Hilary Term
[2010] UKSC 2
On appeal from: [2008] EWCA Civ 1187

JUDGMENT

Her Majesty's Treasury (Respondent) *v* Mohammed Jabar Ahmed and others (FC) (Appellants)
Her Majesty's Treasury (Respondent) *v* Mohammed al-Ghabra (FC) (Appellant)
R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) *v* Her Majesty's Treasury (Appellant)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lady Hale
Lord Brown
Lord Mance

JUDGMENT GIVEN ON

27 January 2010

Heard on 5, 6, 7 and 8 October 2009

Appellants A, K and M
Tim Owen QC
Dan Squires

(Instructed by Birnberg Peirce and Partners)

Respondent
Jonathan Swift
Sir Michael Wood
Andrew O'Connor
(Instructed by Treasury Solicitor)

Appellant G
Rabinder Singh QC
Richard Hermer QC
Alex Bailin
(Instructed by Tuckers)

Respondent HAY
Raza Husain
Dan Squires

(Instructed by Birnberg Peirce and Partners)

Intervener (JUSTICE)
Michael Fordham QC
Shaheed Fatima
Iain Steele
(Instructed by Clifford Chance LLP)

LORD HOPE, with whom Lord Walker and Lady Hale agree

1. On 13 December 2006 the appellant Mohammed al-Ghabra, referred to in these proceedings as "G", was informed that a direction had been made against him by HM Treasury ("the Treasury") under article 4 of the Terrorism (United Nations Measures) Order 2006 (SI 2006/2657) ("the TO") and that he was a designated person for the purposes of that Order. He was told that the direction had been made because the Treasury had reasonable grounds for suspecting that he was, or might be, a person who facilitated the commission of acts of terrorism. He was also told that, in light of the sensitive nature of the information on which the decision had been taken, it was not possible to give him further details and that the effect of the direction was to prohibit him from dealing with his funds and economic resources and to prevent anyone notified of the freeze from making funds, economic resources or financial services available to him or for his benefit. On 2 August 2007 the appellants Mohammed Jabar Ahmed, Mohammed Azmir Khan and Michael Marteen (formerly known as Mohammed Tunveer Ahmed), referred to in these proceedings as "A", "K" and "M", received letters in almost identical terms telling them that a direction had been made against them under article 4 of the TO by the Treasury.

2. A few days after G had been told that he had been designated under the TO he received a letter from the Foreign and Commonwealth Office saying the Sanctions Committee of the Security Council of the United Nations (otherwise known as "the 1267 Committee": see para 18 below) had added his name to its Consolidated List, that this meant that he was subject to a freezing of his funds, assets and economic resources and that these measures were binding on all UN member states with immediate effect and had been implemented in UK law. No mention was made at that stage of the domestic measure under which the restrictions were being imposed on him. But in March 2007 he was told that his listing meant that he was deemed to be a designated person under the Al-Qaida and Taliban (United Nations Measures) Order 2006 (SI 2006/2952) ("the AQO").

3. In September 2005 Hani El Sayed Sabaei Youssef (or Hani al-Seba'i), referred to in these proceedings as "HAY", was told that his name had been added to the Consolidated List by the 1267 Committee. As a result he too was deemed to be a designated person under the AQO. His interest in these proceedings is virtually identical to those of G and A, K and M. So, although his case comes before this court on an appeal by the Treasury to which he is the respondent (see paras 35-37, below), I shall refer to him and to G and A, K and M as "the appellants" when I need to refer to all these designated persons collectively.

4. The TO and the AQO were made by the Treasury in purported exercise of the power to make Orders in Council which was conferred on them by section 1 of the United Nations Act 1946 ("the 1946 Act"). In each case the Orders were made to give effect to resolutions of the United Nations Security Council which were designed to suppress and prevent the financing and preparation of acts of terrorism. The Orders provide for the freezing, without limit of time, of the funds, economic resources and

financial services available to, among others, persons who have been designated. Their freedom of movement is not, in terms, restricted. But the effect of the Orders is to deprive the designated persons of any resources whatsoever. So in practice they have this effect. Persons who have been designated, as Sedley LJ observed in the Court of Appeal, are effectively prisoners of the state: *A and others v HM Treasury* [2008] EWCA Civ 1187; [2009] 3 WLR 25, para 125. Moreover the way the system is administered affects not just those who have been designated. It affects third parties too, including the spouses and other family members of those who have been designated. For them too it is intrusive to a high degree: see *R(M) v HM Treasury (Note)* [2008] UKHL 26, [2008] 2 All ER 1097. In that case, which concerned the payment of social security benefits to the spouses of listed persons living in the United Kingdom, the House of Lords referred a question to the Court of Justice of the European Communities for a preliminary ruling on the interpretation of Council Regulation (EC) No 881/2002 to which the Al-Qa'ida and Taliban (United Nations Measures) Order 2002 (SI 2002/111) gave effect.

5. The procedure that section 1 lays down enables Orders under it to be made by the executive without any kind of Parliamentary scrutiny. This is in sharp contrast to the scheme for the freezing of assets that has been enacted by Parliament in Part 2 of the Anti-terrorism, Crime and Security Act 2001. Orders made under that Act must be kept under review by the Treasury, are time limited and must be approved by both Houses of Parliament: sections 7, 8 and 10. The systems that have been provided for in the TO and the AQO are far more draconian. Yet they lie wholly outside the scope of Parliamentary scrutiny. This raises fundamental questions about the relationship between Parliament and the executive and about judicial control over the power of the executive.

6. The case brings us face to face with the kind of issue that led to Lord Atkin's famously powerful protest in *Liversidge v Anderson* [1942] AC 206, 244 against a construction of a Defence Regulation which had the effect of giving an absolute and uncontrolled power of imprisonment to the minister. In *The Case of Liversidge v Anderson : The Rule of Law Amid the Clash of Arms* (2009) 43 The International Lawyer 33, 38 Lord Bingham of Cornhill, having traced the history of that judgment, said that –

> "we are entitled to be proud that even in that extreme national emergency there was one voice – eloquent and courageous – which asserted older, nobler, more enduring values: the right of the individual against the state; the duty to govern in accordance with law; the role of the courts as guarantor of legality and individual right; the priceless gift, subject only to constraints by law established, of individual freedom."

The consequences of the Orders that were made in this case are so drastic and so oppressive that we must be just as alert to see that the coercive action that the Treasury have taken really is within the powers that the 1946 Act has given them.

Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.

The legislative background: the history

7. To set the scene for the discussion that follows, it is necessary to trace the history of the various measures that have led to the appellants being dealt with in this way.

8. An examination of the legislative background must begin with the Charter of the United Nations. It was signed in San Francisco on 26 June 1945 as the Second World War was coming to an end. It came into force on 24 October 1945. The Preamble records the determination of the United Nations to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. Member states bound themselves to maintain international peace and security, to take collective measures for the prevention and removal of threats to the peace and to promote and encourage respect for human rights and for fundamental freedoms: article 1.

9. No principled objections were raised against a strong Security Council. In order to achieve the goal of maintaining peace states were willing to submit to a central organ in a manner that hitherto had been unprecedented: *The Charter of the United Nations, A Commentary,* ed Bruno Simma, 2nd ed (2002), p 703. Article 2 of the Charter states:

> "The Organisation and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> …
>
> 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

Article 24 confers the primary responsibility on the Security Council for the maintenance of international peace and security. Article 25 provides:

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

10. Chapter VII sets out the action to be taken with respect to threats to the peace, breaches of the peace and acts of aggression. Article 39, which introduces this Chapter, provides that it is for the Security Council to determine the existence of any such threat and to make recommendations or decide what measures shall be taken in accordance with articles 41 and 42 to maintain or restore international peace and security. Article 41 states:

> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the 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."

Article 42 provides for the measures that may be taken if the Security Council considers that measures provided for in article 41 would be or have proved to be inadequate. An example of its use can be found in Resolution 1546 which was adopted by the Security Council on 8 June 2004 which gave authority for a multi-national force to take all necessary measures to contribute to the maintenance of peace and security in Iraq: see *R (Al-Jedda) v Secretary of State for Defence (JUSTICE intervening)* [2007] UKHL 58, [2008] AC 332. This case is concerned with measures that have been taken under article 41.

11. Among a number of miscellaneous provisions in Chapter XVI is article 103, with which the complementary provision in article 25 must be read. It provides:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Treaty provisions that are incompatible with *ius cogens* are void. As for the rest, article 103 does not say that treaty provisions between states which are incompatible with the Charter are void. What it says is that the Charter has higher rank, and that obligations derived from the Charter must prevail. As Simma, *op cit*, p 1295 observes, the Charter aspires to be the "constitution" of the international community accepted by the great majority of states. Obligations under decisions and enforcement measures under Chapter VII prevail over other commitments of the members concerned in international law. As article 103 is concerned only with treaty obligations between member states it says nothing about the relationship between the Charter and the rights and freedoms of individuals in domestic law. In that regard, article 55(c) states that the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms. But the obligation in article 25 is unqualified, and

the regime in Chapter VII leaves it to the Security Council to judge whether the measures that it decides upon are consistent with the objects of the Charter.

12. The United Kingdom gave effect to the Charter in domestic law by means of the United Nations Act 1946. Section 1 of that Act provides:

> "(1) If, under article 41 of the Charter of the United Nations signed at San Francisco on 26 June 1945 (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.
> …"

Subsection (4) of that section as originally enacted provided that any such Order was not to be deemed to be or contain a statutory rule to which section 1(1) of the Rules Publication Act 1893 applied. That section which was repealed by section 12 of the Statutory Instruments Act 1946, required publication of an Order in the London Gazette at least 40 days before it was made.

13. As I said in *R (Stellato) v Secretary of State for the Home Department* [2007] UKHL 5, [2007] 2 AC 70, para 10, the opportunity for scrutiny of delegated legislation by Parliament is determined by the provisions of the enabling Act. Four procedures are available: affirmative resolution procedure; negative resolution procedure; simply laying; and no parliamentary stage at all. In the case of Orders in Council made under section 1 of the 1946 Act the procedure is simply laying before Parliament. All statutory instruments that are laid before Parliament are considered by the Joint Committee on Statutory Instruments. But its role is confined to assessing the technical qualities of the instrument. This is to be contrasted with the procedure which applies to an instrument upon which proceedings may be taken in either House. Under that procedure every draft instrument is considered by the Merits of Statutory Instruments Committee with a view to determining whether or not the special attention of the House should be drawn to it on grounds of a more general character. These include (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House and (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act.

14. This level of scrutiny does not apply to the procedure that was chosen for Orders in Council made under section 1 of the 1946 Act. They are not instruments upon which proceedings may be taken in either House. They are laid before

Parliament for its information only, not for scrutiny of their merits or for debate. The effect of section 1 of the 1946 Act is that decisions as to the provisions that Orders made under it may or should contain lie entirely with the executive.

15. When he introduced the United Nations Bill at its Second Reading in the House of Lords on 12 February 1946 the Lord Chancellor, Lord Jowitt, said that article 41 was the only article of the Charter that required immediate legislation in order to put His Majesty's Government in a position to fulfil their obligations as a member of the United Nations, and that when the Security Council took a decision there was an obligation on the Government to give effect to it: Hansard, HL Debates, 12 February 1946, vol 139, cols 373-375. For the opposition, Viscount Swinton said that he believed that a Bill to enable the Government to do things by Order in Council would have the complete, unanimous and enthusiastic support of everybody in the House, as if the United Nations was to succeed it must be able to take effective action and that action must be prompt and immediate: col 377. Viscount Samuel, supporting the motion, said that the Bill made provision for the eventuality that coercive measures might become necessary by the United Nations "against some State which is indulging, or is apparently about to indulge in acts of aggression": col 378. The Lord Chancellor did not suggest, in his brief reply, that this was an incorrect summary of the purpose of the enactment: col 379.

16. Remarks made during the Second Reading of the Bill in the House of Commons on 5 April 1946 cast further light as to what its purpose was understood to be at that time. Introducing the Bill, the Minister of State, Mr Philip Noel-Baker, said that it would play its part in the vitally important measures for keeping the peace, as clashes between Governments such as those which might have become wars might occur again: Hansard, HC Debates, vol 421, col 1516. Other speakers referred during the debate to the use of non-military, diplomatic and economic sanctions as a means of deterring aggression between states. There was no indication during the debates at Second Reading in either House that it was envisaged that the Security Council would find it necessary under article 41 to require states to impose restraints or take coercive measures against their own citizens. The question whether it would be appropriate, if it were to do so, for the Government to be given power to introduce such measures by Orders in Council in the manner envisaged by the Bill was not discussed.

The Security Council Resolutions

17. The world has not, of course, been immune to threats to international peace and security since 1945. Numerous Security Council Resolutions ("SCRs") have been made calling upon the members of the United Nations to take measures under article 41. Prior to the terrorist attacks that were perpetrated on 11 September 2001 ("9/11") in New York, Washington and Pennsylvania they were directed primarily to the interruption by means of sanctions of economic and other relations between states. As the Security Council's practice evolved they were directed to what states themselves might or might not do. For example, by SCR 1189(1998) the Security Council declared that every state has the duty to refrain from organizing, instigating, assisting

or participating in terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts. But the bombing of United States embassies in Nairobi and Dar es Salaam in 1999 showed that the spectre of international terrorism was not capable of being defeated by measures directed to the transactions of states as such.

18. In response to these outrages the Security Council directed its attention to the activities of the ruling regimes. SCR 1267(1999) provided for the freezing of funds and other financial resources derived from or generated from property owned or controlled by the Taliban or by any undertaking owned or controlled by them: paragraph 4(b). A sanctions Committee was established to oversee implementation of these measures, known as the 1267 Committee. SCR 1333(2000) took this process a step further. It provided by paragraph 8(c) that all states should freeze funds and other financial assets of Usama bin Laden and individuals and entities associated with him to ensure that no funds were made available for the benefit of any person or entity associated with him, including the Al-Qaida organisation. Although previous practice did not go that far, it has not been suggested that it lay outside the powers of the Security Council under article 41 to direct the taking of collective measures at an international level against individuals. The drafting history indicates the contrary. The wording of article 41 was the product of the agreement reached by the Four Powers at Dumbarton Oaks that it should contain an enumeration of the non-military measures that could be taken which was illustrative and non-exhaustive: Simma, op cit, p 737.

19. SCR 1333(2000) was followed by a series of resolutions refining and updating the measures that were to be taken to deal with Al-Qaida, Usama bin Laden, the Taliban and other individuals, groups, undertakings and entities associated with them as designated by the committee established pursuant to SCR 1267. At the hearing of this appeal the most recent was SCR 1822(2008). It was followed and reaffirmed by SCR 1904(2009), which was adopted on 17 December 2009. The preamble to SCR 1822(2008) declared that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security, reiterated the Security Council's condemnation of these persons and stressed that terrorism could only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all states. By paragraph 1 it required all states to take all the measures previously imposed by previous Resolutions with respect to Al-Qaida, Usama bin Laden and the Taliban "and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to Resolutions 1267(1999) and 1333(2000) (the 'Consolidated List')", including:

> "(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons' benefit, or by their nationals or by persons within their territory."

20. Paragraph 8 of SCR 1822(2008) reiterated the obligation of all Member States to implement and enforce the measures set out in paragraph 1 and urged all states to redouble their efforts in that regard. Paragraph 9 encouraged all Member States to submit to the 1267 Committee for inclusion on the Consolidated List names of individuals, groups, undertakings and entities participating by any means in the financing or support of acts or activities of Al-Qaida, Usama bin Laden and the Taliban and other individuals, groups, undertakings and entities associated with them. The persons on that list are the persons to whom the prohibitions in SCR 1267(1999) and subsequent Resolutions applied. Provision was made in paragraphs 19–23 for de-listing and in paragraphs 24-26 for review and maintenance of the Consolidated List. Individuals, groups, undertakings and entities have the option of submitting a petition for de-listing directly to a body known as the Focal Point. The Committee is directed to work, in accordance with its guidelines, to consider petitions for removal from the Consolidated List of those who no longer meet the criteria established in the relevant Resolutions.

21. On 28 September 2001, as part of its response to 9/11, the Security Council broadened its approach to the problem still further. It decided that action required to be taken against everyone who committed or attempted to commit terrorist acts or facilitated their commission. It adopted SCR 1373(2001). The preamble to this Resolution recognised the need for states to complement international co-operation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism. In paragraph 1 it was declared that the Security Council had decided that all States shall:

> "(a) Prevent and suppress the financing of terrorist acts; (b) Criminalize the wilful provision or collection … of funds by their nationals or in their territories with the intention that the funds should be used … 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 … by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities…; [and] (d) Prohibit their nationals or any persons and entities within their territories from making funds, financial assets or economic resources or financial or other related services available … 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 … by such persons and of persons and entities acting on behalf of or at the direction of such persons."

In paragraph 2 it was declared that the Security Council had decided that all States shall, among various other measures –

> "(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
>
> (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice…."

Provision was made in paragraph 6 for establishing a Committee of the Security Council, consisting of all its members, to monitor implementation of the Resolution. In paragraph 8 the Security Council expressed its determination to ensure the full implementation of the Resolution, in accordance with its responsibilities under the Charter. This Resolution was followed by SCR 1452(2002) which was adopted on 20 December 2002.

