4)(d) PTA 2005.

provision is less complex as it does not involve derogation from the ECHR. However, this is not to say that the implementation of non-derogating control orders has not had severe consequences for human rights. The use of control orders has attracted considerable judicial scrutiny with claims that the situation for the individual concerned amounts to ‘house arrest’. There have also been challenges relating to the length of curfews applied and even more significantly here, criticism relating to the use of secret evidence. For example, evidence, which seeks to justify the need for a control order, is frequently not disclosed to the controlled person, as the government does not wish the intelligence to become public knowledge, a situation akin to asset freezing. The use of powers such as the implementation of control orders has threatened the U.K.’s compliance with international obligations. However, unlike the U.S., the U.K has not escaped successful legal challenge and have been openly criticised for their approach to combating terrorist financing. Their actions in this area have certainly brought the importance of adherence to human rights obligations to the forefront as not doing so has led to declarations of incompatibility in the area of counter terrorism and major recommendations for change. Significantly, the control order regime has now been replaced by Terrorist Prevention and Investigation Measures (TPIMs) by virtue of the Terrorism Prevention and Investigation Measures Act 2011. This system has also been heavily criticised by human rights groups. TPIMs are similar to control orders and can be put into effect by the Home Secretary where he/she “reasonably believes” that an individual is involved in terrorist related activities. This measure is used to safeguard the public from a person who is considered dangerous. Those subjected to a TPIM have restrictions placed on travel, movement, association, communication, finances, work and study. Whilst very few TPIMs are actually in operation,¹⁸⁸ their interference with human rights is of huge concern. In line with designation as a terror suspect and freezing orders, as LIBERTY suggest, TPIMs operate outside the criminal justice system and do not require investigation, arrest, charge and conviction¹⁸⁹ before they are applied. Like CTF legislation, this counter terrorist law permits extensive interference with a number of human rights such as the right to a fair trial with little consideration for due process.

¹⁸⁸ As at October 2016, there were 6 TPIM notices in force. Memorandum to the Home Affairs Committee Post-Legislative Scrutiny of the Terrorism Prevention and Investigation Measures Act 2011, October 2016 Cm9348.

¹⁸⁹ ‘*Unsafe, Unfair*’, Liberty80. Available at: <https://www.liberty-human-rights.org.uk/campaigning/other-campaigns/unsafe-unfair>.

Indeed it is suggested that control orders have merely been rebranded, Ryder asserts, “criminal due process and open justice is set aside in favour of suspicion, security service “assessment” and secret hearings. The new provisions leave this feature of control orders largely untouched”.¹⁹⁰ However, whereas control orders were brought in as temporary measures, TPIMs are a permanent feature of counter terrorism legislation. LIBERTY comments that this move represents the normalisation of preventative administrative detention.¹⁹¹ These preventative measures actually penalise those individuals they are applied to before any semblance of guilt has been established.

Whilst the right to liberty may be legitimately derogated from in order to affect a control order, a person’s right to a fair trial is an absolute right. An absolute right does not permit derogations and promises that there can be no limitations placed upon it. In conflict with this, the U.K. government have been allowing control orders and now TPIMs and the freezing of assets without providing the person accused with a right to be heard. The government have upheld the taking of such action as necessary for the prevention of terrorism. They have supported this argument with the suggestion that asset freezing frequently leads to terrorist related charges. HM Treasury contends: “asset freezing does not necessarily or even mainly involve...individuals who are never prosecuted before a Court. On the contrary, the vast majority of cases involve individuals who are charged and prosecuted with terrorist offences”.¹⁹² However, it is evident that some designations have actually lapsed due to failure to satisfy the threshold for renewal or designation.¹⁹³ This implies that a designation and asset freeze is permitted to continue even when no involvement in terrorism has been proven. It is proposed that by allowing an asset freeze to continue without the opportunity to be heard in a court of law could be in direct violation of Article 6 ECHR and runs contrary to other international treaties. A highly significant case in

¹⁹⁰ Ryder, M ‘Control Orders have been rebranded. Big problems remain,’ 28 Jan 2011, www.guardian.co.uk, accessed 03.02.12.

