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Case No: PTA 13, 14, 15, 17 & 19/2007

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 April 2008

**Before**:
# Mr Justice Collins
**Between:**

| | |
|---|---|
| **A, K, M, Q & G** | Applicants |
| **- and -** | |
| **H.M. Treasury** | Respondent |

**Mr Tim Owen, Q.C. & Mr Dan Squires** (instructed by Birnberg Peirce) for the Applicants, A, K & M & (instructed by Public Law Solicitors) for the Applicant Q
**Mr Rabinder Singh, Q.C. & Mr Richard Hermer** (instructed by Tuckers) for the Applicant G
**Mr Jonathan Crow, Q.C. & Mr Andrew O'Connor** (instructed by the Treasury Solicitor) for the Respondent

Hearing dates: 8 & 9 April 2008

## Judgment Approved by the court for handing down (subject to editorial corrections)

**Mr Justice COLLINS :**

1. All five applicants have been subjected to freezing orders over their assets in accordance with the Terrorism ( United Nations Measures) Order 2006 (2006 No.2657) (the TO). In G's case, there is also an order against him by virtue of the Al-Qaida and Taliban (United Nations Measures) Order 2006 (2006 No. 2952) (the AQO). Each order contains a provision (Article 5(4)) whereby ;-

> "The High Court … may set aside a direction on the application of –
>
> (a) the person identified in the direction, or
>
> (b) any other person affected by the direction."

The applications before me are made under those Articles. However, as will become apparent, in G's case he cannot rely on Article 5(4) of the AQO and so his application will have to be changed to a claim for judicial review of the direction made against him. Although this was not raised in the course of the hearing, Mr Crow, Q.C. did not seek to contend that G should not have any remedy if there was one available simply because he had relied on Article 5(4). Accordingly, I propose to treat the application as if it were a claim for judicial review, grant permission, dispense with all requirements of CPR 54 and reach a decision on the merits of the claim.

2. The hearing before me resulted from an order I made by consent setting out a number of preliminary issues which should be determined. These are:-

> "Schedule of Issues for Preliminary Determination
>
> A. *Under the Terrorism (United Nations Measures) Order 2006*
>
> 1. Is the Order ultra vires the United Nations Act 1946 and/or incompatible with Convention rights enjoyed under Schedule 1 of the Human Rights Act and/or unlawful by reference to the principle of legality?
>
> 2. Is it lawful to apply the Special Advocate procedure to applications under Article 5(4) of the Order?
>
> 3. Where a party is challenging a designation to Article 5(4) of the Terrorism Order, is the burden of proof on the Applicant to demonstrate that the designation should be set aside, or does the burden of proof rest upon the Respondent to demonstrate the existence of threshold conditions for designation?
>
> 4. On a hearing of an application under Article 5(4) of the Terrorism Order, what is the applicable standard of proof?
>
> 5. What is the role of the High Court, and the test to be applied by it, when determining an application under Article 5(4)?
>
> B *Under the Al Qaida and Taliban (United Nations Measures) Order 2006*
>
> 1. Does the Court have any power to set aside a designation made under Article 3(1)(b) of the Order?
>
> 2. If the Court has no such power under Article 5(4), does it have any other power to set aside such a designation?

3. As per issues A1-5."

In argument, they were expanded to cover a general attack upon the lawfulness of each order and upon the freezing orders and more particularly upon the criminal offences created by the Orders which could be committed by those who were aware that an individual was subject to a freezing order.

3. Both Orders were made under powers conferred by s.1 of the United Nations Act 1946. This provides, so far as material:-

> "(1) If, under Article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty five (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order …
>
> (4) Every Order in Council made under this Section shall forthwith after it is made be laid … before Parliament."

It is to be noted that, although it must be laid before Parliament, there is no procedure which enables Parliament to scrutinise or to amend any Order, although no doubt an individual Member could seek to initiate a debate if he or she felt that an Order was unsatisfactory. Each order was laid before Parliament the day after it was made and came into force on the following day.

4. Article 41 of the Charter of the United Nations provides :-

> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to the decisions, and it may call upon its Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations."

It is necessary to read Article 41 in the context of the purposes of the UN, which by Article 1 include achieving international cooperation in solving international problems and "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". (Article 1.3). Article 25 provides:-

> "The Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Article 39, which introduces Chapter VII, provides that it is for the Security Council to determine the existence of any threat to the peace, breach of the peace or an act of aggression and to decide what measures shall be taken in accordance with Articles 41 and 42 (which deals with more positive action if that under Article 41 is or has proved inadequate) to maintain or restore international peace and security. Finally, Article 103 provides:-

> "In the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under

> any other international agreement, their obligations under the present Charter shall prevail."

5. I come now to the resolutions of the Security Council which have led to the Orders. The TO is based on two Resolutions. The first is 1373/2001 which decides (Paragraph 1) that all States shall:-

> "(a) Prevent and suppress the financing of terrorist acts;
>
> (b) Criminalise the wilful provision or collection by any means, directly or indirectly, of funds by their nationals or in the territories with the intention that their funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
>
> (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.
>
> (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons."