22. In order to give effect to SCR 1333(2000) and its successors within the European Community, the Council adopted Regulation (EC) No 881/2002 ordering the freezing of the funds and other economic resources of the persons and entities whose names appear on a list annexed to that Regulation. Practice has varied among member states as to whether to implement their obligations under the UN Charter in parallel with their obligation to legislate in their national legal orders in conformity with Regulation 881. Reports of the member states to the 1267 Committee indicate that eleven of the twenty seven member states appear to have relied on Regulation 881 alone. The remaining sixteen member states, including the United Kingdom, have adopted their own legislative measures which run in parallel with the Regulation.

The Orders in Council: the Terrorism Orders

23. The United Kingdom Parliament had already enacted the Terrorism Act 2000 for the creation of a criminal regime dealing with the funding of terrorism. It received the Royal Assent on 20 July 2000. In response to the events of 9/11 the Bill which became the Anti-terrorism, Crime and Security Act 2001 was presented to Parliament on 12 November 2001. It received the Royal Assent on 14 December 2001. It was followed by the Prevention of Terrorism Act 2005, which received the Royal Assent on 11 March 2005, the Terrorism Act 2006 which received the Royal Assent on 30 March 2006 and the Counter-Terrorism Act 2008 which received the Royal Assent on 26 November 2008. Part 2 of the 2001 Act provided for the making of freezing orders. The 2005 Act provided for the making of control orders. The 2006 Act, among other things, amended the definition of terrorism in the 2000 and 2001 Acts to eliminate disparities between its definition in domestic law and that in various international conventions to which the United Kingdom is a party. The 2008 Act introduced a procedure for setting aside financial restrictions decisions taken by the Treasury. The restrictions that were imposed on the appellants in this case were made by the Treasury under section 1 of the 1946 Act. They were not made under powers that were specifically designed for that purpose by primary legislation.

24. Effect was first given to SCR 1373 by the Terrorism (United Nations Measures) Order 2001 (SI 2001/3365), which was made on 9 October 2001, laid before Parliament on the same day and came into force on 10 October 2001. The wording of its leading provision was modelled on that of the SCR. Article 3 of the Order provided:

> "Any person who, except under the authority of a licence granted by the Treasury under this article, makes any funds or financial (or related) services available directly or indirectly to or for the benefit of –
>
> (a) a person who commit, attempts to commit, facilitates or participates in the commission of acts of terrorism,
>
> (b) a person controlled or owned directly or indirectly by a person in (a), or
>
> (c) a person acting on behalf, or at the direction of, a person in (a),
>
> is guilty of an offence under this Order."

25. The Terrorism (United Nations Measures) Order 2006 (SI 2006/2657) ("the TO") was laid before Parliament on 11 October 2006 and came into force on 12 October 2006. As its preamble records, it was made to give effect to SCR 1373(2001) and SCR 1452(2002). By article 20(1) it revoked the 2001 Order. In place of article 3 of that Order there is a new article 3, which is in these terms:

> "(1) For the purposes of this Order a person is a designated person if –
>
> (a) he is identified in the Council Decision, or
>
> (b) he is identified in a direction.
>
> 2) In this Part 'direction' (other than in articles 4(2)(d) and 5(3)(c)) means a direction given by the Treasury under article 4(1)."

Article 4 provides:

> "(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 purposes 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..

…

(4) The Treasury may vary or revoke a direction at any time."

Article 5(4) provides that the High Court or, in Scotland, the Court of Session may set aside a direction on the application of the person identified in the direction.

26. Article 7 of the TO provides:

"(1) A person (including the designated person) must not deal with funds or economic resources belonging to, owned or held by a person referred to in paragraph (2) unless he does so under the authority of a licence granted under article 11.

(2) The prohibition in paragraph (1) applies in respect of –

(a) any person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism;

(b) any designated person;

(c) any person owned or controlled , directly or indirectly, by a person referred to in sub-paragraph (a) or (b); and

(d) any person acting on behalf or at the direction of a person referred to in sub-paragraph (a) or (b).

(3) A person who contravenes the prohibition in paragraph (1) is guilty of an offence.

…"

Article 7(6) defines the phrase "deal with" in terms which are designed to catch every conceivable kind of transaction in respect of funds and economic resources. Article 8 provides that a person must not make funds, economic resources or financial services available, directly or indirectly, to or for the benefit of a person referred to in article 7(2) unless he does so under the authority of a licence granted under article 11. Licences under article 11 may be general or granted to a category of persons or to a particular person, may be subject to conditions and may be of indefinite duration or subject to an expiry date. The Treasury may vary or revoke the licence at any time.

27. On 8 July 2009 a further Order in this sequence, the Terrorism (United Nations Measures) Order 2009 (SI 2009/1747), was laid before Parliament. It came into force on 10 August 2009. Like the 2001 and 2006 Terrorism Orders, it was made under section 1 of the 1946 Act to give effect to SCR 1373(2001). It revoked the 2006 Order, but it provided that persons such as A, K, and M and G who had been

designated under the 2006 Order were to remain subject to its terms until 31 August 2010 unless their designation was revoked by that date: article 26(4). On 22 October 2009, two weeks after the hearing of these appeals had been concluded, G was informed that his designation under the 2006 Order had been revoked and that he had been redesignated under the 2009 Order. On 30 October 2009 A, K and M were redesignated under the 2009 Order and their designations under the 2006 Order were likewise revoked.

28. There are some differences between the 2006 and the 2009 Orders, such as to the definition of dealing with an economic resource, which ameliorate to some degree the onerous effects of the regime on spouses and other third parties who interact with the designated person. The prohibitions that the 2009 Order imposes on making funds, financial services available for his benefit, and on making economic resources available to him or for his benefit, apply only if the benefit that he obtains or is able to obtain is significant: articles 12(4)(a), 13(3)(a), 14(4)(a). An additional pre-condition for designation has been introduced by article 4(1)(b). The Treasury must consider that the direction is necessary for purposes connected with protecting members of the public from the risk of terrorism. But, subject to these minor adjustments, the impact of the regime on the designated person himself is just as rigorous as it was under the 2006 Order, and the phrase "reasonable grounds for suspecting" in article 4(2) of the 2006 Order has been retained in the 2009 Order: see article 4(2). So, although the 2009 Order is not before the court in these proceedings, the arguments that have been directed to the 2006 Order ("the TO") can be taken to apply to it also. They have not been superseded by the action that the Treasury has taken since the end of the hearing on 8 October 2009.

The Al-Qaida and Taliban Order

29. The Treasury's response to the Security Council's direction by a series of resolutions including SCR 1452(2002) that measures that were to be taken to deal with Al-Qaida, Usama bin Laden, the Taliban and other individuals, groups undertakings and entities associated with them as designated by the committee established pursuant to SCR 1267 was to make the Al-Qa'ida and Taliban (United Nations Measures) Order 2002 (SI 2002/111). It was replaced by Al-Qaida and Taliban (United Nations Measures) Order 2006, which was laid before Parliament on 15 November 2006 and came into force on 16 November 2006. As in the case of the TO, this Order sets out a rigorous system of prohibitions and licences which is applied to persons who are designated persons for its purposes.

30. Article 3 defines the expression "designated persons". It provides:

> "(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' … means a direction given by the Treasury under article 4(1).

Article 4 sets out the Treasury's power to designate in these terms:

"(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 purposes of this Order.

(2) The conditions are that 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.

…

(4) The Treasury may vary or revoke a direction at any time."

Article 5(4) provides that the High Court or, in Scotland, the Court of Session may set aside a direction on the application of the person identified in the direction or any other person affected by the direction.

The facts

31. Two of the three cases before this court are appeals against orders made by the Court of Appeal on 30 October 2008. In the first case, A, K and M are brothers aged 31, 35 and 36. They are UK citizens and, at the time of their designation, lived in East London with their respective wives and children. A and K no longer live with their families, and their current whereabouts are unknown. Their solicitor, with whom they have not been in contact for a number of months, attributes their disappearance to the damaging effects upon them and their families of the regimes to which they were subjected by the Treasury. It placed an extraordinary burden on their wives, created significant mental health difficulties and led ultimately to the breakdown of their marriages. M's marriage has also broken down, but he has continued to have a close relationship with his children. He lives at his ex-wife's address where his children live also.

32. A, K and M have never been charged or arrested for terrorism related offences. By letters dated 2 August 2007 they were informed that directions had been

made in respect of each of them under article 4 of the TO. They received letters which stated that the direction had been made because the Treasury had reasonable grounds for suspecting that "you are, or may be, a person who facilitates the commission of acts of terrorism" but that, in light of the sensitive nature of the information on which it was taken, they were unable to give them further details. Their solicitors requested further information. By a letter dated 12 September 2007 the Treasury provided further details about the factual basis for the decision to make the directions, to the extent that this was said to be possible given the sensitive nature of some of the material relied upon. It was said that an Al-Qaida linked operative had identified A and M as East London based Al-Qaida facilitators and that M and his brother K had travelled to Pakistan with the intention of delivering money to contacts there and participating in terrorist training.

33. In the second case, G was informed by a letter dated 13 December 2006 in almost identical terms to that received by A, K and M that a direction had been made against him under article 4 of the TO. A few days later he received a letter from the Foreign and Commonwealth Office saying that the 1267 Committee of the Security Council had added him to its Consolidated List and that this meant that he was subject to a freezing of his funds, assets and economic resources. He was told that these measures were binding on all United Nations member states and had been implemented in UK law. He was told that he could petition the Committee to seek de-listing. He was not told until later that his listing had been at the request of the United Kingdom. It was not until March 2007 that he was told that his listing meant that he was a designated person under the AQO. Article 3(1)(b) provides that for the purposes of that Order any person designated by the Committee is a designated person. It appears to have been assumed on his behalf that a direction was made against him under article 4(1) of the AQO. But there is no evidence that this ever happened, and it would have been unnecessary as he was a designated person for the purposes of that Order simply by reason of the fact that he had been listed.

34. A, K, M and G issued proceedings in the Administrative Court seeking orders under article 5(4) of the TO setting aside the directions made against them in pursuance of that Order by the Treasury. G also sought an order under article 5(4) of the AQO setting aside "the direction made against him" under article 4(1) of that Order "in so far as the court considers that such a direction has been lawfully made". The proceedings were consolidated. On 24 April 2008 Collins J held that the TO and the AQO were ultra vires and he quashed both Orders: [2008] EWHC 869 (Admin), [2008] 3 All ER 361. He gave the Treasury permission to appeal, and the orders that he made were stayed pending the hearing of an appeal. On 30 October 2008 the Court of Appeal (Sir Anthony Clarke MR and Wilson LJ, Sedley LJ dissenting in part) allowed the appeal in part. It held that the words "or may be " in article 4(2) of the TO were not warranted by the SCR, and that, although these words could be severed from the rest of article 4(2), as all the directions had included these words it was necessary to quash the directions. It also held that the provisions of the AQO were lawful but that a person who was designated under article 3(1) was entitled to seek judicial review of the merits of the decision. A, K, M and G were given leave to appeal by an appeal committee of the House of Lords on 3 March 2009.

35. The third proceedings were brought by HAY, who also is resident in the United Kingdom. He is 49 years of age, is married and lives in London with his wife and four of his children. He and his wife are Egyptian nationals and have lived in the United Kingdom since 1994. His name was added to the Consolidated List by the 1267 Committee on 29 September 2005. As a result he became a designated person for the purposes of the AQO in terms of article 3(1)(b). Unlike G, the proposal that his name be added to the list was not made by the United Kingdom. It provided no information to the 1267 Committee in relation to its decision to add his name to the list. But, as it is a member of the 1267 Committee, the United Kingdom had access to all the information available to the Committee that was relied upon at the time of its decision. In December 2005 his solicitors wrote both to the Treasury and to the Foreign and Commonwealth Office requesting disclosure of the state that had proposed HAY's addition to the Consolidated List and of the information that the Committee had relied on in reaching its decision. The Foreign and Commonwealth Office made repeated requests over a long period to the nominating state and to the Committee in an attempt to satisfy these requests. As a result an Interpol Red Note relating to HAY was sent to his solicitors under cover of a letter dated 26 September 2008. It was made clear in this letter that this was not the only information provided to the Committee. But the United Kingdom did not have permission to release any other information, and the nominating state refused to allow its identity to be disclosed.

36. HAY issued a claim for judicial review on 9 February 2009 in which he sought a merits based review of the information relied upon by the 1267 Committee. In the alternative he sought an order quashing the AQO, at least in so far as it applied to him. On 7 April 2009 he submitted an amended claim form which indicated that he was proceeding only on the basis that the AQO was ultra vires. Shortly before the hearing the Foreign Secretary completed a review of the information available to him as to whether HAY continued to meet the criteria applied by the 1267 Committee to determine whether or not a person should be on the Consolidated List. The 1267 Committee, for its part, is presently undertaking a review of the cases of all persons whose names appeared on the list as at June 2008. HAY is in the second tranche of these cases. A decision in his case is unlikely to be reached in the near future. The Foreign Secretary has made an application for HAY's name to be removed from the list, as he considers that HAY's listing is no longer appropriate: see para 82, below.

37. Owen J granted HAY's application for judicial review and made a declaration that the AQO was unlawful in so far as it applied to HAY: [2009] EWHC 1677 (Admin). He concluded that the AQO was ultra vires the 1946 Act but he declined to make a quashing order. He held that the practical effect of the AQO was to preclude access to the court for protection of what HAY contended were his basic rights: para 45. The Treasury appealed against this decision, and by an order dated 14 July 2009 Owen J gave it permission under the leap-frog provisions to appeal to the House of Lords so that its appeal could be heard together with the appeals by A, K, M and G. In response to representations made by HAY's solicitors the Treasury amended his licence conditions which enable his wife to obtain welfare benefits, with the result that she is no longer required to provide monthly reports on how the family spend their money. Otherwise, despite the Foreign Secretary's view that listing is no longer

appropriate, the freezing regime remains in place. The Treasury's position is that HAY and his family must remain subject to the AQO unless and until the 1267 Committee decides to remove him from the Consolidated List.

38. The effect of the regimes that the TO and the AQO impose is that every transaction, however small, which involves the making of any payments or the passing of funds or economic resources whatever directly or indirectly for the benefit of a designated person is criminalised. This affects all aspects of his life, including his ability to move around at will by any means of private or public transport. To enable payments to be made for basic living expenses a system of licensing has been created. It is regulated by the Treasury, whose interpretation of the sanctions regime and of the system of licensing and the conditions that it gives rise to is extremely rigorous. The overall result is very burdensome on all the members of the designated person's family. The impact on normal family life is remorseless and it can be devastating, as the cases of A and K illustrate. As already mentioned (see para 28, above), the effects on third parties have been ameliorated to some extent in the case of designations made under the 2009 Order. Some transactions are affected only if they are "significant". But, taken overall, the regime that is imposed under it remains to a high degree restrictive and, so far as the designated person himself is concerned, just as paralysing.

39. Sir Anthony Clarke MR accepted that the orders are oppressive in their nature and that they are bound to have caused difficulties for the appellants and their families: [2009] 3 WLR 25, para 25. Wilson LJ said that they imposed swingeing disabilities upon those who were designated: para 152. In *R(M) v HM Treasury* [2008] 2 All ER 1097 the House of Lords described the regime as applied to HAY's wife as disproportionate and oppressive and the invasion of the privacy of someone who was not a listed person as extraordinary: para 15. The appellants have all been subjected to a regime which indefinitely freezes their assets under which they are not entitled to use, receive or gain access to any form of property, funds or economic resources unless licensed to do so by the executive. For example, HAY has been denied access to any funds since September 2005. His only permitted subsistence support is in kind provided by his wife. She is permitted, by licence from the Treasury, to access welfare benefits, which are the family's sole source of support. But she may spend money only on what the Treasury determines are "basic expenses". Until recently she was required to report to the Treasury on every item of household expenditure, however small, including expenditure by her children.

The issues

40. As Mr Owen QC for A, K and M said at the outset of his submissions, the fundamental issue in this case is whether the Treasury was empowered by section 1 of the 1946 Act to introduce an asset freezing regime by means of an Order in Council. He submitted that the TO was ultra vires on three grounds: (1) illegality because it was passed without Parliamentary approval, (2) lack of legal certainty and proportionality and (3) the absence of procedures that enabled designated persons to

challenge their designation. For G, Mr Rabinder Singh QC submitted that the AQO was likewise ultra vires the 1946 Act, and that both the TO and the AQO were unlawful by virtue of section 6 of the Human Rights Act 1998 because they were incompatible with article 8 of the European Convention on Human Rights and with article 1 of Protocol 1. For HAY, Mr Husain submitted that the AQO was ultra vires the 1946 Act because it violated his client's right of access to a court for an effective remedy.

41. Some of the issues raised by these submissions are common to both Orders, and others arise under only one of them. They can perhaps best be grouped as follows:

Both Orders

1. Are the Orders ultra vires the 1946 Act by reference to the principle of legality?

2. Are the Orders incompatible with the Convention rights under the Human Rights Act 1998?

The TO

3. If it is not ultra vires on one or other of the previous grounds, is the TO ultra vires the 1946 Act because its terms go beyond those required by the SCR?

The AQO

4. Is the AQO ultra vires the 1946 Act because it violates the right of effective judicial review?

Section 1 of the 1946 Act

42. As the scope of the power conferred by section 1(1) of the 1946 Act is in issue, it is first necessary to examine its wording: see para 12 above, where its full terms are set out. It provides that if the Security Council of the United Nations calls upon the Government to give effect to any of its decisions under article 41 –

> "…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."