¹⁹¹ Liberty and JUSTICE Report Stage Briefing on the Terrorist Prevention and Investigation Measures Bill in the House of Commons, August 2011.

¹⁹² HM Treasury Public Consultation: draft terrorist asset-freezing bill (March 2010) Cm 7852 at para. 4.39. The Treasury support this contention with the following figures in relation to designation: “Of the 51 cases, only seven were not the subject of parallel law enforcement action”. (Ibid).

¹⁹³ HM Treasury, *First Report on the Operation of the Terrorist Asset Freezing Etc Act 2010*, David Anderson Q.C., HM Treasury: London, 2011) at 36.

this area is *HM Treasury v Ahmed and Others (FC)*.¹⁹⁴ The applicants in this case challenged asset freezing orders at Supreme Court where the judges found that HM Treasury had exceeded its powers by imposing orders, which interfered “profoundly with the individual’s fundamental rights without parliamentary scrutiny”.¹⁹⁵ The asset freezing procedure lacked procedural fairness for designated individuals by denying them the opportunity to be heard in a court of law or indeed to discover the evidence that had been mounted against them. The asset freezing orders were based purely upon executive suspicion and as Lord Hope opined “lie wholly outside the scope of Parliamentary scrutiny”.¹⁹⁶ For the U.K. government and its pronounced commitment to the protection of human rights in the prevention of terrorism, the decision in this case was fundamental. In response to this, the government re-iterated its commitments to national security, human rights and UN obligations and promised an “effective, proportionate and fair terrorist asset freezing regime”.¹⁹⁷ Their replacement for the criticised legislation came in The Terrorist Asset Freezing Act 2010.¹⁹⁸

However, criticisms can also be made of this legislation. For instance it may be suggested that the appeals mechanism under section 26, TAFE 2010 is flawed, as it does not guarantee procedural fairness. The right to a fair trial encompasses a person’s right to know the case against them in order to properly challenge that case. In both civil and criminal cases, the matter of basic fairness is essential. To this end, all parties are usually permitted to access the evidence of the other parties ensuring that full disclosure is achieved. However, since 1997 closed material procedures (CMP’s) have been available in cases, which involve sensitive intelligence material.¹⁹⁹ The defendant and his lawyer are not permitted attend the proceedings; instead his interests are represented by a special advocate.²⁰⁰

¹⁹⁴ [2010] UKSC 2.

¹⁹⁵ *HM Treasury v Ahmed and Others (FC)* [2010] UKSC 2.

¹⁹⁶ *HM Treasury v Ahmed and Others (FC)* [2010] UKSC 2.

¹⁹⁷ HM Treasury, *The Terrorist Asset-Freezing Bill*, HM Treasury: London, 2010.

¹⁹⁸ This Act received royal assent on 16 December 2010.

¹⁹⁹ The Special Advocate system was set up under the Special Immigration Appeals Commission Act 1997.

²⁰⁰ The use of special advocates was introduced following the case of *Chahal v U.K.* 23 EHRR 413.

Part 79 of the Civil Procedure Rules (CPR),²⁰¹ provides for the use of closed evidence and special advocates in financial restrictions proceedings. The government has argued strongly that due to national security concerns, information derived from confidential sources cannot be disclosed to a designated person and thus the use of closed material and special advocates is necessary. Special advocates²⁰² are usually specially appointed lawyers who are charged with representing the interests of a person who is excluded from a hearing or is not privy to the closed evidence. This system is hugely controversial.²⁰³ The Court of Appeal in *Secretary of State for Home Department v MB* held that the appointment of a special advocate allows the defendant to achieve a fair trial.²⁰⁴ However, in the government's Justice and Security Green Paper (2011), serving special advocates noted that CMPs "have not proved that they are capable of delivering procedural fairness".²⁰⁵ This in part may be due to the fact that the suspect is unlikely to learn what the case is against him. Lord Chief Justice Woolf opined that, "the use of an SAA is...never a panacea for the grave disadvantages of a person not being aware of the case against him".²⁰⁶ Indeed, Fenwick *et al* suggest that this system is flawed due to three critical issues.²⁰⁷ Firstly, it can prove impossible for a special advocate to mount a thorough defence if the HM Treasury denies them full disclosure of closed evidence.²⁰⁸ Secondly, special advocates may lack the resources to uncover evidence that could disprove any classified material. Thirdly, Fenwick *et al* suggest that the restrictions placed upon communication between the designee and their special advocate has a profound impact upon their effectiveness. Such an issue was challenged in *A. and Others v the*