Paragraph 2(d) requires all States to 'prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.'

Resolution 1452/2002 applies to the regime which has led to the AQO and not directly to that which has resulted in the TO. However, advice has been given that a similar regime should apply. It provides that financial assets or economic resources which have been determined by the State to be

> "(a) necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources."

should not be frozen.

This is subject to notification to the UN Committee by the State in question of its intention to authorise and to the Committee not objecting within 48 hours. Paragraph 1(b) deals with what are described as 'extraordinary expenses', but a dispensation in respect of these requires the Committee's approval.

6. The AQO relies on a number of resolutions. The starting point is 1267/1999, which by paragraph 4(b) requires the freezing of funds and other financial resources "including funds derived or generated from property owned or controlled directly or indirectly by the

Taliban or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need". Resolution 1333/2000 by paragraph 8 decides that all States should freeze funds and other financial assets "of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organisation" to ensure that no funds are made available directly or indirectly for the benefit of any person or entity associated with Usama bin Laden, including the Al-Qaida organisation. The Committee is requested to maintain an up to date list of individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organisation. It is for the States and regional organisations to forward the names of persons or entities that should be designated in the list.

7. Resolution 1390/2002 decides that States must freeze the assets of those on the list maintained by the Committee, and ensure that such persons or entities cannot have made available to them any funds, financial assets or economic resources. Resolution 1452/2002 applies to these provisions. The need to freeze the assets of those on the list was confirmed in Resolution 1526/2004.

8. Resolution 1735/2006, which postdates the AQO, deals with the mechanics of listing. Paragraphs 5 & 6 provide that the Security Council:-

> "5. Decides that, when proposing names to the Committee for inclusion on the Consolidated List, States shall act in accordance with paragraph 17 of resolution 1526(2004) and paragraph 4 of resolution 1617 (2005) and provide a statement of case; the statement of case should provide as much detail as possible on the basis(es) for the listing, including: (i) specific information supporting a determination that the individual or entity meets the criteria above; (ii) the nature of the information and (iii) supporting information or documents that can be provided; States should include details of any connection between the proposed designee and any currently listed individual or entity.
>
> 6. Requests designating States, at the time of submission, to identify those parts of the statement of case which may be publicly released for the purposes of notifying the listed individual or entity, and those parts which may be released upon request to interested States;"

Delisting is dealt with in Paragraphs 13 and 14. They read:-

> "13. Decides that the Committee shall, continue to develop, adopt, and apply guidelines regarding the de-listing of individuals and entities on the Consolidated List;
>
> 14. Decides that the Committee, in determining whether to remove names from the Consolidated List, may consider, among other things, (i) whether the individual or entity was placed on the Consolidated List due to a mistake of identity, or (ii) whether the individual or entity no longer meets the criteria set out in relevant resolutions, in particular resolution 1617 (2005); in making the evaluation in (ii) above, the Committee may consider, among other things, whether the individual is deceased, or whether it has been affirmatively shown that the individual or entity has severed all association, as defined in resolution 1617 (2005), with Al-Qaida, Usama bin Laden, the Taliban, and their supporters, including all individuals and entities on the Consolidated List;"

9. Article 4 of the TO confers power on the Treasury to designate persons. A designated person is one who is identified in Council Decision 2006/379/EC as provided for in Article 2.3 of Regulation (EC) No. 2580/2001 or one identified in a direction made under Article 4 (Article 3). I shall deal with the EC regulation in due course, but the applicants have all been designated under Article 4. This reads:-

> "(1) Where any condition in Paragraph (2) is satisfied, the Treasury may give a direction that a person identified in the direction is designated for the purpose of this Order.
>
> (2) The conditions are that the Treasury have reasonable grounds for suspecting that the 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 identified 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."

The relevant sub-paragraph in these cases is (a). Article 5 enables the Treasury either to publicise the designation generally or to limit publication to particular people, normally those who would be expected to have some financial involvement with the designated person and members of his family. In G's case, there has been general publication. In the other cases, only particular people have been informed (albeit complaint is made that some who have been informed are unknown to the applicant or have never had any financial dealings with him).

10. Article 7 prohibits any person from dealing with funds or economic resources belonging to or held by a designated person. Article 7(6) defines 'deal with' to mean:-

> "(a) in respect of funds –
>
> (i) to use, alter, move, allow access to or transfer;
>
> (ii) deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination' or
>
> (iii) make any other change that would enable use, including portfolio management; and
>
> (b) in respect of economic resources, use to obtain funds, goods or services in any way, including (but not limited to) by selling, hiring or mortgaging the resources."

'Economic resources' are defined in Article 2(1) to mean:-

> "assets of every kind, whether tangible or intangible, moveable or unmoveable, which are not funds but can be used to obtain funds, goods or services."