The question is what limits, if any, there are on the power conferred by this subsection. According to its own terms, it extends to "any" measures mandated by the Security Council. The word "any" gives full weight to the obligation to accept and carry out the decisions of the Security Council that article 25 of the Charter lays down. But the provisions that may be imposed by this means in domestic law must be either "necessary" or "expedient" to enable those measures to be "applied" effectively.

43. Mr Swift for the Treasury said that the words "necessary" and "expedient" were directed to the content of the Order in Council, not the legislative route by which its provisions were given the force of law. I agree, but I do not think that the legislative route that section 1 contemplated can be left out of account. The exclusion of section 1(1) of the Rules Publication Act 1893 by section 1(4) and the direction that the Order is to be forthwith after it is made laid before Parliament are important pointers to the kind of measure that was envisaged when this provision was enacted. They indicate that it was anticipated that the measures that the Security Council was likely to call for would require urgent action rendering Parliamentary scrutiny impracticable. As Mr W S Morrison said in the course of the debate at Second Reading, the procedure possessed "the necessary combination of speed and authority to enable instant effect to be given to the international obligations to which we are pledged": Hansard, HC Debates, vol 421, col 1517.

44. The section leaves the question whether any given measure is "necessary" or "expedient" to the judgment of the executive without subjecting it, or any of the terms and conditions which apply to it, to the scrutiny of Parliament. In the context of what was envisaged when the Bill was debated in 1946, which was the use of non-military, diplomatic and economic sanctions as a means of deterring aggression between states, the surrender of power to the executive to ensure the taking of immediate and effective action in the international sphere is unsurprising. The use of the power as a means of imposing restraints or the taking of coercive measures targeted against individuals in domestic law is an entirely different matter. A distinction must be drawn in this respect between provisions made "for the apprehension, trial and punishment of persons offending against the Order" (see the concluding words of section 1(1)) and those against whom the Order is primarily directed. So long as the primary purpose of the Order is within the powers conferred by the section, ancillary measures which are carefully designed to ensure their efficacy will be also. The crucial question is whether the section confers power on the executive, without any Parliamentary scrutiny, to give effect in this country to decisions of the Security Council which are targeted against individuals.

45. It cannot be suggested, in view of the word "any", that the power is available only for use where the Security Council has called for non-military, diplomatic and economic sanctions to deter aggression between states. But the phrase "necessary or

expedient for enabling those measures to be effectively applied" does require further examination. The closer those measures come to affecting what, in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, Lord Hoffmann described as the basic rights of the individual, the more exacting this scrutiny must become. If the rule of law is to mean anything, decisions as to what is necessary or expedient in this context cannot be left to the uncontrolled judgment of the executive. In *Chester v Bateson* [1920] 1 KB 829, 837, Avory J referred to Lord Shaw of Dunfermline's warning in *R v Halliday* [1917] AC 260, 287 against the risk of arbitrary government if the judiciary were to approach actions of government in excess of its mandate in a spirit of compliance rather than that of independent scrutiny. The undoubted fact that section 1 of the 1946 Act was designed to enable the United Kingdom to fulfil its obligations under the Charter to implement Security Council resolutions does not diminish this essential principle. As Lord Brown says in para 194, the full honouring of these obligations is an imperative. But these resolutions are the product of a body of which the executive is a member as the United Kingdom's representative. Conferring an unlimited discretion on the executive as to how those resolutions, which it has a hand in making, are to be implemented seems to me to be wholly unacceptable. It conflicts with the basic rules that lie at the heart of our democracy.

46. If authority were needed for these propositions it is to be found in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539. At p 573 Lord Browne-Wilkinson said:

> "I consider first whether there is any principle of construction which requires the court, in certain cases, to construe general words contained in the statute as being impliedly limited. In my judgment there is such a principle. It is well established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions."

At p 575, having examined the authorities, he said:

> "From these authorities I think the following proposition is established. A power conferred 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."

47. I would approach the language of section 1 of the 1946 Act, therefore, on the basis that Parliament did not surrender its legislative powers to the executive any more than must necessarily follow from the words used by it. The words "necessary"

and "expedient" both call for the exercise of judgment. But this does not mean that its exercise is unlimited. The wording of the Order must be tested precisely against the words used by the Security Council's resolution and in the light of the obligation to give effect to it that article 25 lays down. A provision in the Order which affects the basic rights of the individual but was unavoidable if effect was to be given to the resolution according to its terms may be taken to have been authorised because it was "necessary". A provision may be included which is "expedient" but not "necessary". This enables provisions to be included in the Order which differ from those used by the resolution or are unavoidably required by it. But it does not permit interference with the basic rights of the individual any more that is necessary and unavoidable to give effect to the SCR and is consistent with the principle of legality.

48. The points that I have just made may be taken from the wording of section 1 itself. But underlying them is a more fundamental point, which is whether measures of the kind which are before us in this case should have been made by Order in Council at all. Concern about excessive use of the power that section 1 of the 1946 Act confers is not new. In February 1999 the House of Commons Foreign Affairs Committee drew attention to the way a resolution of the Security Council about the imposition of sanctions against Sierra Leone had been implemented by an Order in Council made under section 1 of the 1946 Act. The SCR did not define Sierra Leone, leaving the extent of its application ambiguous. The Order in Council defined it in terms which removed any ambiguity but arguably went beyond the scope of the SCR. This was thought by the Committee to create a significant pitfall for anyone inside or outside the Foreign and Commonwealth Office who had read the SCR but not the Order in Council.

49. In its report the Committee said that the way in which the Order in Council was dealt with was unacceptable as it was subject to no parliamentary procedure. Had it been necessary for a Minister to appear before a Standing Committee on Delegated Legislation or to defend the Order on the floor of the House of Lords, it was likely that wider attention would have been given to its true meaning and extent. It recommended that the 1946 Act be amended so that delegated legislation made under section 1 was subject to affirmative resolution in both Houses of Parliament and that any sanctions order approved by a Minister of the Foreign and Commonwealth Office be brought specifically to the attention of the Foreign Affairs Committee: *Second Report of the Foreign Affairs Select Committee on Sierra Leone*, Session 1998-1999, HC 116-I, 9 February 1999. In its response (Cm 4325, 1999) the Government said that it was willing to keep the working of the 1946 Act under review, but that application of the affirmative procedure to sanctions orders would put the United Kingdom in breach of its international obligations if an Order was not approved. The recommendation that such Orders be brought to the attention of the Committee has not been adopted, nor has section 1 of the 1946 Act been amended.

50. The Government's reason for declining to follow the Select Committee's recommendations may have appeared sufficient at the time of its response. But the case for avoiding scrutiny in the interests of certainty has been weakened by the change of direction that the Security Council has adopted for the freezing of assets to

suppress terrorism. Other member states have not found it necessary in this context to rely exclusively on an unlimited delegation of the power to give effect to Security Council resolutions to the executive. Australia gave effect to the post 9/11 SCRs initially by means of regulations passed under the Charter of the United Nations Act 1945. But it then made provision for an asset freezing regime by the Suppression of the Financing of Terrorism Act 2002 which inserted a new Part IV into the 1945 Act. New Zealand initially implemented SCR 1373(2001) by means of regulations made under its United Nations Act 1946, but has replaced them by an asset regime under the Terrorism Suppression Act 2002. The regimes that both Australia and New Zealand have introduced by means of primary legislation are exacting. But they contain various, albeit limited, safeguards and in so far as they interfere with basic rights of the individual that interference has been expressly authorised by their respective legislatures.

51. As I have already noted (see para 23, above), the United Kingdom Parliament had already enacted the Terrorism Act 2000 for the creation of a criminal regime dealing with the funding of terrorism before the events of 9/11. In response to those events, at a time when the general perception was that further terrorist attacks of that kind were likely to occur, the Anti-terrorism, Crime and Security Act 2001 was enacted. It received the Royal Assent on 14 December 2001. The focus of attention now was on threats to the United Kingdom and its residents from foreign states and foreign nationals. No mention was made of the Security Council's resolutions in the long title. But Part 2 of the Act, which makes provision for the making of freezing orders, appears to have been modelled on the initiatives that it had already taken both by the Security Council and, under section 1 of the 1946 Act, by the Treasury by means of the Terrorism (United Nations Measures) Order 2001 (see para 24, above).

52. Section 4 of the 2001 Act provides:

> "(1) The Treasury may make a freezing order if the following two conditions are satisfied.
>
> (2) The first condition is that the Treasury reasonably believe that –
>
> (a) action to the detriment of the United Kingdom's economy (or part of it) has been or is likely to be taken by a person or persons, or
>
> (b) action constituting a threat to the life or property of one or more nationals of the United Kingdom or residents of the United Kingdom has been or is likely to be taken by a person or persons.
>
> (3) If one person is believed to have taken or to be likely to take the action the second condition is that the person is –
>
> (a) the government of a country or territory outside the United Kingdom, or
>
> (b) a resident of a country or territory outside the United Kingdom.

> (4) If two or more persons are believed to have taken or to be likely to take the action the second condition is that each of them falls within paragraph (a) or (b) of subsection (3); and different persons may fall within different paragraphs."

Where the conditions that section 4 sets out are satisfied, the prohibitions contained in the freezing order extend to all persons in the United Kingdom and all persons elsewhere who are United Kingdom nationals: section 5(2). It prohibits persons from making funds available to or for the benefit of a person or persons specified in the order. Section 5(3) provides:

> "The order may specify the following (and only the following) as the person or persons to whom or for whose benefit funds are not to be made available –
>
> (a) the person or persons reasonably believed by the Treasury to have taken or to be likely to take the action referred to in section 4;
>
> (b) any person the Treasury reasonably believe has provided or is likely to provide assistance (directly or indirectly) to that person or any of those persons."

53. Detailed provision is made in Schedule 3 for the content of freezing orders, including a system for the granting of licences authorising funds to be made available. Orders made under the Act are subject to the affirmative resolution procedure (section 10), and they cease to have effect after two years (section 8). To a large degree, the power to make freezing orders under this Act enables the Treasury to do what paras 1(d) and 2(d) of SCR 1373(2001) require (see para 21 above). But it is more precisely worded, and it contains various safeguards. Although the test in section 4(2)(b) is that action which is a threat to the life or property of one or more nationals or residents of the United Kingdom has been or is likely to be taken, it is by no means obvious that the power that it confers was not available for use in the appellants' cases. In their letter dated 12 September 2007 to A, K and M's solicitors, in which further details were given about the factual basis for the decision to make the directions in their cases, the Treasury referred to various contacts between those appellants and persons in Pakistan who were engaged in terrorist activities. The persons with whom they are said to have been in contact would appear to satisfy the conditions in subsection (2)(b) of section 4, and they would appear to be persons of the kind referred to in section 5(3)(b). Yet the Treasury have, it seems, chosen not to make use of the powers given to them by this Act, preferring to use the general power under section 1 of the 1946 Act. Mr Swift said that this was a matter for political control. By this I think he meant it was no business of the court to interfere. For the reasons already given in para 45, above, I disagree. In my opinion the rule of law requires that the actions of the Treasury in this context be subjected to judicial scrutiny.

54. Against that background I now turn to the issues that have been raised about the validity of the TO and the AQO, and the directions that have been made under them, in these appeals.

The TO

55. The Treasury's initial response to SCR 1373(2001) was to make the Terrorism (United Nations Measures) Order 2001. The key provision in this Order is to be found in article 3: see para 24, above. For convenience I will set it out again here. It was in these terms:

> "Any person who, except under the authority of a licence granted by the Treasury under this article, makes any funds or financial (or related) services available directly or indirectly to or for the benefit of –
>
> (a) a person who commits, attempts to commit, facilitates or participates in the commission of acts of terrorism,
>
> (b) a person controlled or owned directly or indirectly by a person in (a),
>
> (c) a person acting on behalf, or at the direction, of a person in (a),
>
> is guilty of an offence under this Order."

The wording of this article was closely modelled on that of para 1(d) of the SCR. Article 4, which was headed "Freezing of Funds" and was modelled on para 1(c) of the SCR, provided that where the Treasury had reasonable grounds for suspecting that the person by, for or on behalf of whom any funds were held was or might be a person described in article 3, it might by notice direct that those funds were not to be made available to any person, except under the authority of a licence granted by the Treasury under that article.

56. The TO, which was made in 2006 and replaced the 2001 Order, introduced the system, to which objection is taken in this case, for persons to be designated if they are identified in a direction given by the Treasury. The power to designate is set out in Article 4: see para 25, above. It provides in para (2)(a) that the Treasury may give a direction if they have reasonable grounds for suspecting that the person is or may be a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism.

57. The question is whether, by introducing the words "have reasonable grounds for suspecting that the person is or may be", the Treasury exceeded their powers under section 1 of the 1946 Act. The Court of Appeal held that the introduction of the "reasonable grounds for suspecting" test was within the ambit of that section, provided that the person's right to challenge the direction was preserved: but that

there was no warrant in the SCR for the addition of the words "or may be" and that, as the directions under the TO were made by reference to those words, they should be quashed: [2009] 3 WLR 25, paras 46, 124 and 135. There is no appeal against its decision as to the inclusion of "or may be", and the Treasury have made fresh directions against A, K, M and G which do not include these words. The validity of the "reasonable grounds for suspecting" test remains in issue.

58. SCR 1373(2001) is not phrased in terms of reasonable suspicion. It refers instead to persons "who commit, or attempt to commit, terrorist acts". The preamble refers to "acts of terrorism". The standard of proof is not addressed. The question how persons falling within the ambit of the decision are to be identified is left to the member states. Transposition of the direction into domestic law under section 1 of the 1946 Act raises questions of judgment as to what is "necessary" on the one hand and what is "expedient" on the other. It was not necessary to introduce the reasonable suspicion test in order to reproduce what the SCR requires. It may well have been expedient to do so, to ease the process of identifying those who should be restricted in their access to funds or economic resources. But widening the scope of the Order in this way was not just a drafting exercise. It was bound to have a very real impact on the people that were exposed to the restrictions as a result of it. The facts of these cases show how devastating their imposition can be on the restricted persons and their families. This raises fundamental questions, such as the standard of proof that should be required, whether the directions should be capable of being challenged by an effective form of judicial review and whether they should last indefinitely or be time limited. The validity of the introduction of the reasonable grounds test must be assessed in the light of the entire system that the TO provides for. Is it acceptable that the exercise of judgment in matters of this kind should be left exclusively, without any form of Parliamentary scrutiny, to the executive?

59. Mr Swift submitted that the reasonable grounds test was within the scope of the SCR. He accepted that the less direct the link to the wording of the SCR, the greater the scope for argument about the Order's legality. But he submitted that the test was needed to enable restrictions directed by the Security Council to work effectively and that it was soundly based on international practice. Mr Guthrie, the Head of HM Treasury's Asset Freezing Unit, said in his witness statement that this is the standard that is applied by the United Nations International Task Force. It had overall support among states. The SCR contemplated interference with the economic and other rights of those affected by it. The objection that the designated person had no access to an effective judicial remedy had been met by Part 6 of the Counter-Terrorism Act 2008, which introduced a scheme for subjecting financial restrictions decisions of the Treasury under the UN Terrorism Orders and orders made under Part 2 of the 2001 Act to proceedings for judicial review.

60. I do not think that these arguments are sufficient to meet the basic objection to the use of the powers of section 1 of the 1946 to impose the restrictions provided for by the TO on the grounds of a reasonable suspicion only. I can leave aside the use of unsupervised delegated powers to block access to the courts which Sedley LJ in the Court of Appeal, I think rightly, regarded as a fatal flaw in the Order: para 147. It was

common ground that, given the intensity of judicial review that would be appropriate under Part 6 of the 2008 Act, this objection has been met by the fact that decisions of the Treasury under the UN terrorism orders are subject to its provisions: see section 63(1)(a) of the 2008 Act. There remains however the objection that the restrictions strike at the very heart of the individual's basic right to live his own life as he chooses. Collins J, in his impressive judgment, described the range of powers that it conferred on the Treasury as draconian, and the AQO as even more so: [2008] 3 All ER 361, para 11. It is no exaggeration to say, as Sedley LJ did in para 125, that designated persons are effectively prisoners of the state. I repeat: their freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating.

61. I would hold that, by introducing the reasonable suspicion test as a means of giving effect to SCR 1373(2001), the Treasury exceeded their powers under section 1(1) of the 1946 Act. This is a clear example of an attempt to adversely affect the basic rights of the citizen without the clear authority of Parliament – a process which Lord Browne-Wilkinson condemned in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539. As Lord Hoffmann said in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, fundamental rights cannot be overridden by general or ambiguous words. The absence of any indication that Parliament had the imposition of restrictions on the freedom of individuals in mind when the provisions of the 1946 Act were being debated makes it impossible to say that it squarely confronted those effects and was willing to accept the political cost when that measure was enacted. In my opinion the TO is ultra vires section 1(1) of the 1946 Act and, subject to what I say about the date when these orders should take effect, it together with the directions that have been made under it in the cases of A, K, M and G must be quashed.

62. Various subsidiary arguments were advanced to the effect that the TO was ultra vires because in certain material respects it lacked legal certainty. As I consider that it is open to attack on more fundamental grounds, however, I prefer to express no opinion as to whether any of these criticisms of its terms were well founded and, if so, what would be the consequences.