²⁰¹ Part 79- Proceedings under the Counter –Terrorism Act 2008. Available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part79>.

²⁰² The appointment of Special advocates came as a result of the decision of the ECHR in *Chahal v United Kingdom* (1996) 23 EHRR.

²⁰³ However, Kenneth Clarke defends the use of CMP's stating "the Government has never claimed that Closed Material Procedures are ideal, but in very difficult and exceptional circumstances where national security is at stake, they offer a means to deliver justice where otherwise there would be none". (HM Government Response to the Joint Committee on Human Rights Fourth Report of Session 2012-13: Legislative Scrutiny: Justice and Security Bill, cm 8533 at 3).

²⁰⁴ [2006] EWCA Civ 1140.

²⁰⁵ Justice and Green Paper- Response to consultation from Special Advocates, 16 December 2011, at 2.

²⁰⁶ *R (Roberts) v Parole Board* [2005] UKHL 45 at para. 60.

²⁰⁷ A Tomkins, H Fenwick and L Lazurus 'Terrorist asset-freezing- Continuing flaws in the current scheme', *International Review of Law, Computers & Technology*, vol. 25, No. 3, November 2011, 117-128 at 122.

²⁰⁸ During the passage of TAFE 2010, it was suggested that a 'gisting' clause be included which implies that that the designee could be informed of the 'gist' of the case against them. This suggestion however was not acted upon.

United Kingdom,²⁰⁹ where the court considered whether the execution of control orders breached individual's right to a fair hearing pursuant to Article 6(1) ECHR. The ECtHR unanimously found that the use of closed hearings and special advocates in relation to Part 4 of the ATCSA 2001 denies individuals the opportunity to effectively challenge the charges against them. Indeed in cases concerning control orders, the House of Lords clearly stated in *Secretary of State for the Home Department v.A.F.*²¹⁰ that in order for an individual to experience a fair trial they must be armed with sufficient information of the allegations against them. Such a principle also applies to asset freezes. In *Bank Mellat v HM Treasury*,²¹¹ the Court of Appeal applied the decision in *Secretary of State for the Home Department v.A.F.*, noting that a party subjected to an asset freeze "must be given sufficient information to enable it actually to refute, in so far as that is possible, the case made out against it."²¹² With this principle in mind, it is proposed that the effect of a control order on a person can be likened to the impact of an asset freezing order. Whilst on the surface these preventative measures may appear insubstantial, their operation does in fact have serious consequences for the right to a fair trial. Whilst the necessity to protect sensitive intelligence information is clear, the ability for an individual to effectively defend themselves from allegations of terrorism is also essential. Successfully challenging an allegation of terrorism and consequent asset freeze will be almost impossible if a person is kept in ignorance of the case against them.

So, whilst it is preferable to have a dedicated appeals mechanism rather than only provision for judicial review (as was included in the draft Bill), flaws continue to exist. A full right of appeal against an asset freeze may "ensure that the judicial scrutiny process of asset freezing decisions is, and is seen to be, properly robust and rigorous",²¹³ but the original decision to take action is still taken by the executive and this action remains practically unchecked. This fact along with the use of secret evidence and CMP's implies that the achievement of procedural fairness is in jeopardy. It is contended that the use of closed evidence limits the potential success of an appeal. If the evidence which the designated party or indeed their special advocate

²⁰⁹ [2009] 49 EHRR 29.