Article 8(1) prohibits anyone from making 'funds, economic resources or financial services available, directly or indirectly, to or for the benefit of' a designated person. It is a criminal offence to contravene any of the prohibitions (Articles 7(3) and 8(2)). The offence carries a maximum of 7 years imprisonment on indictment or 6 months on summary conviction (Article 13(1)). The only defence available requires the defendant to show that he 'did not know and had no reasonable cause to suspect' that he was dealing with funds or economic resources contrary to Article 7(1) or that the person was designated if he was

acting contrary to Article 8(1). Thus the offence is one of strict liability and the potential penalty is severe.

11. The AQO is even more draconian. It provides by Article 3:-

> "(1) For the purposes of this Order –
>
> (a) Usama bin Laden
>
> (b) Any person designated by the Sanctions Committee, and
>
> (c) Any person identified in a direction,
>
> is a designated person
>
> (2) In this Part, 'direction' (other than Articles 4(2)(d) and 5(3)(c)) means a direction given by the Treasury under Article 4(1)".

Article 4(1) permits designation where the Treasury have reasonable grounds for suspecting that the person is or may be –

> "(a) Usama bin Laden
>
> (b) A person designated by the Sanctions Committee
>
> (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."

12. The distinction between Articles 3(1)(a) and (b) and 4(2)(a) and (b) is that the latter applies if there is some issue whether the individual in question is listed. If he is listed and there is no doubt he is indeed that person, he is automatically designated under Article 3(1). G is listed and so is caught by Article 3(1). That is important because by Article 5(4) an application to the High Court can only be made to set aside a direction. Article 3(1) does not involve a direction. Thus there is no right to apply to the High Court in respect of the freezing of assets and the criminal offences imposed under Articles 7 and 8, which are almost identical to Articles 7 and 8 of the TO.

13. The relevant EU regulation is in fact (EC) No. 881/2002. This requires the freezing of assets of those designated by the UN Sanctions Committee and listed in Annex 1 to the Regulations. Commission regulation (EC) No.14/2007 added G to the list in Annex 1. Article 2 requires the freezing of his assets following the provisions in the UN Resolution and Article 2a excludes, subject to the need to inform and, for extraordinary expenses, to get the approval of the Sanctions Committee, assets required to cover basic living expenses. Article 9 provides:-

> "This Regulation shall apply notwithstanding any rights conferred or obligations imposed by any international agreement signed or any contract entered into or any licence or permit granted by before the entry into force of this Regulation, (viz 28 May 2002)".

14. Council Regulation (EC/No.2580/2001) purports to implement UN Resolution 1373/2001, the equivalent of the TO, but does so by naming those who are covered by it on a list (Article 2(3)). None of the applicants is on the list and so none is within the purview of the Regulation.

15. Mr Owen, Q.C. submitted that s.1 of the 1946 Act should apply only to inter-state relations and not to sanctions to be imposed on individuals within a state. He relied on statements

in Parliament when the Bill was being considered. It may well be that no one at the time thought that Article 41 would be used against individuals, but that is nothing to the point. The Charter clearly requires Member States to take the action needed to carry out decisions of the Security Council (Article 48). The wording of s.1 of the 1946 Act is clear: it applies to any measure which the Security Council calls upon the U.K. to apply under Article 41. The resolutions in question focus on individuals and it is not nor could be suggested that they are ultra vires Article 41. It follows that, whatever may have been the belief in 1946, s.1 of the Act can apply to the Resolutions which require the freezing of the assets of those who fall within the scope of the Resolutions.

16. It is convenient to deal first with the arguments which are specific to the AQO. Mr Rabinder Singh, Q.C., contended that there must be implied with the Order a right to access the court at least by way of judicial review. He further submitted that, since fundamental rights were being affected, that review must include a means of challenging the factual basis upon which the freezing order was made against G. This would require the court to have power to set aside the order notwithstanding that G was on the Sanctions Committee list if on consideration of the facts it took the view that he ought not to have been listed because he was not involved in any terrorist activity. This was all the more important because there was no means whereby G could mount an effective challenge to his listing since he did not know nor was there any procedure whereby he could be informed of what material had led the Committee to list him. It is known that he was listed following information given against him by the government. Thus, without the support of the government, his chances of achieving delisting are infinitesimal.

17. The delisting procedure is referred to in an annexure to a statement from Mr Guthrie, the head of H.M. Treasury's Asset Freezing Unit. In a document entitled 'Guidelines of the Committee for the Conduct of its Work' delisting is dealt with at paragraph 8. The listed person may present a petition which should 'provide justification for the de-listing request, offer relevant information and request support for de-listing'. The petition can be presented either through the person's state of residence or what is called 'the focal point process'. The relevant governments, including naturally of the state in which the person resides, will be notified and asked to comment and to indicate if they recommend de-listing. Any information in support of de-listing held by a government should be forwarded to the Committee and any opposition to de-listing will also be conveyed to the Committee. After 3 months, a decision will be taken and the person notified of it.