The AQO

63. Mr Singh QC submits for the appellant G that the AQO is ultra vires section 1 of the 1946 and that it is also unlawful by virtue of section 6(1) of the Human Rights Act 1998. He adopted Mr Owen's submissions as part of his argument on the first point. Mr Husain for HAY, who has the benefit of a decision in his favour by Owen J in the administrative court, submitted that the AQO was ultra vires because it violated his right of access to a court as he was unable to obtain an effective remedy. G, it will be recalled (see para 33, above), was listed by the 1267 Committee at the request of the United Kingdom. HAY's name, on the other hand, was added to the list at the request of another state in September 2005 (see para 35). His listing is regarded by the

United Kingdom as no longer appropriate. But its efforts so far to obtain the de-listing of HAY's name have proved to be unsuccessful.

64. Unlike the TO, the AQO does not rely for its application, at least in the first instance, on a reasonable grounds to suspect test. To this extent it does, as Lord Brown says in para 197, faithfully implement the relevant SCRs. The persons who are designated persons for its purposes are (a) Usama bin Laden, (b) any person designated by the Sanctions Committee and (c) any person identified in a direction: article 3. A reasonable grounds to suspect test is introduced by article 4, which provides that the Treasury may give a direction that a person is designated for the purposes of the Order if they have reasonable grounds for suspecting that the person is or may be Usama bin Laden or a person designated by the Sanctions Committee or a person owned or controlled by a designated person or acting on his behalf. Mr Swift explained that the latitude that had been built into article 4 was explicable, at least in part, by problems caused by the widespread use of assumed names by those who were engaged in terrorist activities. It is not necessary to explore the consequences of its use in the context of the AQO any further in this case, however. Both G and HAY are designated persons because their names are on the list maintained by the 1267 Committee. As they have not been subjected to freezing orders on the basis of a reasonable suspicion, the grounds on which I would hold that the TO was ultra vires do not apply to their designation under the AQO.

65. The question which is common to both G and HAY is whether the AQO is ultra vires section 1 of the 1946 Act because there is no effective judicial remedy against a listing by the 1267 Committee. But I must deal first with Mr Singh's argument that the AQO is unlawful under section 6(1) of the Human Rights Act 1998 which, as he explained, he advanced as an alternative to his main submission that the AQO was ultra vires section 1 of the 1946 Act.

66. Mr Singh's case under section 6(1) of the Human Rights Act is that the AQO is unlawful because it interferes with G's rights protected by articles 6 and 8 of the European Convention on Human Rights and article 1 of Protocol 1. He submits that G's rights under article 8 and article 1 of Protocol 1 are obviously interfered with, and that his rights under article 6 are interfered with too as his designation under the AQO interfered with his civil rights but did not give him a meaningful right of access to a court which was capable of granting him an effective remedy. He frankly acknowledged that the decision of the House of Lords in *R (Al-Jedda) v Secretary of State for Defence* [2008] AC 332 was against him on this branch of his argument. But he invited this court to reconsider that decision, especially in the light of the decision of the European Court of Justice in *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225.

67. In *Kadi v Council of the European Union* the ECJ was asked to consider Council Regulation (EC) No 881/2002 implementing UN resolutions under Chapter VII of the Charter of the United Nations for the freezing of the funds and economic resources controlled directly or indirectly by persons associated with Osama bin

Laden, Al Qaeda (sic) or the Taliban. It ordered the freezing of the funds and other economic resources of the person and entities whose names appeared on a list annexed to that regulation. Mr Kadi was one of those named on that list, as his name was on the list kept by the Sanctions Committee of the United Nations. He sought annulment of the regulation on the grounds that it was not competent for the Council to adopt it and that it infringed several of his fundamental rights, including his right to property and his right to be heard and to an effective judicial review. The case is important and deserves close attention because of the way the ECJ dealt with the argument about the protection of fundamental rights. Advocate General Maduro observed in para 51 of his opinion that the Community institutions had not afforded any opportunity to Mr Kadi to make known his views on whether the sanctions against him were justified and whether they should be kept in force:

> "The existence of a de-listing procedure at the level of the United Nations offers no consolation in that regard. That procedure allows petitioners to submit a request to the Sanctions Committee or to their government for removal from the list. Yet, the processing of that request is purely a matter of intergovernmental consultation. There is no obligation on the Sanctions Committee actually to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list."

In para 52 he said that the right to effective judicial protection holds a prominent place in the firmament of fundamental rights. In paras 54 and 55 he said that had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations this might have released the Community from the obligation to provide this within the Community legal order but that, as this was not so, Mr Kadi's claim that the regulation infringed his rights was well founded.

68. In its judgment the ECJ endorsed this approach. In paras 281-283 it said that the Community was based on the rule of law, inasmuch as neither its member states nor its institutions could avoid review of conformity of their acts with the EC treaty, that an international agreement could not affect the autonomy of the Community legal system and that according to settled case law fundamental rights formed an integral part of the general principles of law whose observance the Court ensured. In para 285 it said:

> "It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty."

The court went on to say that it did not follow from the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms was excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations: para 287. The existence within the United Nations of the re-examination procedure could not give rise to generalised immunity from jurisdiction within the internal legal order of the Community, and the Community judicature must ensure the full review of all Community acts including measures designed to give effect to resolutions adopted by the Security Council under Chapter VII: paras 299 and 326. In his paper, *Terrorism and the ECJ: Empowerment and democracy in the EC legal order* (2009) 34 EL Rev 103, 126 Professor Takis Tridimas said that the ECJ's commitment to the protection of fundamental rights was to be applauded, but that as regards the exercise of finding a balance between the overriding interests of public security and the rights of the individual it marked the beginning rather than the end of the inquiry.

69. The ECJ is not alone in regarding the way the decisions under the listing system administered by the 1267 Committee are dealt with as incompatible with the fundamental right that there should be an opportunity for a review by an independent tribunal of their lawfulness. In *Abdelrazik v The Minister of Foreign Affairs* [2009] FC 580 Zinn J sitting in the Federal Court of Canada said in para 51:

> "I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provides for basic procedural fairness. … It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge."

He found that Mr Abdelrazik's right under the Canadian Charter of Rights and Freedoms to enter Canada, his country of citizenship, which had been denied to him because he was listed and facilitating his return by purchasing an airline ticket on his behalf was precluded by the ban on transferring assets to a listed entity, had been breached. He held that the remedy to which Mr Abdelrazik was entitled required the Canadian government to take immediate action so that he be returned to Canada.

70. In *KindHearts for Charitable Humanitarian Development Inc v Timothy Geithner*, Case 3.08c v 02400, 18 August 2009, the United States District Court for the Northern District of Ohio upheld a challenge to a provisional determination under President Bush's Executive Order No. 13224 of 24 September 2001 by the Office of Foreign Assets Control of the US Treasury Department that KindHearts was a

specially designated global terrorist on the ground that blocking access to its assets pending investigation was contrary to its Fourth Amendment right to be secure against unreasonable search and seizure. The judge held that the Office's handling of KindHearts' request for access to blocked assets to pay counsel's fees had been arbitrary and capricious without individualised consideration of the facts of the case. It is worth noting that the President's EO was issued before the Security Council adopted SCR 1373(2001). This appears to be the first time that a challenge to the taking of action of that kind has been successful in the United States.

71. Caution must however be exercised in drawing any firm conclusions from these cases. The decisions of the courts in Canada and the United States were not made under reference to an international human rights instrument such as the European Convention. It should be noted too that in *Diggs v Shultz*, 470 F.2d 461 (DC Cir 1972) the US Federal Court of Appeals held that it lacked the authority to compel the President to comply with a UNSCR obligation regarding sanctions against Rhodesia, as subsequent legislation by Congress which plainly contravened the SCR had equal status to the obligation under the treaty: see also *Whitney v Robertson* 124 US 190 (1888). The ECJ was not faced in *Kadi v Council of the European Union* with the problem that article 103 of the UN Charter gives rise to in member states in international law, as the institutions of the European Community are not party to the UN Charter. We must take our guidance from *R (Al-Jedda) v Secretary of State for Defence* [2008] AC 332. In that case the House was unanimous in holding that the obligation under article 25 of the Charter was, by virtue of article 103, to prevail over any other international agreement, including the Convention. It had regard to a passage in *Behrami v France; Saramati v France, Germany and Norway* (2007) 45 EHRR SE 85, para 149, which in para 36 of his opinion in *Al-Jedda* Lord Bingham of Cornhill said was a strong statement. In that paragraph the Strasbourg court said that the Convention cannot be interpreted in a manner which would subject the acts and omissions of contracting parties which are covered by UNSCRs to the scrutiny of the court, as to do so would be to interfere with the fulfilment of the UN's key mission to secure international peace and security.

72. Lord Bingham gave this explanation for the conclusion that the House had reached in *Al-Jedda's* case:

> "35. Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 to 'any other international agreement' leaves no room for any excepted category, and such appears to be the consensus of learned opinion. The decisions of the International Court of Justice (*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* [1992] ICJ Rep 3, para 39; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [1992] IJC Rep 325, 439-440, paras 99-100 per Judge ad hoc Lauterpacht) give no warrant for drawing any distinction save where an obligation is jus cogens and according to Judge Bernhardt it now

> seems to be generally recognised that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments (*The Charter of the United Nations: A Commentary* 2nd ed, ed Simma, pp 1299-1300).
>
> 36. I do not think that the European court, if the appellant's article 5(1) claim were before it as an application, would ignore the significance of article 103 of the Charter in international law. …"

In para 39, acknowledging that there was clash between a power or duty to detain exercisable on the express authority of the Security Council and a fundamental human right which the United Kingdom had undertaken to secure to those within its jurisdiction, he said that there was only one way that they could be reconciled. This was by ruling that the United Kingdom might exercise the power of detention authorised by the Security Council but must ensure that the detainee's rights under article 5 were not infringed to any greater extent than was inherent in such detention.

73. The Security Council resolutions that were in issue in that case were made pursuant to article 42 of the Charter not, as in this case, under article 41. But Mr Singh did not suggest, in my view rightly, that it could be distinguished on that ground. What he did suggest was that the Grand Chamber of the European Court of Human Rights, before which the *Al-Jedda* case is to be heard, might reach a different view on this matter, especially in the light of the decision of the ECJ in *Kadi v Council of the European Union*. He pointed out that, as the prohibition on the death penalty, unlike that against torture, was not ius cogens, the logical conclusion of the *Al-Jedda* approach was that a direction by the Security Council that those found guilty of terrorist acts must be sentenced to death would have to prevail over article 2 of the Convention and article 1 of Protocol 13 (the Death Penalty Protocol). It was arguable that this was to drive the effect of article 103 too far: see *Soering v United Kingdom* (1989) 11 EHRR 439. The same could be said of the breaches of Convention rights that resulted from the SCRs directing the kind of freezing regime that the AQO was designed to give effect to, especially in view of their indefinite effect and the lack of effective access to an independent tribunal for the determination of challenges to decisions about listing and de-listing.

74. I do not think that it is open to this court to predict how the reasoning of the House of Lords in *Al-Jedda* would be viewed in Strasbourg. For the time being we must proceed on the basis that article 103 leaves no room for any exception, and that the Convention rights fall into the category of obligations under an international agreement over which obligations under the Charter must prevail. The fact that the rights that G seeks to invoke in this case are now part of domestic law does not affect that conclusion. As Lord Bingham memorably pointed out in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20, the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. It must be for the Strasbourg court to provide the authoritative guidance that is needed so that all the contracting states can adopt a uniform position

about the extent to which, if at all, the Convention rights or any of them can be held to prevail over their obligations under the UN Charter.

75. But this leaves open for consideration how the position may be regarded under domestic law. Mr Singh submitted that the obligation under article 25 of the Charter to give effect to the SCRs directing the measures to be taken against Usama bin Laden, Al-Qaida and the Taliban had to respect the basic premises of our own legal order. Two fundamental rights were in issue in G's case, and as they were to be found in domestic law his right to invoke them was not affected by article 103 of the UN Charter. One was the right to peaceful enjoyment of his property, which could only be interfered with by clear legislative words: *Entick v Carrington* (1765) 19 Howell's State Trials 1029, 1066, per Lord Camden CJ. The other was his right of unimpeded access to a court: *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, para 26, per Lord Steyn. As it was put by Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286, the subject's right of access to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. As Mr Singh pointed out, both of these rights are embraced by the principle of legality, which lies at the heart of the relationship between Parliament and the citizen. Fundamental rights may not be overridden by general words. This can only be done by express language or by necessary implication. So it was not open to the Treasury to use its powers under the general wording of section 1(1) of the 1946 Act to subject individuals to a regime which had these effects.

76. I would accept Mr Singh's proposition that, as fundamental rights may not be overridden by general words, section 1 of the 1946 Act does not give authority for overriding the fundamental rights of the individual. It does not do so either expressly or by necessary implication. The question is whether the effect of G's designation under the AQO has that effect. To some extent this must be a question of degree. Some interference with the right to peaceful enjoyment of one's property may have been foreseen by the framers of section 1, as it authorises the making of provision for the apprehension, trial and punishment of persons offending against the Order. To that extent coercive steps to enable the measures to be applied effectively can be regarded as within its scope. But there must come a point when the intrusion upon the right to enjoyment of one's property is so great, so overwhelming and so timeless that the absence of any effective means of challenging it means that this can only be brought about under the express authority of Parliament. Has that point been reached in the case of those who are designated persons under the AQO?

77. The opportunity to seek judicial review under Part 6 of the 2008 Act is not available in the case of persons such as G who are subject to the AQO only because they have been listed by the 1267 Committee. No direction under article 4(1) of the AQO was made in his case. Even if such a direction had been made he would still be a designated person to whom the AQO applied as he has been designated by the Committee: see article 3(1)(b). In the Court of Appeal Sir Anthony Clarke MR summarised the position in which G found himself in this way [2009] 3 WLR 25, para 108:

> "It is common ground that G is subject to the AQO only because he has been listed by the UN Sanctions Committee ("the committee"). He has never had any contact with the committee, has no idea who precisely made the decision or upon what evidence it was based, although he does now know that it was the UK Government which requested that he be listed. It presumably had some evidential basis for its request. Indeed, it was presumably on the same basis as that relied upon by HMT in making a direction for his designation under the TO and was thus said to be so sensitive that G could not be given details. As to the committee, Mr Singh stresses that there is no information in the public domain that throws any light on who its members are, what degree of independence they enjoy, what evidential test they apply and what, if any, safeguards are in place to protect the rights of the individuals affected."

78. Some further details can be obtained from the *Guidelines of the Security Council Committee established pursuant to Resolution 1267(1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities* of 9 December 2008. They state that the committee is comprised of all the members of the Security Council from time to time, that decisions of the committee are taken by consensus of its members and that a criminal charge or conviction is not necessary for a person's inclusion in the consolidated list that the committee maintains, as the sanctions are intended to be preventative in nature. It would appear that listing may be made on the basis of a reasonable suspicion only. It is also clear that, as the committee works by consensus, the effect of the guidelines is that the United Kingdom is not able unilaterally to procure listing, but it is not able unilaterally to procure de-listing either under the "Focal Point" procedure established under SCR 1730(2006). Although the Security Council has implemented a number of procedural reforms in recent years and has sought improvement in the quality of information provided to the 1267 Committee for the making of listing decisions, the Treasury accepted in its response of 6 October 2009 (Cm 7718) to the House of Lords European Union Committee's *Report into Money Laundering and the Financing of Terrorism* (19th Report, Session 2008-2009, HL Paper 132) that there is scope to further improve the transparency of decisions made by the 1267 Committee and the effectiveness of the de-listing process. On 17 December 2009 the Security Council adopted SCR 1904(2009) which provides in paras 20 and 21 that, when considering de-listing requests, the Committee shall be assisted by an Ombudsperson appointed by the Secretary-General, being an eminent individual of integrity, impartiality and experience, and that the Office of the Ombudsman is to deal with requests for de-listing from individuals and entities in accordance with procedures outlined in an annex to the resolution. While these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy.

79. Mr Swift accepted that the principle of legality requires that the power to impose restrictions such as those that flow from designation under the AQO should be subject to judicial review. But he said that it was vital to identify the decision that had to be scrutinised. In G's case the proper focus was on article 3(1)(b) of the AQO. Its effect was that all those designated by the 1267 Committee were subject to the Order.

The reasons why the person had been so designated were not relevant in domestic law. He added that the United Kingdom would be setting a bad example if it were to default on its obligation to give effect to the resolutions that had this effect. It was not open to Member States to go behind the system that had been set up to meet the global challenge that was presented by terrorism.

80. While I recognise the force of Mr Swift's argument, it seems to me that it does not meet the essence of Mr Singh's complaint. Nor does the fact that the AQO does what SCR 1267 and subsequent resolutions required of it. In part Mr Singh's complaint was about the inability of the 1267 Committee's procedures to provide an effective remedy. But it was also about the means that had been used in domestic law to subject G to the AQO's regime. As Zinn J said in *Abdelrazik v The Minister of Foreign Affairs* [2009] FC 580, para 51, there is nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provides for basic procedural fairness. Some steps have been taken to address this problem, but there is still much force in these criticisms. The essential point that Mr Singh makes is that G ought not to have been subjected to this by an Order made under section 1 of the 1946 Act which avoids Parliamentary scrutiny. This is a fundamental objection which, as in the case of the TO, is directed to the dangers that lie in the uncontrolled power of the executive.

81. I would hold that G is entitled to succeed on the point that the regime to which he has been subjected has deprived him of access to an effective remedy. As Mr Swift indicates, seeking a judicial review of the Treasury's decision to treat him as a designated person will get him nowhere. G answers to that description because he has been designated by the 1267 Committee. What he needs if he is to be afforded an effective remedy is a means of subjecting that listing to judicial review. This is something that, under the system that the 1267 Committee currently operates, is denied to him. I would hold that article 3(1)(b) of the AQO, which has this effect, is ultra vires section 1 of the 1946 Act. It is not necessary to consider for the purposes of this case whether the AQO as a whole is ultra vires except to say that I am not to be taken as indicating that article 4 of that Order, had it been applicable in G's case, would have survived scrutiny.