²¹⁰ (No.3) [2010] 2 AC 269.

²¹¹ [2010] EWCA Civ 483, para 21.

²¹² *Bank Mellat v HM Treasury* [2010] EWCA Civ 483, para 21

²¹³ House of Lords House of Commons, Joint Committee on Human Rights, Legislative Scrutiny: Terrorist Asset- Freezing etc. Bill (Preliminary Report), Third Report of Session 2010-11 at 11

has access to is restricted, then their ability to counter argue and to cross examine witnesses is also restricted. This part of the asset freezing appeals procedure differs from that which has been adopted in Canada. Canada has adopted broader powers with which to compel the authorities to disclose classified material.²¹⁴ Clubb contends that the defects found in the asset freezing regime following *Ahmed* are remedied with the implementation of TAFE, ensuring that “exceptional measures have exceptional safeguards”.²¹⁵ However, whilst this is true and many improvements have been made, there is opportunity for further amendment. For example, the annual review of designations is a highly important proviso as it ensures that any implications for human rights such as the right to a fair trial are brought to the attention of the government but human rights intrusion should be limited to begin with. Following an examination of some of the provisions of TAFE 2010, it would appear that this legislation offers little improvement on its predecessor in terms of impact upon human rights. The executive can still designate an individual as a suspected terrorist in the absence of any trial or indeed any criminal charge being brought. Evidence, which leads to belief of terrorist involvement, are still largely based on classified material, which is not disclosed to the designee. As Sedley LJ opined in *Ahmed*, this regime can make designated individuals “effectively, prisoners of the state”.²¹⁶ Whilst a designation under the TAFE 2010 is now based on “reasonable belief” rather than “reasonable suspicion”, it is contended that the satisfaction of this test is not sufficient to warrant the application of a powerful freezing order.²¹⁷ Human rights groups Liberty and JUSTICE note the value of imposing asset freezing orders to the CTF strategy but they suggest that an order cannot be permitted to continue when no criminal trial ensues.²¹⁸ They quite correctly highlight, that the “reasonable belief” element is left untested whilst the damaging asset freezing order is in operation. The use of interim designations is a welcome addition to the asset freezing regime but it does not ensure that the evidence is examined in a fair and open procedure. A

²¹⁴ For further commentary, see chapter 6.

²¹⁵ K Clubb *The Terrorist Asset Freezing etc Act 2010: Harassing proportionality to secure prevention without punishment*, [2014] *Covert Policing, Terrorism and Intelligence Law Review*, Issue 1, 32-51 at 51

²¹⁶ *A & Others V HM Treasury* [2008] EWCA Civ 1187 at para 125.

²¹⁷ *Terrorist Asset Freezing Bill*, Memorandum issued by Liberty and JUSTICE (TA 01). Session 2010-11. Available at: <http://www.publications.parliament.uk/pa/cm201011/cmpublic/terroristass/memo/ta01.htm>

²¹⁸ Liberty and JUSTICE Report Stage Briefing on the Terror Asset-Freezing Etc Bill in the House of Commons, December 2010.

designated person is guilty of terrorist involvement until proven innocent, a situation that could be regarded as in violation of Article 6.2 ECHR. Significantly however, the operation of an asset freezing order is claimed to be merely preventative and thus does not amount to a criminal charge pursuant to Article 6 ECHR. It is suggested here, that the punitive impact of asset freezing enforces the necessity for adequate safeguards and the opportunity for individuals to effectively challenge an order.

Alongside powerful measures to counter the financing of terrorism, the U.K. government, like the U.S., have the power to derogate from certain human rights in circumstances where a threat to national security requires it. It is to this subject that this chapter now turns.