18. It is I think obvious that this procedure does not begin to achieve fairness for the person who is listed. Governments may have their own reasons to want to ensure that he remains on the list and there is no procedure which enables him to know the case he has to meet so that he can make meaningful representations. Nevertheless, that is what the Security Council has approved and the Resolution, which Member States are obliged to put into effect, requires the freezing of the assets of those listed. Article 103 of the Charter makes clear that the obligations under the Charter take precedence over any other international agreements. Thus human rights under the ECHR cannot prevail over the obligations set out in the Resolutions.

19. Mr Singh has relied on the constitutional right of access to the court, a right which cannot be taken away save by express words in a statute. An Order in Council following the exercise of the Royal Prerogative is itself amenable to judicial review. Accordingly, submits Mr Singh, albeit no right of challenge is contained in the Order, there must be such a right. He has taken me to a number of authorities in which this principle is enshrined. They include *Raymond v Honey* [1983] 1 AC1 and *R v Lord Chancellor ex p Witham* [1998] QB 575. I do not need to refer to them in any detail since Mr Crow has not challenged the proposition that the Order does not preclude a right to come to the court. He submits that, having regard to the clear words of the Resolutions, EC Regulation 881 and s.1 of the 1946 Act, the court cannot grant any relief which involves the setting aside of the freezing order, so long as G remains on the list maintained by the Sanctions Committee.

20. Mr Singh submits that our law shows that an order which curtails fundamental rights cannot preclude an effective judicial review. His starting point is *Re Boaler* [1915] KB 21. The issue in the case was whether the Vexatious Actions Act 1896 covered the institution

of criminal proceedings. The Court of Appeal by a majority decided that it did not. In the course of his judgment, Scrutton J said this (p.39):-

> "In the case of this statute the legislature clearly intends to interfere with some rights of persons, and uses words capable of extension to rights of litigation in criminal matters, but in my opinion more suitable to the subject-matter of rights of litigation in civil matters only. In my view, looking at the enacting part of the statute only, the presumption against the interference with the vital rights and liberties of the subject entitles, even compels, me to limit the words to the meaning which effects the least interference with those rights."

But at p.36 he had said:-

> "The object of the court is, from the words used, construed in reference to the subject-matter in which they are used, to get at the intention of the legislature and give effect to it. When the legislature has used general words capable of a larger and a narrower meaning, those words may be restricted by innumerable presumptions all designed to give effect to the reasonable intent of the legislature."

21. In *Chester v Bateson* [1920] 1 KB 829, a regulation made under the Defence of the Realm Consolidation Act 1914 which prohibited the bringing of possession proceedings against a munitions worker without the consent of the Minister was declared to be unlawful. This grave invasion of the rights of subjects was not intended by the legislature to be accomplished by a departmental order (per Darling J at p.833). Avory J cited words of Lord Shaw of Dunfermline in *R v Halliday* [1917] A.C. 287 where he said:-

> "Whether the government has exceeded its statutory mandate is a question of ultra or intra vires such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger. The increasing crush of legislative effects and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger twofold were the judiciary to approach any such action by the government in a spirit of compliance rather than of independent scrutiny."

22. More recently, in *R v Secretary of State ex p Pierson* [1998] A.C. 539, Lord Browne-Wilkinson made the point at p.575D, saying:-

> "From those authorities, I think the following proposition is established. A power enacted by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

23. But at the foot of p.575, he went on to make clear that it was not open to judges to quash administrative decisions on the simple ground that the decision was unfair. So here, it is clear that the Order is extremely harsh in its effect on the designated person and because of the possible criminal liability of those, including particularly his family, who may provide him with economic resources, having regard to the very wide definition given to that expression. But its harshness is not in itself a reason to interfere with it.

24. In *R v Home Secretary ex p Simms* [1999] 1 A.C. 69, which concerned a bar imposed by use of the Prison Rules upon a prisoner's wish to speak to a journalist in order to pursue his claim that he had been wrongly convicted, Lord Hoffmann said this (at p.131E):-

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of the unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implications to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way, the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

25. Mr Crow has referred me to two cases in which he submits the court has allowed general words to override fundamental rights. In *Bishopgate v Maxwell* [1992] BCLC 475, the Court of Appeal decided that the legislative purpose behind ss.235 and 236 of the Insolvency Act 1986, whereby an officer of a company could be required to provide a statement giving details of his dealings with the assets of the company, barred the officer from relying on the privilege against self incrimination. It is to be noted that the decision would not have survived the Human Rights Act unless it was made clear that any answers would not be used against the officer in any criminal proceedings. The second case is *R v Lord Chancellor ex p Lightfoot* [2000] QB 597 which concerned the obligation of the applicant to pay a deposit of £250 required by the relevant Fees Order. The applicant in that case sought to present a petition so as to obtain a declaration of bankruptcy from the court but, being in debt to the tune of nearly £60,000, she could not afford the deposit. The Court of Appeal decided the case on the basis that there was no constitutional right for a debtor to petition the court to achieve his or her own bankruptcy. But Simon Brown LJ went on to consider whether, if there was such a constitutional right, the legislation overrode it. He accepted that there could be a necessary implication so that express words were not always required. He was persuaded that the history of the legislation showed that Parliament had intended that the regulation should be made as it had been. But he said, at the foot of p.627, that the more fundamental the right affected by the Regulation, the less likely it was that Parliament would have authorised its impairment and the greater would be the court's need to be satisfied that such indeed was Parliament's true intention. All that can, I think, be derived from those authorities is that it is proper to look to see whether the context in which the relevant legislation is made provides a clear indication that, even in the absence of express words, fundamental rights are overridden.