82. I would treat HAY's case in the same way. He too is a designated person by reason of the fact that his name is on the 1267 Committee's list. As has already been observed, the United Kingdom is now seeking that his name should be removed from it. By letter dated 1 October 2009 the Treasury's Sanctions Team informed his solicitors that the de-listing request was submitted on 26 June 2009 but that at the committee's first consideration of it a number of States were not in a position to accede to the request. Further efforts to obtain de-listing are continuing, but this has still not been achieved. So he remains subject to the AQO. In this situation he too is being denied an effective remedy.

Conclusion

83. I would allow the appeals by A, K, M and G. I would declare that the TO is ultra vires and I would quash that Order. I would allow G's appeal as regards the AQO to the extent of declaring that article 3(1)(b) of that Order is ultra vires. Had the Terrorism (United Nations Measures) Order 2009 under which A, K, M and G have now been re-designated been before us, I would have quashed that Order too as it is open to objection on the same grounds. I would allow the Treasury's appeal in HAY's case to the extent of setting aside the declaration by Owen J that the AQO as a whole is ultra vires and substituting for it the order that I would make in G's case.

84. I would however suspend the operation of the orders that I would make as regards the AQO for a period of one month from the date of the judgment to give the Treasury time to consider what steps, if any, they should now take. I would have suspended the operation of the orders in the appeals of A, K, M and G as regards the TO had it not been for the fact that they have all been re-designated under the 2009 Order. The designations made under that order are not before the court in these proceedings. It will be for the administrative court to consider whether the Treasury need time to consider their position should an application be made to it for these fresh designations to be set aside. It is perhaps arguable that suspension of the order relating to the AQO is not needed in HAY's case in view of the steps that are currently being taken for him to be de-listed by the 1267 Committee. But so long as he remains on the list the United Kingdom is bound by article 25 of the Charter to treat him as a designated person and must take steps to subject him to a freezing order in this country. So I think that suspension of the order is needed in his case to enable the Treasury, if so minded, to take the steps to give effect to this obligation pending the proceedings for HAY's de-listing.

LORD PHILLIPS

85. It is particularly appropriate that these should be the first appeals to be heard in the Supreme Court of the United Kingdom, for they concern the separation of powers. At issue is the extent to which Parliament has, by the United Nations Act 1946 ("the 1946 Act"), delegated to the executive the power to legislate. Resolution of this issue depends upon the approach properly to be adopted by the court in interpreting legislation which may affect fundamental rights at common law or under the European Convention on Human Rights ("the Convention").

86. I am grateful to Lord Hope for the clarity with which he has performed the laborious task of describing the legislative background and history of these appeals. Although we have held that anonymity cannot be justified in this case it is convenient to continue to refer to the individuals who have been subjected to freezing orders by initials and I shall follow the example of Lord Hope in referring to them all collectively as "the appellants". I shall also adopt his references to the different forms of freezing order by the initials TO and AQO.

87. The appellants claim, for a variety of reasons, that the freezing orders made against them were *ultra vires,* that is, beyond the power conferred by section 1 of the 1946 Act, which is set out by Lord Hope at paragraph 12**.** That section confers power on, in effect, the Government, by Order in Council to make "such provision" as appears "necessary or expedient" for enabling "measures to be effectively applied". The measures in question are those that the Security Council has, pursuant to article 41 of the Charter, decided should be "employed to give effect to its decisions" and called upon Members to apply. The Security Council embodies such decisions in Resolutions.

88. There are three different bases for contending that the freezing orders are *ultra vires*:

i) The freezing orders violate rights protected by the European Convention on Human Rights ("the Convention").

ii) The relevant Security Council Resolutions do not fall within the scope of the 1946 Act.

iii) The terms of the freezing orders do not fall within the powers of the 1946 Act.

Convention Rights

89. The appellants did not put reliance on Convention rights at the forefront of their case, but I propose to start with this ground of appeal. Section 1 of the 1946 Act was passed in order to provide a way of giving effect to this country's treaty obligations under the United Nations Charter. Executive action in the form of an Order in Council can be used to implement decisions of the Security Council under article 41 of the Charter. The Human Rights Act 1998 ("the HRA") was passed to give effect to this country's obligations under the Convention. Section 6(1) of the HRA prohibits the executive from action that infringes a Convention right. It provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

The appellants contend that the freezing orders are incompatible with a number of Convention rights and that, accordingly it was unlawful to make them.

90. There is another way that the HRA can be deployed. Section 3 of the Act requires, in so far as possible, that legislation be read and given effect in a way which is compatible with the Convention rights. It can be argued that the power to make Orders in Council conferred by section 1 of the 1946 Act must be read subject to the implied proviso that such Orders must not violate Convention rights.

91. The appellants argue that the freezing orders violate their right to respect for family life under article 8 of the Convention, their peaceful enjoyment of their possessions under article 1 of the First Protocol and their right to a fair trial under article 6. Mr Swift, for the Treasury, does not accept that, if these articles are applicable, they have been infringed by the freezing orders. His primary submission is, however, that in so far as there is a conflict between the duty of the United Kingdom to comply with Security Council Resolutions under article 41 of the Charter and a duty to secure human rights under the Convention, the former duty prevails. He contends that no claim will lie under section 6(1) of the HRA in respect of breach of Convention rights which are "trumped" in this way by obligations under the Charter.

92. The starting point of this argument is article 103 of the UN Charter. Article 25 requires members of the United Nations to carry out decisions of the Security Council in accordance with the Charter. Article 103 provides

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

93. Next one must turn to the definition of "the Convention" in section 21 of the HRA:

> "the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 *as it has effect for the time being in relation to the United Kingdom"* (my emphasis).

In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 AC 529 the House of Lords held that this definition reflected the policy of the HRA, which was to "bring rights home", so that no claim for breach of section 6(1) would lie unless the Strasbourg Court would also find a violation of the Convention by the United Kingdom. It follows that the provision of section 6(1) rendering unlawful action incompatible with Convention rights will not render unlawful the making of the freezing orders if the Strasbourg Court accepts that the duty to comply with the Security Council Resolutions takes precedence over the duty to comply with the Convention.

94. That is not a question that the Strasbourg Court has had, directly, to resolve. The Grand Chamber did, however, make some very relevant comments when giving its decision as to admissibility in *Behrami v France; Saramati v France, Germany and Norway* (2007) 45 EHRR SE 85.The applicants in those cases complained of the action and inaction of members of an international security force ("KFOR") that had been deployed in Kosovo pursuant to Security Council Resolution 1244(1999). The Grand Chamber ultimately held that the applications were not admissible on the

ground that the Court was not competent *ratione personae*. This was because the individual respondents fell to be treated as part of KFOR and KFOR was exercising powers "lawfully delegated under Chapter VII of the Charter by the UN Security Council". In these circumstances the actions of the respondents were "directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective" (para 151).

95. Under the heading "Relevant Law and Practice" the Court made the following observations about article 103 of the UN Charter:

> "The ICJ considers article 103 to mean that the Charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement (*Nicaragua v United States of America*, ICJ Reports, 1984, p 392, at para 107. See also *Kadi v Council and Commission*, para 183, judgment of the Court of First Instance of the European Communities ('CFI') of 21 September 2005 (under appeal) and two more recent judgments of the CFI in the same vein: *Yusuf and Al Barakaat v Council and Commission*, 21 September 2005, paras 231, 234, 242-243 and 254 as well as *Ayadi v Council*, 12 July 2006, para 116). The ICJ has also found article 25 to mean that UN member states' obligations under a UNSC Resolution prevail over obligations arising under any other international agreement (Orders of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United States of America and Libyan Arab Jamahiriya v United Kingdom*), ICJ Reports, 1992, p.16, para 42 and p 113, para 39, respectively)."(para 27).

96. Later in its judgment the Grand Chamber cited the first paragraph of article 30 of the Vienna Convention on the Law of Treaties:

> "1. Subject to article 103 of the Charter of the United Nations, the rights and obligations of states parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs."(para 35)

97. The Court went on to make the following observations about the Convention and the UN acting under Chapter VII of its Charter:

> "147. The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two respondent States), that the great majority of the contracting parties joined the UN before they signed the Convention and that currently all contracting parties are members of the UN. Indeed, one of the aims of this Convention (see its preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN. More generally, it is further recalled, as noted at para 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its contracting parties. The Court has therefore had regard to two complementary provisions of the Charter, articles 25 and 103, as interpreted by the International Court of Justice (see para 27 above).
>
> 148. Of even greater significance is the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. In particular, it is evident from the Preamble, articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force (see paras 18-20 above).
>
> 149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR. Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of contracting parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field… "

98. These passages suggest that the Grand Chamber was prepared to recognise the primacy of obligations under the UN Charter over obligations under the Convention. That the Strasbourg Court would take such an approach was accepted by the House of Lords in *R(Al-Jedda) v Secretary of State for Defence (JUSTICE*

intervening) [2007] UKHL 58; [2008] AC 332. The claimant in that case had been detained by British forces in Iraq, acting pursuant to Security Council Resolution 1546 made under article 42 of the Charter. He claimed under the HRA a declaration that his detention infringed his rights under article 5(1) of the Convention. The Court of Appeal [2006] EWCA Civ 327; [2007] QB 621 held that the United Kingdom's obligations under Resolution 1546 prevailed over its obligations under the Convention and that accordingly, applying *Quark Fishing*, no action could be founded on the HRA.

99. The House of Lords upheld the Court of Appeal. In paragraph 21 of his opinion Lord Bingham cited the passage from *Behrami* that I have set out at paragraph 97 above. He went on to hold:

> "I do not think that the European court, if the appellant's article 5(1) claim were before it as an application, would ignore the significance of article 103 of the Charter in international law. The court has on repeated occasions taken account of provisions of international law, invoking the interpretative principle laid down in article 31(3)(c) of the Vienna Convention on the Law of Treaties, acknowledging that the Convention cannot be interpreted and applied in a vacuum and recognising that the responsibility of states must be determined in conformity and harmony with the governing principles of international law: see, for instance, *Loizidou v Turkey* (1996) 23 EHRR 513, paras 42-43, 52; *Bankovic v Belgium* (2001) 11 BHRC 435, para 57; *Fogarty v United Kingdom* (2001) 34 EHRR 302, para 34; *Al-Adsani v United Kingdom* (2001) 34 EHRR 273, paras 54-55; *Behrami and Saramati*, 45 EHRR SE 85, para 122. In the latter case, in para 149, the court made the strong statement quoted in para 21 above."

100. Mr Rabinder Singh QC, in argument advanced on behalf of G which was adopted by the other appellants, recognised that the reasoning of the House of Lords in *Al-Jedda*, which was equally applicable to obligations arising under article 41 of the UN Charter, would be fatal to the appellants' claim of breach of section 6(1) of the HRA. He contended, however, that the landscape had been changed by the recent decision of the European Court of Justice ("ECJ") in *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225. In the light of that decision it was no longer right to assume that the Strasbourg Court would hold that obligations under the UN Charter took precedence over obligations under the Convention. The decision of the House of Lords in *Al-Jedda* has been challenged in an application to Strasbourg, so that the Strasbourg Court will have to consider this matter in the context of that very case.

101. The background to *Kadi* was the practice adopted by the European Council of adopting Regulations to give effect in the Community to UN resolutions under Chapter VII of the Charter. Pursuant to this practice the Council adopted Regulation

881/2002 in order to implement the Security Council resolutions that the United Kingdom has sought to implement by the freezing orders. Mr Kadi is one of those whose name is on the list kept by the 1267 Committee and brought proceedings seeking the annulment of the Regulation on the grounds (i) that it was not competent for the Council to adopt it and (ii) that it infringed his fundamental rights. Before the Court of First Instance both grounds failed. Before the ECJ the challenge to the Council's competence failed, but the challenge based on infringement of his fundamental rights succeeded.

102. The ECJ emphasised that it was concerned with the legitimacy of Regulation 881 as a matter of Community law. It held:

> " 285…the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.
>
> 286. In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.
>
> 287. With more particular regard to a Community act which, like the contested Regulation, is intended to give effect to a Resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by article 220EC, to review the lawfulness of such a Resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that Resolution with jus cogens.
>
> 288. However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a Resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that Resolution in international law."

103. The ECJ went on to find that the regime imposed by Regulation 881 did not respect fundamental rights in a number of respects. There was no communication to those who were put on the 1267 Committee's list of the evidence relied upon to justify their inclusion. In these circumstances their rights of defence, and in particular the right to be heard, were not respected. The right to an effective legal remedy was not observed (paragraphs 347 to 350). Because Mr Kadi suffered a significant restriction of his right to property in circumstances where he was not enabled to put

his case to the relevant authorities his plea that his fundamental right to respect for property had been infringed was well founded. Regulation 881, insofar as it concerned him (and another appellant whose case was heard with his), had to be annulled (paras 369 to 372).

104. It is important to note that this decision was about the legitimacy of a Council Regulation judged against the rules of the autonomous and self contained regime instituted under the EC Treaty. Advocate General Maduro in his opinion had gone so far as to suggest at para 30, p 1241 that:

> "if the Court were to annul the contested Regulation on the ground that it infringed Community rules for the protection of fundamental rights, then, by implication, member states could not possibly adopt the same measures without – in so far as those measures came within the scope of Community law – acting in breach of fundamental rights as protected by the court."

105. Mr Singh did not suggest that the decision in *Kadi* had any direct effect on the legitimacy of the freezing orders. He simply submitted that it gave cause to reconsider the premise on which the decision of the House of Lords in *Al-Jedda* had been based.

106. I do not believe that any firm conclusion can be drawn from the decision in *Kadi* as to the approach that the Strasbourg Court will take to the conflict between the obligations imposed by Security Council Regulations and Convention obligations. In these circumstances it would not be right to depart from the decision in *Al-Jedda.* As Mr Singh recognised, it follows from that decision that the appellants can found no claim on the provisions of the HRA.

Do the Resolutions fall within the scope of the 1946 Act?

107. I turn to the second basis for contending that the freezing orders are *ultra vires*, namely that the relevant Security Council Resolutions do not fall within the scope of the 1946 Act. Two separate arguments are advanced in respect of this basis. The first applies both to the TO and to the AQO. The argument was advanced by Mr Owen QC on behalf of A, K and M but adopted by the other appellants, and is as follows. The 1946 Act only permits the making of orders that transpose specific measures directed by the Security Council. The relevant Resolutions do not simply direct Members to implement specific measures but require them to fashion the legislative design that gives effect to the measures. This is a task for Parliament, not the executive.

108. The other argument relates only to the AQO. It is that the relevant Resolutions require Member States to interfere with fundamental rights of individuals within their territories on grounds that those individuals will have no right to

challenge before a court. It is argued that section 1 of the 1946 Act does not extend to such a Resolution.

109. The issues raised by this argument are issues of statutory interpretation. Treaties entered into by the United Kingdom do not take direct effect. Treaties are entered into by the Government under the Royal Prerogative, but unless and until Parliament incorporates them into domestic law, they confer no powers upon the executive nor rights or duties upon the individual citizen – *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499-500.

110. The 1946 Act is designed to provide a means of giving effect to the international obligations imposed upon the United Kingdom under article 41 of the UN Charter. The primary arguments advanced by the appellants relate to the true interpretation of section 1 of that Act. Their arguments in relation to this have not turned on the natural meaning of the section. Rather they have relied upon a principle of construction that requires limitations to be placed on the scope of statutory powers as a matter of presumption or implication. This they have described as the principle of legality.

The principle of legality

111. The appellants have put this principle at the forefront of their argument on the interpretation of the 1946 Act. Under this principle the court must, where possible, interpret a statute in such a way as to avoid encroachment on fundamental rights, sometimes described as constitutional rights. Lord Hope at paragraph 46 has cited the passages in the speech of Lord Browne-Wilkinson in *Pierson* in which he described this principle. Equally pertinent is the oft cited passage in the speech of Lord Hoffmann in *Simms* at p 131:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 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 their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication 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."

112. Lord Hoffmann went on to say that the principle of legality applied as much to subordinate legislation as to Acts of Parliament. Lord Hoffmann made it plain that the principle of legality was one that applied to the interpretation of general or ambiguous words in the absence of express language or necessary implication to the contrary. At the time of his judgment the Human Rights Act had not yet come into effect and Lord Hoffmann commented that the principle of legality had been expressly enacted as a rule of construction in section 3 of the Act. I believe that the House of Lords has extended the reach of section 3 of the HRA beyond that of the principle of legality.

113. Section 3(1) provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"

114. The Convention rights are defined in section 1 to mean the rights and fundamental freedoms set out in articles 2 to 12 and 14 of the Convention, articles 1 to 3 of the First Protocol and article 1 of the Thirteenth Protocol.

115. The effect of section 3 has been the subject of extensive academic discussion – see the literature referred to in footnote 27 to paragraph 4.08 in the Second Edition (2009) of *The Law of Human Rights by Clayton and Tomlinson.* It has also been the subject of judicial consideration on a number of occasions in the House of Lords. It is not necessary to refer in detail to this body of authority. It suffices to note that it accords to section 3 a role of constitutional significance. By enacting section 3, Parliament has been held to direct the courts to interpret legislation in a way which is compatible with Convention rights, even where such interpretation involves departing from the "unambiguous meaning the legislation would otherwise bear", or the "legislative intention of Parliament" – see *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 at paragraph 30 per Lord Nicholls and *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264 at paragraph 24 per Lord Bingham. Such an interpretation must, however, be one that is "possible" having regard to the underlying thrust or intention of the legislation.