5.4 Derogation from human rights

In order to avoid condemnation for weakening certain human rights, the U.K. government can rely on the power provided by The Convention and the HRA 1998 to justify such a move. This power provides the capacity to derogate or ‘opt-out’ of specific human rights, which are provided by The Convention and the HRA 1998. However it is essential to note that this power may only be applied where certain circumstances exist. Article 15 of The Convention states:

“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”.

Thus, derogation may be made away from certain human rights where it is thought that the current situation in the U.K is such that the need to act and bring in legislation outweighs the importance of guaranteeing a person’s human rights. However, such derogation should not be made lightly and it is required that: the government must establish the existence of a public emergency threatening the life of the nation, the ‘public emergency’ must be officially proclaimed, the measures taken which derogate from certain human rights must only be to the extent strictly required by the

exigencies of the situation and action taken must not be inconsistent or discriminatory to other international legal obligations. These strict requirements are meant to ensure that any derogation made may be deemed legal. However despite the existence of such safeguards, errors may still be made, as the test for assessing the validity of derogation is an objective one. The requirements for derogation rely heavily upon the principle of proportionality and involve weighing the impact of the loss of the full scope of human rights against the need to put measures in place to counter terrorism and terrorist financing. The U.K. government have called upon powers of derogation in the past and in some instances problems have ensued regarding the legality of their actions. For example, the U.K. government derogated from the right to liberty under Article 5 ECHR when it enacted Part IV of the Anti-Terrorism, Crime and Security Act 2001, which authorised the indefinite detention of foreign national terrorism suspects. They did so based on the premise that there was a ‘public emergency threatening the life of the nation’. An example of the problems caused by such derogation came in the aforementioned case of *A (FC) and Others (FC) v Secretary of State for the Home Department*.²¹⁹ Shah rightly identifies that this case is “one of great constitutional importance”²²⁰ which concerned the indefinite detention of foreign prisoners without trial at Belmarsh Prison under s. 23 ATCSA 2001. On presentation to the House of Lords, two primary areas were examined; whether the derogation was legal and whether the fact that the provision only applied to foreign nationals was discriminatory and contrary to article 14 taken with article 5. As regards the legality of the derogation, the House of Lords considered the government’s claim that there existed a “public emergency threatening the life of the nation”.²²¹ Whilst deciding the case, Lord Walker gave his opinion that this action was “proportionate, rational and non-discriminatory”²²² based on the premise that there existed a public emergency threatening the life of the nation. Lord Hoffman disagreed with such a notion claiming that “a power of detention confined to foreigners is irrational and discriminatory” and he was of the belief that conditions for the test of derogation had not been met, that is, there was not a threat to the life of the nation so no derogation could lawfully be made. They consequently failed to agree that Article 15 had been

²¹⁹ (2004) UKHL 56

²²⁰ S Shah ‘The U.K’s anti-terror legislation and the House of Lord’s: the first skirmish, *H.R.L Rev.* 2005, 5(2), 403-421

²²¹ *A (FC) and Others (FC) v Secretary of State for the Home Department* (2004) UKHL 56 at paragraph 16.

²²² *Ibid* at paragraph 209.

fulfilled and the response was proportionate to the threat, “to the extent strictly required by the exigencies of the situation”.²²³ This finding was supported by the conclusion that the House of Lords could find no good reason for the difference in treatment of foreign and British nationals. Indeed, the Law Lords highlighted that some terrorist suspects are British, a point which was proven correct after the London bombings in 2005. Donohue notes that, “the Law Lords ruled that this provision exploited an impermissible double standard”.²²⁴ Thus, the derogation carried out in this instance was quashed and the detention regime under the ATCSA 2001 was deemed to be incompatible with Articles 5 and 14 of the HRA 1998.