26. The attack on the AQO does not avail G unless he can show that he must have a right to challenge the freezing order under the EC Regulation. This question has been considered by the Court of First Instance (CFI) in *Kadi v Council of the EU* (2005) ECR 11-3353. This was an attack on Regulation 881/2002 by Mr Kadi who was on the Sanctions Committee's list and who was placed on the list maintained in the EC Regulation. Thus his funds in the Community were frozen. The CFI decided that, having regard to the primacy of the UN Charter, the EC was bound to adopt all measures to enable the Member States to fulfil their obligations under the Charter. There was no power to undertake what would amount to an indirect review of the lawfulness of the UN Resolution unless the Security Council had failed to observe the fundamental peremptory provisions of jus cogens.

27. The freezing of funds was not to be regarded as an arbitrary, inappropriate or disproportionate interference with the fundamental right to the enjoyment of property (see Paragraphs 234 to 252). The Court decided that the procedure as set out in the Security Council's guidelines in relation to de-listing showed that the Security Council 'intended to take account, so far as possible, of the fundamental rights of the persons entered in the Sanction Committee's list, and in particular their right to be heard' (Paragraph 265). It is, I am bound to say, difficult to see how the absence of any right to be heard, beyond submitting a petition in ignorance of the substance of the material relied on against the petitioner, can justify the conclusion reached. However, in paragraph 268, having

recognised that the petitioner was dependent on the diplomatic protection afforded by states to their nationals, the Court decided that the restriction on the right to be heard 'is not … to be deemed improper in the light of the mandatory prescriptions of the public international order.' It went on :-

> "On the contrary, with regard to the challenge to the validity of decisions ordering the freezing of funds belonging to individuals or entities suspected of contributing to the financing of international terrorism … it is normal that the right of the persons involved to be heard should be adapted to an administrative procedure on several levels .."

28. In Paragraph 274, the decision was that, since what was in issue was a temporary precautionary measure restricting the availability of the applicant's property, the observance of his fundamental rights did not require him to be informed of the facts and evidence adduced against him.

29. So far as a right of effective judicial review was concerned, the CFI took the view that the limitation of the right of access to the court was justified "both by the nature of the decisions that the Security Council is led to take under Chapter VII of the Charter … and by the legitimate objective pursued." It went on in Paragraph 289 to say:-

> "In the circumstances of this case, the applicant's interest in having a court hear his case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter. In this regard, special significance must attach to the fact that, far from providing for measures for an unlimited period of application, the resolutions successively adopted by the Security Council have always provided a mechanism for re-examining whether it is appropriate to maintain those measures after 12 to 18 months have elapsed."

The time limits referred to are not, as I read the resolutions and in particular 1526/2004, necessarily of any assistance to the person listed since what is required is not a re-examination of whether he should qualify but of the sort of measures, whether more or less stringent, which are required to combat international terrorism. The CFI concluded in Paragraph 290 that the procedure for applying for de-listing constituted 'another reasonable method of affording adequate protection of the applicant's fundamental rights as recognised by jus cogens.'

30. Not surprisingly, an appeal has been lodged to the ECJ against this decision. The opinion of Advocate General Maduro was delivered on 8 January 2008: the judgment of the Court is awaited. His conclusion is that the Court should allow the appeal and annul Regulation 881/2002 because it infringes the right to be heard, the right to judicial review and the right to property. He stated that it was for the Community courts to determine the effect of international obligations within the Community legal order by reference to the conditions set by Community law (Paragraph 23). He went on thus in Paragraphs 24 and 25:-

> "24. All these cases have in common that, although the Court takes great care to respect the obligations that are incumbent on the Community by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty. Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.

> 25. It follows that the present appeal turns fundamentally on the following question: is there any basis in the Treaty for holding that the contested regulation is exempt from the constitutional constraints normally imposed by Community law, since it implements a sanctions regime imposed by Security Council resolutions? Or, to put it differently: does the Community legal order accord supra-constitutional status to measures that are necessary for the implementation of resolutions adopted by the Security Council?"