116. *Bennion on Statutory Interpretation,* 5th ed (2008), at section 270, p.823, comments that the term "principle of legality" is likely to lead to confusion but goes on to suggest that the "so-called principle of legality" was widened by a majority of the House of Lords in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 AC 604 so as to contradict what Lord Bingham (who dissented) called "a clear and unambiguous legislative provision" (para 20), the provision in question being contained in delegated legislation.

117. The other members of the House did not, however, purport to depart from wording that was clear and unambiguous – see Lord Steyn at para 31, Lord Hoffmann at para 37, Lord Millett at para 43 and Lord Scott at para 58. I do not consider that the principle of legality permits a court to disregard an unambiguous expression of Parliament's intention. To this extent its reach is less than that of section 3 of the HRA.

Transposition and legislative design

118. Mr Owen QC for A, K and M put at the forefront of his submissions the contention that the 1946 Act authorised Orders in Council that gave effect to specific measures directed by the Security Council but not Orders in Council that themselves directed what measures should be taken. He contrasted "transposition" that was authorised by the Act and "legislative design" that was not. He submitted that this distinction was one that fell within the principle of legality. In a written note he clarified his submission as follows:

> "The constitutional principle at issue in the instant case is that the recognition by the common law of the supremacy of Parliament is based on an assumption that Parliament will not surrender its law making powers to the Executive (or an international body) on an uncontrolled and uncertain basis. Unless the contrary intention is clearly and expressly indicated, no Act of Parliament will be construed as delivering a 'blank cheque' to the Executive to legislate at will in any area, simply because it is called upon to do so by an international body".

119. This submission was supported by the intervener. On behalf of JUSTICE, Mr Fordham QC submitted that, under the principle of legality, only Parliament could impose an asset freezing regime. Because such a regime interfered with fundamental rights, it was necessary that the controls imposed should be necessary, proportional and certain and attended with basic procedural safeguards under which the individual would secure a fair hearing and effective judicial protection. These were matters for Parliament, not the executive. These submissions overlapped with the submission that the 1946 Act could not, on its true construction, authorise Orders in Council which interfered with fundamental rights.

120. Mr Owen turned to two New Zealand cases for support for his submission. In *Reade v Smith* [1959] NZLR 996 Turner J sitting in the Supreme Court had to consider the scope of section 6 of the Education Amendment Act 1915 (No 2), which was in the following terms:

> "The Governor-General in Council may make such Regulations as he thinks necessary or expedient for avoiding any doubt or difficulty which may appear to him to arise in the administration of the principal Act by reason of any omission or inconsistency therein, and all such Regulations shall have the force of law, anything to the contrary in the principal Act notwithstanding.**"**

He observed at pp 1003-1004:

> "To anyone accustomed to the notion that the law-giving powers of the people are reposed by them in Parliament, it may come as a surprise to learn that since 1915 the Legislature appears to have surrendered these powers to the Executive as regards such matters as are covered by this section; and that not content with delegating its principal function to the Governor-General, it has purported to sign a blank cheque and to ratify in advance whatever he shall do by regulation, even if it is in conflict with the express provisions of the Education Act itself. In construing a section which at first sight may appear to carry self-abnegation so far, the Court will strive to give it a restricted interpretation, preferring to regard Parliament as not having made any more complete surrender of its powers than must necessarily follow from the plain words used."

121. In *Brader v Ministry of Transport* [1981] 1 NZLR 73 the Court of Appeal had to consider the scope of section 11 of the Economic Stabilisation Act 1948 which gave the Minister power by Order in Council to make such regulations "as appear to him to be necessary or expedient for the general purpose of this Act". At p 78 Cooke J remarked:

> "It may be added that the recognition by the common law of the supremacy of Parliament can hardly be regarded as given on the footing that Parliament would abdicate its function."

This remark was made, however, in the context of restricting the power conferred on the Minister to within reasonable limits. The Court went on to hold that the Minister had acted *intra vires* in making it a criminal offence to drive a private car on specified "carless days" with the object of saving petrol.

122. These decisions fall short of supporting the proposition that the principle of legality raises a general presumption against Parliament delegating to the executive the power to make regulations that call for legislative design. *Brader* points in the

opposite direction. I reject Mr Owen's submissions on this point. I would accept, however, that a statutory provision which delegates to the executive the power to make regulations should be strictly construed and that, where the power is conferred in general terms, it may be necessary to imply restrictions in its scope in order to avoid interference with individual rights that is not proportionate to the object of the primary legislation.

123. Mr Owen was on stronger ground when he submitted that some limitations had to be placed upon the power conferred by the 1946 Act. He drew attention to paragraph 2(d) of UN SCR 1373 which decides that all States shall

> "Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens."

He submitted that on the Treasury's interpretation of the 1946 Act there would have been no obstacle to the Government imposing by Order in Council the provisions contained in the Anti-terrorism, Crime and Security Act 2001, permitting indefinite detention of foreign nationals, or preventative measures such as control orders now contained in the Prevention of Terrorism Act 2005. When pressed in argument, Mr Swift for the Treasury accepted, with some reluctance, that such was indeed his position.

124. I do not accept that the 1946 Act authorises such wide ranging legislation. The natural meaning of the wording of section 1, when read with the wording of article 41 of the Charter, imposes limits on the power granted by section 1. That power is to make such provision as appears necessary or expedient for enabling the effective application of "measures not involving the use of armed force" which the Security Council has decided "are to be employed to give effect to its decisions". Measures to which the 1946 Act refers must necessarily have a degree of specificity. They have to be capable of being "employed" or "effectively applied". They will often be the means to an objective rather than the objective itself. Preventing terrorists from using the territory of the United Kingdom for terrorist acts is an objective, it is not a "measure". It is not something that can be "employed" or "applied". Detention of foreign nationals or the imposition of control orders are measures, but they are not measures the employment of which forms any part of the decision of the Security Council that is set out in paragraph 2(d) of Resolution 1373.

125. The generality of the provisions of paragraph 2(d) contrasts with the specificity of paragraph 1(b)(c) and (d) of the same Resolution. It is to these provisions that the TO gives effect. These provisions are specific measures. They fall within the scope of the wording of section 1 of the 1946 Act in that one can sensibly speak of provisions that are necessary or expedient to enable them "to be effectively applied". They can also properly be described as "measures" that the Security Council has decided "are to be employed to give effect to its decisions" under article 41. The

TO involves a degree of legislative design, including the creation of offences and the range of penalties that relate to them, but legislation of this type is expressly provided for by section 1 of the 1946 Act.

126. For these reasons I reject the submission that, whether under the natural meaning of section 1 of the 1946 Act, or under the application of the principle of legality, the TO falls outside the powers conferred by the section simply because the TO involves a degree of legislative design rather than mere transposition.

127. I propose to defer consideration of the argument that the Resolutions to which the AQO relates fall outside the scope of the 1946 Act in order to deal first, in relation to the TO, with the third basis for arguing that the freezing orders are ultra vires, which is that the terms of the freezing orders fall outside the scope of what is permitted by the 1946 Act.

Do the terms of the TO fall outside the powers of the 1946 Act?

128. The following points are advanced by the appellants:

i) The TO goes further than the relevant Security Council Resolution requires.

ii) The freezing orders are disproportionate and oppressive.

iii) The terms of the freezing orders are uncertain.

iv) In the case of the TO adequate provision is not made to enable those designated to challenge their designation.

Does the TO go further than the Resolution requires?

129. Resolution 1373 recited that the Security Council decided that all States should:

> "1 (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;"

130. Section 1 of the 1946 Act empowers the making by Order in Council of such provision as appears "necessary or expedient" for enabling the measures in the Resolution to be effectively applied. The conditions laid down by the 2006 TO for making a freezing order are set out in paragraph 4(2):

> "(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."

131. The wording of the TO tracks the wording of the Resolution, save that those who can be made subject to the Order are not only those described in the Resolution but those whom the Treasury have reasonable grounds for suspecting fall or may fall within that description. The issue is whether it can properly be said to be "necessary or expedient" to apply this test of reasonable suspicion in order to ensure that the measures in the Resolution are effectively applied to those described in the Resolution. This question goes not merely to the legitimate scope of the TO but to the legitimacy of the entire TO regime.

132. The Court of Appeal concluded that a "reasonable suspicion" test fell within the scope of what appeared "necessary or expedient" to give effect to the measures in the Resolution. The Master of the Rolls treated this as essentially a question of the standard of proof and observed that such a test had been accepted by the Strasbourg Court in relation to a similar problem arising out of the risk of terrorism. He concluded:

> "I would accept such a test as lawful provided that the person concerned has a proper opportunity to challenge the decision made against him" (para 42).

He went on to hold, however, that the inclusion of the words "or may be" went beyond what was necessary or expedient. He considered that these words widened the test of "reasonable suspicion" to an extent that was not legitimate, albeit that "there is scope for argument as to how much difference this will make" (paras 47-49).

133. There may be a tendency to approach the requirements of the Resolution by reference to other measures that have been taken in this jurisdiction to combat terrorism, such as control orders imposed on the basis of reasonable suspicion. Such, however, are exceptional measures, treading the boundaries of what is compatible with respect for fundamental rights and the rule of law. They should not be treated as the norm. Identification of the requirements of Resolution 1373 should be approached, in the first instance, by consideration of the natural meaning of its provisions. That natural meaning appears to me to be relatively clear. The object of the Resolution appears from the following statement in its preamble:

> "*Recognizing* the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism."

134. The first specific measure called for by the Resolution in paragraph 1(b) is that States shall:

> "Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts."

135. Paragraph 2(e) adds to this:

> "Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;"

136. Paragraph 1(c) requires the freezing of the assets of those who commit the acts that the Resolution has required should be criminalised and their agents. Thus what the Resolution requires is the freezing of the assets of criminals. The natural way of giving effect to this requirement would be by freezing the assets of those convicted of or charged with the offences in question. This would permit the freezing of assets pending trial on a criminal charge, but would make the long term freezing of assets dependent upon conviction of the relevant criminal offence to the criminal standard of proof.

137. The Resolution nowhere requires, expressly or by implication, the freezing of the assets of those who are merely suspected of the criminal offences in question. Such a requirement would radically change the effect of the measures. Even if the test were that of reasonable suspicion, the result would almost inevitably be that some who were subjected to freezing orders were not guilty of the offences of which they were reasonably suspected. The consequences of a freezing order, not merely on the enjoyment of property, but upon the enjoyment of private and family life are dire. If imposed on reasonable suspicion they can last indefinitely, without the question of whether or not the suspicion is well-founded ever being subject to judicial determination.

138. It may be argued that it is "expedient" to throw the net wide in order to ensure that the criminals are caught within it, even if this is at the expense of enmeshing those who are not. But I would not give "expedient", as used in the 1946 Act, so extravagant a scope. Whether in so deciding I am applying the principle of legality, or a simple rule of construction that confines general words within reasonable limits where fundamental rights are in play, matters not. Bennion would probably say that they are one and the same – see p 823.

139. It is, I think, legitimate to look at the parallel series of Resolutions adopted by the Security Council under article 41 that have led to the AQO for guidance on the intended scope of Resolution 1373. I have done so, but found nothing to indicate that the Security Council has decided that freezing orders should be imposed on a basis of mere suspicion. Resolution 1333 first made provision for the Committee to keep what subsequently became the Consolidated List of "individuals and entities designated as being associated with Usama bin Laden". The scheme is that the Committee determines what names should be included on the list in the light of information provided by Member States. In recent years there has been an increasing emphasis on the duty of States to specify the evidence justifying the proposal that a name be placed on the list – see Resolution 1617 (2005), paragraph 4; Resolution 1735 (2006), paragraph 5 and Resolution 1822 (2008) paragraph 12.

140. The "Guidelines of the Committee for the Conduct of its Work", as amended up to 9 December 2008 provide in paragraph 6(d):

"Member States shall provide a detailed statement of case in support of the proposed listing that forms the basis or justification for the listing in accordance with the relevant resolutions. The statement of case should provide as much detail as possible on the basis(es) for listing indicated above, including: (1) specific findings demonstrating the association or activities alleged; (2) the nature of the supporting evidence (e.g. intelligence, law enforcement, judicial, media, admissions by subject, etc.) and (3) supporting evidence or documents that can be supplied. States should include details of any connection with a currently listed individual or entity. States shall identify those parts of the statement of case that may be publicly released, including for the use by the Committee for development of the summary described in paragraph (h) below or for the purpose of notifying or informing the listed individual or entity of the listing, and those parts that may be released upon request to interested States."

141. Paragraph 6 (c) of the Guidelines provides:

"Before a Member State proposes a name for addition to the Consolidated List, it is encouraged, if it deems it appropriate, to approach the State(s) of residence and/or nationality of the individual or entity concerned to seek additional information. States are advised to submit names as soon as they gather the supporting evidence of association with Al-Qaida and/or the Taliban. A criminal charge or conviction is not necessary for inclusion on the Consolidated List as the sanctions are intended to be preventative in nature. The Committee will consider proposed listings on the basis of the 'associated with' standard described in paragraphs 2 and 3 of Resolution 1617 (2005), as reaffirmed in paragraph 2 of Resolution 1822 (2008). When submitting names of groups, undertakings and/or entities, States are encouraged, if they deem it appropriate, to propose for listing at the same time the names of the individuals responsible for the decisions of the group, undertaking and/or entity concerned."

142. The Resolutions cited lay down specific factual tests for association with Al-Qaida and the Taliban. The statement that a criminal charge or conviction is not necessary, if applied to the TO regime, opens the door to the suggestion that freezing orders should be imposed not merely where ancillary to a criminal charge or conviction, but in circumstances where there are reasonable grounds for believing that the subject of the order has been guilty of the relevant offending – see, by way of example, the test for a freezing order under section 4 of the Anti-terrorism, Crime and Security Act 2001.

143. Whether an Order in Council providing for the making of freezing orders on the basis of reasonable belief would fall within the scope of the 1946 Act is not a

question that I would resolve in the abstract. It would be manifestly preferable for any such measure to be imposed by primary legislation, which would not be restricted by the need to keep strictly within the requirements of the relevant Resolution. For the reasons that I have given I would quash the TO on the ground that, by applying a test of reasonable suspicion, it goes beyond what is necessary or expedient to comply with the relevant requirements of Resolution 1373 and thus beyond the scope of section 1 of the 1946 Act.

144. It is not necessary to address the alternative reasons advanced by the appellants for contending that the terms of the TO fall outside the powers of the 1946 Act, but I will record my agreement with the conclusions expressed by Lord Mance in paragraphs 232 to 236 of his judgment.

The challenge to the AQO

145. The common law rights of G and HAY to the enjoyment of their property, to privacy and to family life are very severely invaded by the AQO. Their counsel have adopted the submissions that were advanced on behalf of A, K and M to the effect that the principle of legality renders ultra vires orders that have such draconian effect and that lack certainty. If, however, they have justifiably been placed on the Consolidated List on the ground that they have been supporting the activities of Al-Qaida, Usama bin Laden or the Taliban they can reasonably expect serious interferences with those rights. Their primary complaint is that they have no right to challenge before a court their inclusion on that list. Access to a court to challenge interference with rights is, they submit, a fundamental right protected by the principle of legality.

146. Access to a court to protect one's rights is the foundation of the rule of law. Mr Swift accepted that if the AQO purported to exclude access to a court it would be ultra vires. He submitted, however, that it did no such thing. Designation by the Sanctions Committee was a fact that, under English law as embodied in the AQO, resulted in the imposition of severe restrictions on the rights of the person listed. It was open to any individual who experienced such restrictions, to challenge, by judicial review proceedings, whether the AQO rendered such interference lawful. In such proceedings the appellant could put in issue the assertion that he was a person designated on the Sanction Committee's list. He could challenge the validity of the Order, as indeed G and HAY had done. What he could not do was challenge the basis upon which the Sanctions Committee had placed him on the list, for that question had no relevance to his rights under English law.

147. I find this argument unreal. On the Treasury's case, the relevant Resolutions and the 1946 Act, when read together, have had a devastating effect on G's and HAY's rights and left them unable to make an effective judicial challenge to the reasons for treating them in this way. That results from the fact that, by the 1946 Act Parliament, in effect, granted to the Security Council the power to specify legislation

that it required Member States to enact and granted to the executive the power to enact that legislation by Order in Council. The stark issue is, having regard to the principle of legality did the AQO fall outside limitations, express or implied, to the scope of this legislation?

148. I have already, in paragraphs 124 to 126 identified some limitations on the scope of section 1 of the 1946 Act, derived from the language of the section. As I explained, those limitations did not place the TO outside the ambit of the section. The same, *a fortiori*, is true in the case of the AQO. The Resolutions to which that Order gives effect decide upon measures which are significantly more specific than those in the Resolutions giving rise to the TO, for the application of the AQO measures is restricted to those on the Consolidated List.