The ability to derogate is a highly controversial power particularly due to the fact that it has seemingly become a long term solution to countering terrorism and terrorist financing. Whilst derogation may only be permitted where the exigencies of the circumstances require, case law detailed here illustrates that the power to derogate from human rights can be used imprudently. It is suggested here that examples such as these, damage the reputation of the U.K. legal system and call into question the dedication expressed by the U.K. government to the protection of human rights. Zedner supports such an observation stating, “Janus-faced, the government simultaneously declares itself publicly committed to the human rights agenda and, in the name of security, good order and public safety, shows itself only too willing to undermine, evade and even formally derogate from the provisions of ECHR”.²²⁵ Such a statement is in stark contrast to the HM Treasury’s claim that their approach to countering terrorist financing would be “proportionate, so that the benefits of intervention outweigh the costs”.²²⁶ Furthermore, they have declared that the rights of individuals would be protected and that any measures taken would be consistent with the U.K.’s international commitments.²²⁷ The imposition of counter terrorism

²²³ *A (FC) and Others (FC) v Secretary of State for the Home Department* (2004) UKHL 56 at para 68.

²²⁴ Donohue, L.K. Anti-terrorism Legislation: Civil Liberty and Judicial Alteration in Leonard Weinberg (eds), *Democratic Responses to Terrorism* (Routledge 2008) 103.

²²⁵ L Zedner, Seeking Security by Eroding Rights: The Side-Stepping of Due Process, in Leonard Weinberg (eds), *Democratic Responses to Terrorism* (Routledge 2008) 267.

²²⁶ HM Treasury ‘*The financial challenge to crime and terrorism*’, HM Treasury: London, 2007 at 3

²²⁷ Cabinet Office, *The UK and the Campaign against international terrorism*, Cabinet Office: London, 2002 at 15.

measures especially those which have involved derogation from particular human rights has had an adverse impact and left the government open to legal challenge.²²⁸

5.5 Conclusion

The U.K. has implemented controversial measures to strengthen its ability to starve terrorists of their funds. However, in common with Canada, the U.K. have repeated previous counter terrorism mistakes and allowed the application of CTF provisions, which lack appropriate procedural safeguards. Whilst, there is no doubt that considering the terrorist threat that the U.K. faces, exceptional measures are necessary, Ashworth rightly identifies that “exceptional powers require exceptional safeguards”.²²⁹ The success of measures taken to combat the funding of terrorism in the U.K. may be impossible to quantify but the harmful consequences of their enforcement on individuals has been clearly illustrated. Many human rights protected by the ECHR have been sidelined in order to allow for the effective application of CTF measures, not least the right to a fair trial. It has been shown here that individuals can and have been designated as connected with terrorism and have had their assets frozen for a significant period of time without ever being convicted or indeed charged with a crime. This situation is made worse by the fact that avenues for appeal are lacking in procedural fairness. Whilst some suspension of human rights is acceptable, the parameters of limitation on rights need to be strictly defined. Furthermore, these limitations on human rights, such as a right to a fair trial, should only be temporary and should not be incorporated into permanent legislation. When the suspension of human rights becomes normalised, it is difficult to argue that the measures taken are necessary and proportionate to the negative impact felt by citizens. If action taken is not considered proportionate and is in violation of the right to a fair trial, then the legality of CTF measures is also in question. Whilst the U.K. government have made positive amendments to the CTF regime following previous successful legal challenges, there is still scope for improvement. For instance, the implementation of a minimum evidentiary threshold before designation, including

²²⁸ Whittaker argues that long term derogations have had a “corrosive effect on the culture of respect for human rights,” D.J. Whittaker *Counter-Terrorism and Human Rights*, (Pearson Education 2009) 66).

²²⁹ HM Treasury, *First Report on the Operation of the Terrorist Asset Freezing Etc Act 2010*, David Anderson Q.C., HM Treasury: London, 2011) at 5.

interim designations are issued would ensure that harsh sanctions are not imposed based on broad speculation. Such suggestions for improvement are discussed in further detail in chapter seven. It is paramount that human rights are not breached needlessly and even more important that procedural justice is enforced. If human rights such as the right to a fair trial continue to be weakened, then the integrity of the U.K. legal system is in jeopardy. Such a point is considered in the next chapter, which discusses the impact of the CTF regime on the right to trial, by jury in Canada.