31. The Advocate General stated in Paragraphs 34 and 35 as follows:-

> "34. The implication that the present case concerns a 'political question', in respect of which even the most humble degree of judicial interference would be inappropriate, is, in my view, untenable. The claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights. This does not detract from the importance of the interest in maintaining international peace and security; it simply means the duty of the courts to assess the lawfulness of measures that may conflict with other interests that are equally of great importance and with the protection of which the courts are entrusted. As Justice Murphy rightly stated in his dissenting opinion in the *Korematsu* case of the United States Supreme Court:
>
> > "Like other claims conflicting with the asserted constitutional rights of the individual [that] claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. What are the allowable limits of [discretion], and whether or not they have been overstepped in a particular case, are judicial questions".
>
> 35. Certainly, extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions. However, that should not induce us to say that 'there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods'. Nor does it mean, as the United Kingdom submits, that judicial review in those cases should be only 'of the most marginal kind'. On the contrary, when the risks to public security are believed to be extraordinarily high, the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who have little or no access to the political process. Therefore, in those instances, the courts should fulfil their duty to uphold the rule of law with increased vigilance. Thus, the same circumstances that may justify exceptional restrictions on fundamental rights also require the courts to ascertain carefully whether those restrictions go beyond what is necessary. As I shall discuss below, the Court must verify whether the claim that extraordinarily high security risks exist is substantiated and it must ensure that the measures adopted strike a proper balance between the nature of the security risk and the extent to which these measures encroach upon the fundamental rights of individuals."

32. Since the right to be heard and the right to effective judicial review constituted fundamental rights forming part of the general principles of Community law and those rights, particularly that to effective judicial review, were removed because of the lack of any genuine and effective mechanism to challenge listing, the applicants' claim must succeed. Mr Singh submits with force that that approach applies equally to domestic law. The requirement that there should be an effective right to be heard has recently been confirmed in the terrorism context by the decision of the House of Lords in *Secretary of*

*State for the Home Department v MB* [2007] 3 W.L.R. 681. Thus the acceptance of the Advocate General's views would inevitably lead to the quashing of the AQO.

33. The decision of the Advocate General is no more than an opinion to which a domestic court is entitled to have regard. But at present the only decision of a court is that of the CFI which, unless reviewed, determines the relevant EC law. In domestic law terms, I have to have regard to the obligation to apply the Resolutions of the Security Council which is absolute and which takes precedence over all other international obligations. The applicants submit that fundamental principles of domestic law are not within Article 103 since they are not 'obligations under any other international treaty'. These fundamental rights are not conferred only by Article 6 of the ECHR but are rights which have for long existed under Common Law.

34. In *R(Al-Jeddah) v Defence Secretary* [2008] 2 W.L.R. 31, the House of Lords considered whether internment of a British Citizen in Iraq pursuant to a Security Council resolution permitting such internment if it was 'necessary for imperative reasons of security' overrode the rights conferred by Article 5 of the ECHR. Lord Bingham in Paragraph 33 drew attention to the possibility that the Security Council could adopt resolutions couched in mandatory terms in which case Article 25 of the Charter bound Member States to comply with them. But he accepted that, while maintenance of international peace and security is a fundamental purpose of the UN, so too is the promotion of respect for human rights. In Paragraph 39, Lord Bingham dealt with the means whereby the clash between the power or duty to detain on the express authority of the Security Council and the fundamental human right enshrined in Article 5 of the ECHR can be reconciled. He said this:-

> "There is in my opinion only one way in which they can be reconciled: by ruling that the U.K. may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by [the relevant resolutions], but must ensure that the detainee's rights under Article 5 are not infringed to any greater extent than is inherent in such detention."

This reasoning is clearly applicable to the inevitable breaches of property rights and infringement of Article 8 rights resulting from the freezing orders.

35. Lord Carswell in Paragraph 136 stated:-

> "I would emphasise … that that power [viz: to detain] has to be exercised in such a way as to minimise the infringements of the detainees' rights under Article 5(1) …"

36. Much as I would like to, I do not think I can go as far as the Advocate General in *Kadi*. These cases concern the means whereby the freezing orders necessarily resulting from the listing under the AQO or the application of Paragraph 1(c) of Resolution 1373/2001 under the TO are put into effect. Article 25 of the Charter obliges the U.K. to freeze the assets of a person listed by the UN Committee and so the shortcomings in the procedure to challenge such listing cannot of themselves constitute a bar to freezing. Thus any right to challenge the factual basis for listing has to recognise that obstacle. Nevertheless, there is in my judgment a real practical benefit that can be afforded to the listed person by the ability of this court to consider the facts and to judge whether the necessary threshold has been met. If on considering all relevant material the court concluded that there was not evidence to justify listing, that conclusion would bind the Government to pursue a de-listing application to the Security Council. It follows that I reject the approach of the Government recorded by the Advocate General in *Kadi* at paragraph 35 that judicial review 'should be only of the most marginal kind'. Mr Crow in the course of argument accepted – or rather, he was not instructed to oppose – the view I expressed that there should be a power in the court to decide whether the basis for listing existed which would then bind the Government to support de-listing.

37. However, for reasons which will become clear, this does not save the AQO. Counsel for the applicants have submitted that the means used to apply the obligations imposed by the UN Resolutions is unlawful. Parliament has been bypassed by use of Orders in Council.

But in deciding the appropriate way in which the obligations should be applied and in particular in creating the criminal offences set out in the Orders it was necessary that Parliamentary approval should be obtained. Those submissions are in my judgment entirely persuasive.