149. The list is, however, the primary object of the challenge brought by G and HAY to the legitimacy of the AQO. Names are placed on the list at the suggestion of Member States. A Member State has to give particulars of its reasons for putting forward a name, but it can place an embargo on disclosing those reasons to the name, or even on disclosing the fact that it was the State responsible for the inclusion of the name on the list. That is precisely what has occurred in the case of HAY. The Security Council has shown an appreciation of the need to provide a means whereby an individual can challenge the inclusion of his name on the Consolidated List. The Guideline that I have quoted at paragraph 140 above makes provision for notifying a listed individual of those parts of a Member State's statement of the case against him that the State identifies may be publicly released and Resolutions make express provision for de-listing, including the establishment of a focal point for submitting requests for de-listing – see Resolution 1730. But these provisions fall far short of the provision of access to a court for the purpose of challenging the inclusion of a name on the Consolidated List, and far short of ensuring that a listed individual receives sufficient information of the reasons why he has been placed on the list to enable him to make an effective challenge to the listing.

150. Does an Order in Council that subjects individuals to severe interference with their rights to the enjoyment of property, to privacy and to family life on the ground that they are associated with terrorists, in circumstances where they are denied the right to know the case against them or to have access to a court to challenge that case, fall within the power conferred by section 1 of the 1946 Act? The natural meaning of section 1 is wide enough to extend to implementation of the measures in Resolution 1267 and the later relevant Resolutions that are reproduced in the AQO. Are those measures none the less implicitly excluded from the ambit of the section under the principle of legality?

151. The first question to address is whether the provisions of section 1 are subject to any implied limitation at all. As to this there was no dispute between the parties. Mr Swift accepted that, if the Security Council decided, by a Resolution under article 41, that Member States should obtain information from terrorist suspects by the application of torture, section 1 of the 1946 Act would not apply to that measure. I

think that at the very least the powers conferred by section 1 must be limited to measures imposed by the Security Council that are *intra vires*. The general, albeit not universal view, is that this would exclude measures that violated *jus cogens* – see the discussion in the article by Tridimas and Gutierrez-Fons on *EU Law, International Law, Economic Sanctions against Terrorism: The Judiciary in Distress?* Vol 32 901 Fordham Int'l LJ, at pp 930-931. The implication of this would seem to be that it must be open to the domestic courts in this country to review the *vires* of Security Council Resolutions in order to rule on the validity of Orders made under the 1946 Act – see footnote 159 to p 932 of the same article.

152. It has not, however, been suggested on behalf of any of the appellants that the relevant Resolutions were *ultra vires*. None the less they are of a kind that Parliament cannot reasonably have anticipated when enacting the 1946 Act. Article 41 gives, by way of example of the "measures not involving the use of armed force" to which it relates, "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." These were measures against rogue States, not by States against individuals within them, and it is no cause for surprise that, when debating the Bill in the House of Lords, Viscount Samuel remarked:

> "This particular Bill makes provision for the eventuality that coercive measures may become necessary by the United Nations against some State which is indulging, or is apparently about to indulge, in acts of aggression. Those coercive measures may be either military or non-military – what we are accustomed to speak of under the name of sanctions, economic sanctions, or similar sanctions." Hansard 12 February 1946 col 378 HL.

153. The fact that Parliament may not have anticipated the nature of the measures upon which the Security Council decided over sixty years after the 1946 Act was passed does not mean that the Act cannot, on its true construction, apply to them – see *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 at p 822. It is necessary to consider the intention of Parliament, reading the statute "in the historical context of the situation which led to its enactment" – per Lord Bingham of Cornhill *R(Quintavalle) v Secretary for Health* [2003] UKHL 13; [2003] 2 AC 687 para 8. Reference to Hansard demonstrates the enthusiasm in 1946 of all sections of both Houses for the new United Nations and the Security Council, of which the United Kingdom was a permanent member. Parliament should not be presumed to have intended that the measures covered by section 1 of the 1946 Act would be restricted to measures similar to the examples in article 41 of the Charter.

154. Different considerations apply, however, to the question of whether Parliament would have appreciated the possibility that the Security Council would,

under article 41, decide on measures that seriously interfered with the rights of individuals in the United Kingdom on the ground of the behaviour of those individuals without providing them with a means of effective challenge before a court. I conclude that Parliament would not have foreseen this possibility, having particular regard to the reference to human rights in the preamble and article 1.3 of the Charter and to the fact that the 1946 Act was passed at a time when the importance of human rights was generally recognised, as exemplified two years later by the adoption by the General Assembly of the Universal Declaration of Human Rights. This is material, for it makes the principle of legality a realistic guide to the presumed intention of Parliament.

155. Applying that principle, I share with the majority of the court the conclusion that the Resolutions to which the AQO relates, insofar as they call for measures to be applied to those on the Consolidated List, fall outside the scope of section 1 of the 1946 Act. I agree with Lord Mance, for the reasons that he gives, that in so far as the Resolutions relate to Usama bin Laden himself, their validity is not impugned.

156. For these reasons I would grant the relief proposed by Lord Hope in paragraph 83 of this judgment. I endorse his comments in relation to the 2009 Order. I agree for the reasons that he gives that the operation of the Order in HAY's case shall be suspended for one month from the date of judgment.

157. Nobody should conclude that the result of these appeals constitutes judicial interference with the will of Parliament. On the contrary it upholds the supremacy of Parliament in deciding whether or not measures should be imposed that affect the fundamental rights of those in this country.

LORD RODGER, with whom Lady Hale agrees

158. The Court is asked to decide whether, by virtue of section 1(1) of the United Nations Act 1946, Her Majesty in Council had power to enact the Al-Qaida and Taliban (United Nations Measures) Order 2006 ("AQO Order") and the Terrorism (United Nations Measures) Order 2006 ("TO 2006"). The same question arises in respect of the Terrorism (United Nations Measures) Order 2009 ("TO 2009").

159. At the time of the hearing TO 2006 was the current embodiment of the measures by which the United Kingdom implemented SCR 1373, which was adopted by the Security Council on 28 September 2001, in the aftermath of the 9/11 attacks on the United States. But SCR 1373 was by no means the first resolution which the Council had adopted to deal with terrorist attacks. What marks it out is that the other resolutions relate to specific incidents and specific individuals, or organisations. SCR 1373 is, by contrast, generic: it deals with "international terrorism", with threats to international peace and security caused by "terrorist acts". Previous resolutions, such as SCR 1189 (1998), had, of course, included calls for States to take measures for the

prevention of terrorism. But SCR 1373 was intended to go much further: the aim was to create a permanent international system for combating terrorism.

160. This helps to explain certain unique, or unusual, features of SCR 1373. The Security Council envisages that its other resolutions relating to terrorist acts will have a limited life before being reconsidered and renewed, if appropriate. There is no such time-limit in SCR 1373: it is intended to apply indefinitely – unless and until the Security Council decides to revoke it. The other SCRs are targeted at a particular threat – for example, SCR 1333 (2000) is directed at the Taliban and Osama bin Laden, Al Qaida and their associates. In para 1(a) of SCR 1373, by contrast, the Security Council simply decides that all States shall prevent and suppress the financing of terrorist acts. Para 1(c) requires States to freeze without delay funds etc of "persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts…." The same thinking runs through the resolution.

161. If, in these respects, SCR 1373 looks more like an international convention, this is not surprising since it really comprises selected measures which had been included in the International Convention for the Suppression of the Financing of Terrorism that was adopted by the General Assembly in December 1999. By September 2001 only a few States had ratified the Convention. So SCR 1373, in effect, imposed on all States the selected obligations which would otherwise have bound them only if they had eventually decided to ratify the Convention.

162. Given its focus on "terrorist acts", it is striking that the resolution does not define "terrorism" or "terrorist acts". This is no accident. It would have been impossible to get agreement on a single definition. So, at the risk of some inconsistency and incoherence in their response, SCR 1373 leaves it up to States to adopt measures to combat what they regard as terrorism. In both TO 2006 and TO 2009 the definition adopted by the United Kingdom is to be found in article 2(3)-(6). It is important to notice that this definition is extremely wide and, as a result, the power of the Treasury to make a freezing order under the TOs is much more extensive than its power under section 4 of the Anti-terrorism, Crime and Security Act 2001. For example, under article 2(3) of the TOs, "terrorism" means the use or threat of action of the kind falling within article 2(4) which is designed to influence "the government" – and, by article 2(6)(d), "the government" includes "the government … of a country other than the United Kingdom." So under the TOs the Treasury is intended to have power to impose a freezing order to deal with a threat which is designed to influence a foreign government – something that could not be done under the 2001 Act.

163. These wide provisions are entirely appropriate in a measure that is intended to allow the requirements of SCR 1373 to be effectively applied in the United Kingdom. The freezing orders that are under consideration in these appeals relate to the funds and assets of individuals who live in this country. It is therefore tempting to think of

such cases as the paradigm. But that would be a fundamental error. The very premise of SCR 1373 is that terrorism is an international phenomenon.

164. For example, someone living in Ruritania may facilitate acts of terrorism against the government of Utopia by transferring funds from his account in a bank in the United Kingdom to an account controlled by the terrorist in a bank in Erewhon. The hope and intention behind paras 1(b) and 2(e) of SCR 1373 is that the authorities in Ruritania will have the necessary laws and resources to prosecute the individual concerned for financing and facilitating terrorism. Equally, it is hoped that the Erewhon authorities will have the necessary powers to freeze any funds that reach the account in the bank there. But the reality may well be that, for a variety of reasons, Ruritania is not actually in a position to arrest and prosecute the individual concerned for his actions and Erewhon may not have the necessary legislation to freeze his funds. Terrorists may indeed choose to live or operate in States which are too weak to take effective action against them. And, of course, in all probability the British courts will not have jurisdiction to prosecute the individual for facilitating terrorist acts in Utopia – even supposing that he could ever be arrested or extradited to this country from Ruritania. Nevertheless, the intention behind SCR 1373 is that the United Kingdom should be able to counter the threat of terrorist acts in Utopia by freezing the individual's assets in the British bank. And the United Kingdom aims to assist in fulfilling the Security Council's intention by giving the Treasury power under TO 2006 and TO 2009 to designate the individual and to freeze his funds in the British bank.

165. It follows that it could never have been the intention of the Security Council that a State should freeze only the funds of individuals whom it could itself charge with committing, attempting to commit, participating in or facilitating, acts of terrorism. It would be equally unconvincing to say that, unless someone had been charged with, or convicted of, one of these offences, his assets were to remain unfrozen. After all, the Treasury might have reliable information that showed that the individual, living in another country, was facilitating terrorism, even though there was not the slightest chance of his ever being brought to justice. It would be absurd to allow the individual to continue transferring funds to be used to carry out terrorist acts, simply because he was going to evade justice for the foreseeable future. In such a case the Treasury would not only have reasonable grounds for suspecting that the individual was facilitating acts of terrorism; they would have a solid basis for concluding that he was actually doing so. So the international law obligation imposed on the United Kingdom by para 1(c) of SCR 1373 to freeze the individual's assets would be clear.

166. The appellants, A, K, M and G, argue, however, that TO 2006 is ultra vires because it goes further and allows the Treasury to designate an individual and to freeze his assets if they "have reasonable grounds for suspecting that [he] is or may be … a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism…." The argument is that this goes further than the terms of para 1(c) of SCR 1373 and that it is neither "necessary" nor "expedient", in terms of section 1(1) of the United Nations Act 1946, for the Treasury to be given

power to designate and freeze on the basis of reasonable grounds for suspicion. As Lord Mance puts it, at para 230, this is to freeze "the assets of a different and much wider group of persons on an indefinite basis" and to change "the essential nature and target of the freezing order."

167. I acknowledge the force of the argument, but I have come to the conclusion that it should be rejected.

168. In the first place, as is perhaps apparent from the variety of approaches adopted in the judgments, para 1(c) of SCR 1373 does not provide any express guidance. It simply prescribes the result that is to be achieved: freezing without delay the funds etc of persons who commit etc terrorist acts. It does not indicate how States are to identify the people in question.

169. There will, of course, be no difficulty if the authorities of a State catch someone red-handed committing a terrorist act or handing over cash to a terrorist organisation. The State will freeze his assets if there are any within its jurisdiction. And, if satisfied that the information provided is accurate, other States will do the same – even though they will not have first-hand knowledge of the act in question.

170. Often, however, things will not be so clear-cut. Items of information may come from a variety of sources which, if pieced together, indicate, more or less clearly, what an individual or a group is doing. How is effect to be given to para 1(c) of SCR 1373 in that situation? Lord Phillips, at para 136 of his opinion, seems to envisage that a long-term freezing order should be dependent on "conviction of the relevant criminal offence to the criminal standard of proof" or that it would be merely "ancillary to a criminal charge or conviction" (para 142). I have just explained why I cannot accept that approach which would emasculate the international system that the Security Council wishes to create. I infer from what Lord Mance says, at para 230, that in his view the Security Council envisages that a (long-term) freezing order should be made only against individuals who, the State is satisfied, on the balance of probabilities, have committed etc a terrorist act. In other words, even if the State thinks that there is, say, a 40% chance that the individual is busy financing terrorist activities, he should be allowed to continue. I would reject that approach because it would leave a lot of loop-holes and would be unlikely to conduce to achieving the Security Council's overall aim of preventing terrorist acts.

171. I understand Lord Brown to opt, at para 199, for a requirement that the Treasury should have reasonable grounds for *believing* that the person in question is committing, or has committed, etc terrorist acts. That seems to me to be one possible approach which would be likely to identify many people whose funds etc are to be frozen in terms of para 1(c). Plainly, however, if a State applies that test, it will be liable to freeze the assets of a number of people who, it turns out, are not committing, or have not committed etc, terrorist acts. Nevertheless, in my view, a measure which adopted that approach could be said to be expedient for enabling the United Kingdom

to fulfil its obligation under SCR 1373 to freeze the assets of those who facilitate terrorist acts.

172. The actual test in the TOs, based on reasonable grounds for *suspecting*, is just a little less stringent than the one favoured by Lord Brown. In other words, while it may (slightly) increase the chances of catching individuals who are actually committing etc terrorist acts, it correspondingly increases the chances that someone who is not committing etc a terrorist act will have his assets frozen. Lord Hope, at para 58, considers that it may well have been expedient to introduce the reasonable suspicion test to reproduce what the SCR requires, but he is of the view that the formulation of the text should be left to Parliament. In his view, therefore, TO 2006 really fails, not because it is framed too widely, but because of the "principle of legality" (para 61).

173. As Lord Hope points out, there is evidence that the reasonable grounds for suspecting test would be consistent with the approach of the United Nations International Task Force. It seems to me that the expediency of the United Kingdom adopting that test really depends on a whole range of practical matters with which the members of this Court are largely unfamiliar. Inevitably, much of the information about terrorist activities that is available to national authorities will come from other countries and, often, in the form of intelligence provided by overseas security services. In the case of the United Kingdom, the Treasury – and indeed the British security services – may well be in no position to make an independent assessment of the material. Similarly, it may well be that, in a significant number of cases, because of its variable quality and fragmentary nature, the available information does not permit the Treasury to go further than to say that they have reasonable grounds for suspecting that the person concerned is committing or facilitating terrorist acts. If so, then it may be better to base designation on reasonable grounds for suspicion rather than on some higher standard which could not be readily achieved and which, if applied faithfully, would mean that the Treasury failed to freeze a significant number of assets which were actually under the control of people who committed etc terrorist acts. I therefore see no sufficient reason to conclude that the test in the TOs is not expedient for enabling the United Kingdom to fulfil its obligations under para 1(c) of SCR 1373.

174. Nevertheless, adopting that test does mean that, sooner or later, someone will be designated who has not actually been committing or facilitating terrorist acts. That is inevitable. The availability of judicial review under Part 6 of the Counter-Terrorism Act 2008 is, of course, a palliative. But, in my view, for the reasons given by Lord Hope, at paras 60 and 61, the making of an Order, which, in effect, amounts to permanent legislation conferring powers to affect, directly, very basic domestic law rights of citizens and others lawfully present in the United Kingdom goes well beyond the general power to make Orders in Council conferred by section 1(1) of the United Nations Act 1946. If such measures are to be taken, it is for Parliament to deliberate and to determine that the benefits of giving the Treasury such powers outweigh the potential disadvantages and that it is accordingly expedient to adopt these measures in order to enable the United Kingdom to fulfil its obligations under SCR 1373.

175. That is so, even though, for the reasons given by Lord Hope, at paras 70-73, the Court must proceed on the basis that, having regard to articles 25 and 103 of the Charter, the United Kingdom's obligations under the SCRs would trump any relevant obligations under the European Convention.

176. I consider, however, that section 1(1) would authorise Her Majesty to make an Order in Council, even with these far-reaching effects, provided that it had only a limited life-span and was replaced, as soon as practically possible, by equivalent legislation passed by Parliament. In this way the United Kingdom could promptly fulfil its obligations under the United Nations Charter.

177. For these reasons TO 2006 was ultra vires and TO 2009, which is, so far as relevant, in similar terms, must also be ultra vires. I am accordingly satisfied that the designation orders relating to A, K and M under TO 2006 were void and that the new orders made under TO 2009 must also be void.

178. I turn now to the AQO.

179. The history of the matter has been described by Lord Hope and Lord Mance. In para 4(b) of SCR 1267 (1999) the Security Council decided that all States should – in broad terms – freeze funds and other financial resources owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee that was to be established under para 6 of the SCR. This committee, comprising all the members of the Security Council, came to be known as the "1267 Committee". The following year, in SCR 1333 (2000), the Security Council decided that all States were to freeze without delay, inter alia, funds and other financial assets of "Usama bin Laden and individuals and entities associated with him as designated by" the 1267 Committee, "including those in the Al-Qaida organisation". After the 9/11 atrocity, at the instigation of the United States, the Committee added a large number of names to its list of groups and individuals associated with Osama bin Laden and Al-Qaida.