38. The obligation to apply the Resolutions necessarily involves consideration of how that can be achieved. Since there is a breach of fundamental rights, the application must involve the least possible interference with such rights. Parliament can of course decide what measures are needed and can go as far as it considers necessary to achieve the avoidance of funds being made available for terrorist purposes. The purpose of the UN Resolution is to ensure so far as possible that funds are not made available to assist terrorism by placing constraints on the ability of those who are involved in terrorist activities or who support such activities to provide funds for them.

39. S.1 of the 1946 Act enables an Order in Council to be used rather than legislation to be put through Parliament only where it appears to Her Majesty that it is 'necessary and expedient' for enabling the measure to be effectively applied to do so. Thus it is in my judgment necessary, if Parliament is not to be involved, that the Order in Council goes no further than to apply what the Resolution requires. Paragraph 1(c) of Resolution 1373/2001 requires the freezing of financial assets or economic resources of "persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts". The TO confers power to designate where the Treasury have "reasonable grounds for suspecting that the person is or *may be* a person who commits etc".

40. The threshold is thus a very low one. While I can see the force of an argument that reasonable suspicion may suffice (and it is to be noted that both the CFI and the Advocate General use the word) to implement the requirement of Paragraph 1(c) of 1373/2001, it is impossible to see how the test could properly be as low as reasonable suspicion that a person may be a person who commits etc. I do not accept - indeed the applicants do not argue – that it is to be limited to those who are proved by conviction to be committing or attempting to commit acts of terrorism. But it is impossible to see how the test applied in the TO can constitute a necessary means of applying the resolution. Mr Crow submits that it is expedient, which has a wider meaning. In *R(Gillan) v Commissioner of Metropolitan Police* [2006] 2 A.C. 307, the distinction between necessary and expedient was considered in the context of powers of random search conferred by s.44 of the Terrorism Act 2000. Lord Bingham at paragraph 14 said that Parliament had used the word deliberately recognising that the powers were desirable in the interest of combating terrorism. But Lord Bingham drew attention to the close regulation of the exercise of the statutory power. There is no such regulation here and I do not accept that the extension to those who are suspected of possible involvement is properly within the scope of what is authorised by s.1 of the 1946 Act.

41. There is another cogent reason for saying that it is not expedient. It is rightly accepted by Mr Crow that the TO in terms and the AQO through judicial review allows consideration of whether the person affected is on the facts properly within the test to be applied. This means that all material must be available to the court, whether closed or open. I have some experience both as an ex-chairman of SIAC and in considering Control Orders cases of the evidence upon which reliance is placed by the Security Services and so available to the Treasury. This will usually – in my experience invariably – include intercept material. Section 17 of the Regulation of Investigatory Powers Act 2000 (RIPA) excludes such evidence from any legal proceedings. Exceptions to this exclusionary rule are contained in s.18, but they do not extend to applications or judicial review claims against orders made under the TO or the AQO. Thus the court is disabled from considering such material. This means that a fair and just consideration of the question whether the individual applicant is one who should be subjected to an order is likely to be impossible in most cases. Fairness works for the Crown as it does for the applicant. Thus the Treasury will be unable to rely on inculpatory intercept material just as the applicant will be unable to rely on exculpatory intercept material. This cannot be in the interests of justice or indeed of ensuring that the right people are made subject to these orders. Thus it is in my view impossible to say that the use of an Order in Council is expedient unless it can provide an exception to s.17 of RIPA. It cannot nor does it purport to do so.

42. It is submitted that the orders are unlawful in establishing criminal offences which go far beyond what is reasonably required and offend against the principle of legal certainty. The very wide definition of economic resources makes it impossible for members of the family of the designated person in particular to know whether they are committing an offence or a licence is needed. Article 8(1) of the TO applies to any asset which could in theory be used to obtain funds. The solicitor for the applicants A, K and M was concerned to ascertain on their families' behalf what could and could not be provided without the need for a licence and I gather that those in the Treasury who have to deal with those matters have had to consider whether licences should be granted on more than 50 occasions. A specific query arose, and it is a good illustration of the absurdity which can result, in relation to the loan of a car to an applicant to enable him to go to the supermarket to get the family's groceries. After some delay, the Treasury (in my view wrongly) decided that a licence was needed. The car was an economic resource and could be used to obtain or deliver goods or services. This was only resolved by the Treasury after seeking ministerial consideration. Similar concerns have been raised in relation to an Oyster card to enable the applicant to travel and any borrowing of items for any purpose. Since the possible penalty on conviction is severe, the concerns are understandable and the effect on the applicant and his family, whose human rights are also in issue, is serious.

43. In *Norris v USA* [2008] UKHL 16, the House of Lords has recently considered the principle of legal certainty in the context of criminal offences. *Norris* was an extradition case. A question before their Lordships was whether price fixing was a common law offence. They decided it was not and it would be wrong in principle to decide that it was. The Appellate Committee in a report which comprised its composite opinion said this at paragraphs 53 and 54:-

> "53. In *R v Rimmington* [2006] 1 A.C. 459, Para 33 Lord Bingham of Cornhill said that there were two "guiding principles" relevant in that case, namely:
>
> > "no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done".
>
> As he went on to say in the next paragraph, those principles are "entirely consistent with Article 7(1) of the European Convention". At paragraph 35, he discussed a number of decisions of the Strasbourg Court on the topic, which established that, while "absolute certainty is unattainable, and might entail excessive rigidity", and "some degree of vagueness is inevitable" particularly in common law systems, "the law-making function of the courts must remain within reasonable limits".
>
> 54. In *R v Jones (Margaret)* [2007] 1 A.C. 136, Lord Bingham took the matter a little further when he identified, at Paragraph 29
>
> "what has become an important democratic principle in this country: that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties. One would need very compelling reasons for departing from that principle".
>
> Lord Hoffmann said much the same at Paragraph 60."

Those observations are pertinent in considering whether the offences created under the Orders offend against the principle of legal certainty.

44. *R v Jones* [2007] 1 A.C. 136, concerned the meaning to be attached to 'offence' within the meaning of s.68(2) of the Criminal Justice and Public Order Act 1994 in relation to convictions for acts of civil disobedience by opponents of the Iraq war at military institutions. At paragraph 28, Lord Bingham said:-

> " … [T]here now exists no power in the courts to create new criminal offences, as decided by a unanimous House in *Knuller v Director of Public Prosecutions* [1973] A.C. 435 … Statute is now the sole source of new criminal offences."

In Paragraph 62, Lord Hoffmann said this, in the context of incorporating new crimes in international law:-

> "New domestic offences should in my opinion be debated in Parliament, defined in a statute and come into force on a prescribed date. They should not creep into existence as a result of an international consensus to which only the executive of this country is a party."

45. I recognise that this dictum relates to offences which international bodies consider should exist. And Mr Crow submits that s.1 of the 1946 Act gives express power to provide for the trial and punishment of persons offending against any Order. But the principle of maximum certainty (as identified by Professor Ashworth in his Principles of Criminal Law at p.24 et seq) requires that a citizen must be able to have an adequate indication of the legal rules applicable. That follows from the decision of the ECtHR in *Sunday Times v U.K.* (1979) EHRR 245 at paragraph 49. On p.76, Professor Ashworth states:-

> "… [A] person's ability to know of the existence and extent of a rule is fundamental: respect for a citizen as a rational autonomous individual and as a person with social and political duties requires fair warning of the criminal law's provisions and no undue difficulty in ascertaining them."

46. The purpose of asset freezing is to ensure that funds are not made available for terrorist purposes. Thus any criminal liability which could fall on those who make any assets available to a designated person should depend on whether it was or ought to have been known to the supplier that the asset in question could result in funds being available for terrorist purposes. That at the very least seems to me to be an appropriate limitation on criminal liability. How the requirements of the Sanctions Committee should be put into law is, as it seems to me, having regard to the principles to which I have referred a matter for Parliamentary consideration. Thus I am satisfied that neither Order in Council represents a necessary or expedient means of giving effect to the obligations imposed by the Committee.

47. A further attack is made in that no procedure is set out to deal with the inevitable reliance on closed material. It is said by Mr Crow that there is no reason why the Court should not sanction the use of special advocates: it has that power in the exercise of its inherent jurisdiction: see *R(Roberts) v Parole Board* [2005] 2 A.C. 738. It is to be noted that as long ago as October 2006, the then Economic Secretary to the Treasury said, in connection with the TO on the day it was made:-

> "The Treasury has agreed … to use closed source evidence in asset freezing cases where there are strong operational reasons to impose a freeze, but insufficient open source evidence available. The use of closed source material will be subject to proper judicial safeguards. The Government intend to put in place a special advocates procedure to ensure that appeals and reviews in these cases can be heard on a fair and consistent basis."

That was 18 months ago. There is no such procedure in force. It is not for the court to devise a procedure particularly as it cannot deal with the constraints imposed by RIPA and there are resource considerations in the use of special advocates. *Roberts* case related to

cases in which use of such material would be exceptional; cases under the Orders will regularly involve such material.

48. Finally, I come to the burden and standard of proof. I regard this as an unnecessary and unhelpful approach. In judicial reviews of the AQO and applications under Article 5(4) of the TO, the approach should be the same. It should follow that laid down by the Court of Appeal in *Secretary of State for the Home Department v MB* [2007] QB 415 at paragraph 67. This requires the court to consider all the evidence put before it and decide whether, taken as a whole, it shows that the grounds for making the order are established.

49. The result of this judgment will, I think, be that both the Orders must be quashed. This is not to say that freezing orders cannot be made to comply with the UN resolutions. But in my view it is essential that Parliament considers the way in which what is required should be achieved and it is not proper to do it by relying on s.1 of the 1946 Act. However, I will hear counsel on the appropriate order that I should make.