180. SCR 1267 was aimed at the Taliban regime. So the role of the Committee was to designate Taliban funds which States were to freeze. But, from SCR 1333 onwards, the Security Council has targeted the funds and assets of individuals and entities associated with Osama bin Laden and the Al-Qaida organisation. And the role of the 1267 Committee has, therefore, been to designate those individuals whose funds are then to be frozen. As Lord Mance explains, at para 215, this was not a new device: the Security Council had previously adopted resolutions which left it to a committee to designate individuals to whom particular sanctions were to apply. Those resolutions had been directed, however, at individuals associated with a particular régime in a particular country. By contrast, from SCR 1333 onwards, the 1267 Committee was having to identify individuals and groups associated with a much more amorphous organisation, emanations of which might be operating in countries all over the world.

181. Obviously, preventing terrorists from obtaining funds and other assets is a crucial part of any system for combating terrorism. Equally obviously, if there is to be a successful international effort to combat terrorism all over the world, a central organisation which gathers information and co-ordinates action is going to play a vital role. Assessing the information and deciding whether to act on it involved matters of political judgment. Obviously, again, much of the necessary information will come from the security services of different countries and there may well be problems about revealing it. The 1267 Committee acts as the central co-ordinating body and is not in the habit of revealing much about the basis for its decisions. It would, of course, be absurd to expect the Committee to notify individuals of any proposal to list them: any funds would quickly be disposed of. But, even after the reforms introduced in the last two years, there is little that individuals can do to launch an effective challenge to their listing after it has occurred. The Committee is not obliged to publish more than a narrative summary of reasons for their listing. There is no appeal body outside the Committee to which they can complain. The individuals themselves cannot apply directly to the Committee to have their names removed from the list. Such requests now go to the Ombudsperson. And, if a State applies on their behalf, the name will still not be removed unless all members of the Committee agree. There is an obvious danger that States will use listing as a convenient means of crippling political opponents whose links with, say, Al-Qaida may be tenuous at best.

182. The Security Council is a political, not a judicial, body – as is the 1267 Committee. And it may be that the Committee's procedures are the best that can be devised if it is to be effective in combating terrorism. But, again, the harsh reality is that mistakes in designating will inevitably occur and, when they do, the individuals who are wrongly designated will find their funds and assets frozen and their lives disrupted, without their having any realistic prospect of putting matters right. On one view, they are simply the incidental but inevitable casualties of the measures which the Security Council has judged it proper to adopt in order to counter the threat posed by terrorism to the peace and security of the world. The Council adopts those measures in order to prevent even worse casualties – those who would be killed or wounded in terrorist attacks.

183. On the assumption that the Human Rights Act is not in play, Parliament can pass legislation to give effect in our domestic law to the obligations imposed on the United Kingdom by the Security Council resolutions relating to Osama bin Laden, Al-Qaida etc - however grave the interference with rights of property and even though there is no effective remedy against an unjustified listing. In effect, Parliament could enact a statute in similar terms to the AQO. In doing so, Parliament would be consciously deciding that the need to fulfil the Chapter VII obligations imposed by the Security Council meant that the basic common law rights of the individuals concerned would have to yield.

184. Can the same be done by Order in Council under section 1(1) of the United Nations Act 1946? In other words, does section 1(1) authorise Her Majesty in Council to make legislation which encroaches to such an extent on individuals' basic common law rights of property and access to the courts?

185. Undoubtedly, given the terms of article 41 of the Charter which envisages interruption of economic relations, Parliament must have envisaged that, for example, an Order in Council giving effect to a ban on trade with a particular country would interfere significantly with the rights of individuals or companies to export their goods or to use their funds to make payments to individuals or companies in the country concerned. But, having regard to the principle stated by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 575, I have come to the conclusion that, by enacting the general words of section 1(1) of the 1946 Act, Parliament could not have intended to authorise the making of AQO 2006 which so gravely and directly affected the legal right of individuals to use their property and which did so in a way which deprived them of any real possibility of challenging their listing in the courts.

186. Lord Brown rejects that conclusion because, he says, there could surely be no political cost in doing what, unless we were flagrantly to violate our UN Charter obligations, the United Kingdom had no alternative but to do. I accept that there might be no real political cost in enacting the measure. But the essential point is that these matters should not pass unnoticed in the democratic process and that the democratically elected Parliament, rather than the executive, should make the final decision that this system, with its inherent problems, should indeed be introduced into our law. The need for Parliamentary endorsement is all the more important if the ordinary human rights restraints do not apply.

187. I would accordingly hold that article 3(1)(b) of the AQO is ultra vires and void.

188. For these reasons I agree that the appeals of A, K, M and G should be allowed and the appeal by the Treasury should be dismissed.

LORD BROWN

189. The principal question for the Court's decision on these appeals is whether the Terrorism (United Nations Measures) Order 2006 (The Terrorism Order) or the Al-Qaida and Taliban (United Nations Measures) Order 2006 (The Al-Qaida Order) or both fall to be quashed as having been made *ultra vires* the enabling power – section 1 (1) of the United Nations Act 1946 (the 1946 Act). Section 1(1) is central to the appeals:

> "If, under Article 41 of the Charter of the United Nations . . . (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."

190. The appellants (together with JUSTICE who intervene in these proceedings in support of their case) submit (and I simplify) that the Terrorism Order and the Al-Qaida Order are *ultra vires* the 1946 Act, first, because they offend the common law principle of legality and, secondly, because they necessarily involve violations of Convention rights. Essentially what are challenged here are not the designations of the individual appellants and the directions made against them by the Treasury as such, but rather the Orders themselves.

191. I gratefully adopt without repetition Lord Hope's detailed recitation of the facts of these appeals and the relevant provisions of all the main instruments under consideration: the United Nations Charter, the various United Nations Security Council Resolutions, the impugned Orders and, indeed, a number of other relevant Orders in Council made under the 1946 Act. This enables me to proceed at once to what I regard as the core issues.

192. Although, as I shall come to explain, my final conclusion on these appeals is that the Terrorism Order should be struck down but the Al-Qaida Order should stand, let me first make one or two brief introductory observations applicable to both. The draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated. Construe and apply them how one will – and to my mind they should have been construed and applied altogether more benevolently than they appear to have been – they are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing. Undoubtedly, therefore, these Orders provide for a regime which considerably interferes with the article 8 and article 1 of Protocol 1 rights of those designated. Similarly, it is indisputable that serious questions arise as to the sufficiency of protection of the article 6 rights of those designated. This is so, moreover, even if one superimposes upon the regime (as the Court of Appeal thought permissible) the services of a special advocate when required and the means of overcoming the potentially unfair effect of section 17 of the Regulation of Investigatory Powers Act 2000 with regard to the use of intercept evidence.

193. These, then, are powerful reasons for questioning the legitimacy of introducing such restrictive measures by executive order instead of by primary legislation. As Lord Hoffmann famously said in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. . . . 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 their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication 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."

I shall call this for simplicity's sake the *Simms* principle.

194. There is, however, an important countervailing principle also in play here. Chapter VII of the UN Charter concerns action to be taken with regard to threats to international peace and security and by article 41 authorises the Security Council to decide on measures to be taken short of armed force to maintain peace and security and to call upon member states to apply such measures. When one considers the ravages of terrorism and war and the gross invasions of human rights which they inevitably entail, it is difficult to think of any greater imperative than that member states should fully honour their international law obligation to implement Security Council decisions under article 41. The existence of such an obligation could not be plainer. Article 25 of the Charter mandates it and article 103 expressly dictates that it is to prevail over any conflicting international law obligation.

195. It follows that these appeals involve the clash of conflicting principles, each of profound importance.

196. As it seems to me, almost any Order made under section 1(1) of the 1946 Act is likely to interfere with somebody's fundamental rights. Take a UN resolution imposing trading actions against some state. Any domestic measure giving effect to such a decision is bound to interfere with someone's contractual dealings and impinge on their article 1 Protocol 1 rights and quite likely their article 8 rights too. Obviously the *Simms* principle cannot operate to emasculate the section 1(1) power entirely. What, then, are the touchstones by which to decide whether a particular executive Order falls within the scope of the power? As it seems to me, two paramount considerations will always arise: first, the degree of specificity of the UN decision which the UK is called upon to implement; second, the extent to which the implementing measure will interfere with fundamental human rights. Of course, the legislation affords the Minister some margin of appreciation as to just what is "necessary or expedient" for enabling the effective implementation of the United Nations resolution. But, the more invasive of human rights of those affected the proposed provision is, the narrower that margin will be – until, indeed, the point is reached where, unless the UK could not consistently with its obligations under the Charter introduce provisions any less invasive of human rights than those proposed, they could not properly be introduced by Order in Council at all but only by primary

legislation. Where, as here, those to be designated under the proposed measure will suffer very considerable restrictions under the regime, I would hold that it can only properly be introduced by executive Order in Council if the measure is in all important respects clearly and categorically mandated by the UN resolution which it is purporting to implement. If the implementing measure is to go beyond this, then, consistently with the *Simms* principle, it can only properly be introduced by primary legislation.

197. Turning to the impugned Orders, there seems to me a crucially important distinction between them. The fundamental reason why I for my part would strike down the Terrorism Order but not the Al-Qaida Order as *ultra vires* the 1946 Act is that whereas I cannot regard the former as sufficiently mandated by SCR 1373 to which it purports to give effect, the Al-Qaida Order to my mind *does* faithfully implement SCRs 1267, 1333 and 1390. Let me explain. First, the Terrorism Order. SCR1373, by paragraph 1(c), decided that all States shall "[f]reeze 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 . . ." The Terrorism Order, however, provides for designation by HM Treasury on the basis merely that it has "reasonable grounds for suspecting" that the person "is" (I omit the words "or may be", struck out by the Court of Appeal) "a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism". This goes well beyond the strict requirements of Resolution 1373. To my mind, it was not open to the Minister to introduce such a provision by Order in Council under the 1946 Act.

198. By contrast, paragraph 2 of SCR 1390 required that all States "[f]reeze without delay the funds and other financial assets or economic resources" of Osama Bin-Laden, members of the Al-Qaida organisation and the Taliban and others associated with them as referred to in the Sanctions Committee list. And that, as it seems to me, is precisely what the implementing Al-Qaida Order sets out to achieve, no more and no less. What essentially it provides for is the designation of all those designated by the UN Sanctions Committee. I cannot see why the *Simms* principle should apply to limit the power of the executive to accomplish this.

199. I have found it instructive in this regard to see how certain other Commonwealth countries have given effect to these same UNSCRs. Australia, New Zealand and Canada all have legislation akin to our 1946 Act. All three countries initially implemented both SCR 1267 and SCR 1373 by Regulations made under that legislation but in 2002 Australia and New Zealand (although not Canada) replaced these by primary legislation. As I understand it, both the Regulations and the legislation have directly implemented the Sanctions Committee designations under Resolution 1267 i.e. they automatically freeze the listed person's assets in just the same way as our Al-Qaida Order. On the other hand, the provisions implementing Resolution 1373 are altogether more tightly drawn than our Terrorism Order. Unless designated by the Sanctions Committee, people cannot be subjected to executive designation and asset freezing unless the following conditions are met: in Australia only when the Minister is satisfied that the person "is" involved in terrorism; in

Canada only when the Governor General is satisfied that there are reasonable grounds to believe this; in New Zealand only if the Prime Minister believes this on reasonable grounds (except that he can make an interim designation for 30 days if he has good cause to suspect it). Contrast all this with the position under the Terrorism Order where HM Treasury can designate – on a long-term basis – merely on "reasonable grounds for suspecting" the person to be involved in terrorism. As I pointed out in a very different context in *R v Saik* [2007] 1 AC 18, 61, at para 120: "To suspect something to be so is by no means to believe it to be so: it is to believe only that it may be so."

200. The way Australia, New Zealand and Canada have dealt with these UNSCRs to my mind tends to support the conclusions I have reached about the impugned Orders. It suggests that whilst SCR 1267 is regarded as mandating the automatic asset-freezing of those designated by the Sanctions Committee, SCR 1373 certainly cannot be regarded as mandating the long-term asset-freezing of people not designated by the Sanctions Committee merely on the ground of reasonable suspicion.

201. With regard to the Terrorism Order I add only this. The logic of the Treasury's argument is that not only is that Order sufficiently mandated by the terms of Resolution 1373 but so too would have been Orders in Council introducing the various other regimes aimed at combating terrorism in fact introduced over recent years by primary legislation. Consider for example paragraph 2(b) of Resolution 1373 deciding that all states should "[t]ake the necessary steps to prevent the commission of terrorist acts". Why should not the control order regime or, indeed, the earlier regime involving the executive detention of suspected terrorists unable to be deported have been the subject of Orders in Council under section 1(1) of the 1946 Act? The answer to my mind is plain. Both regimes were hugely invasive of human rights. Plainly they would have had to be mandated in the clearest and most categoric terms by a Chapter VII Resolution before they could properly have been introduced by Orders in Council. Equally clearly they were not. But by the same token that the control order regime – itself similarly triggered by the Minister merely having reasonable grounds for suspecting someone of terrorist activity – was lawfully introduced by legislation, so too, provided always, of course, that Parliament was persuaded to enact it, could the asset-freezing regime have been. I am unimpressed by the alternative grounds on which the Order is challenged, those of certainty and proportionality. Primary legislation introducing this same asset-freezing regime could not have been declared incompatible on those grounds. It is only because the Order was plainly insufficiently mandated by the SCR 1373 that I would hold it invalid.

202. I return to the Al-Qaida Order which, as I have suggested, does precisely what SCR 1267 (and subsequent Resolutions) expressly required the UK to do. I recognise, of course, that the UK's international law obligations give rise to no domestic law rights or obligations unless and until they are given effect in domestic law. But here the Resolution *was* given domestic law effect. The only question is whether that could properly be done by Order in Council under the 1946 Act.

203. Inevitably in considering this question one is struck by the traumatic consequences of implementing SCR 1267: the long-term radical restrictions upon the lives of those designated by the Sanctions Committee without there being afforded any judicial means of challenging that designation. (I cannot accept the Court of Appeal's suggestion that a merits-based review can somehow be achieved within the scope of this regime.) In these circumstances it is perhaps unsurprising that the European Court of Justice in *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225 struck down an implementing EC Regulation for want of any procedure for telling those designated of the evidence against them or for a hearing on the merits of the case for (and against) their inclusion in the Sanction Committee's list. But, of course, the European Community is not a member state of the UN: unlike the UK, it is not under an international law obligation to implement Security Council decisions under article 41 of Chapter VII of the Charter and, more particularly, to do so in the light of article 103 of the Charter:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The UK's position as a member state is quite different. Not merely was the UK entitled to introduce this asset-freezing scheme in respect of those designated by the Sanctions Committee; it was (under international law) bound to do so. And given that it was bound to do so, I can see no good reason why that should not have been achieved under the 1946 Act. I accept, of course, that the regime introduced by the Al-Qaida Order is "contrary to fundamental principles of human rights" (to use Lord Hoffmann's phrase in *Simms*). But that was the inevitable consequence of implementing Resolution 1267. Obviously, as it seems to me, it could have been implemented by primary legislation. Certainly, whilst *R (Al-Jedda) v Secretary of State for Defence (JUSTICE intervening)* [2008] AC 332 stands, such legislation could not be declared incompatible with Convention Rights. What purpose then, one asks, would be served by adopting this course rather than making use of the 1946 Act?

204. The *Simms* principle is intended to ensure that human rights are not interfered with to a greater extent than Parliament has already unambiguously sanctioned. The loss of such rights is not to be allowed to "[pass] unnoticed in the democratic process". "Parliament must squarely confront what it is doing and accept the political cost." But in this case the Security Council by Resolution 1267 unambiguously stated what was required of the UK and the 1946 Act equally unambiguously provided that that measure could be implemented by Order in Council. There could surely be no political cost in doing what, unless we were flagrantly to violate our UN Charter obligations, the UK had no alternative but to do.

205. I do not accept that such an approach carries with it the implication that the 1946 Act could similarly be used to introduce by Order in Council the sort of

internment regime mandated by the Security Council Resolution under consideration in *Al-Jedda*. Given the obvious extent to which internment interferes with fundamental human rights, such a resolution would need a degree of specificity at least as great as that characterising SCR 1267 to satisfy my suggested criteria (see para 196 above) for the proper use of the 1946 Act power. "Internment where this is necessary for imperative reasons of security" (the terms of the resolution providing for internment in post-war Iraq with which the House was concerned in *Al-Jedda)*, understandable as that was in its particular context, would not sufficiently clearly mandate a comprehensive internment regime in the UK pursuant to Executive Order; internment of named individuals in certain circumstances might.

206. Since, however, it now appears that the approach I favour is not one which commends itself to the majority of the Court, it would be unhelpful to pursue the matter further. I content myself with the hope that the view of the majority will not be thought to indicate any weakening in this country's commitment to the UN Charter.

LORD MANCE

Introduction

207. These appeals concern the validity of (i) the Terrorism (United Nations Measures) Order 2006 and (ii) the Al-Qaida and Taliban (United Nations Measures) Order 2006. I shall refer to these as the Terrorism Order 2006 and the Al-Qaida Order. Both were made in reliance on the power contained in section 1(1) of the United Nations Act 1946, providing:

> "**Measures under article 41** 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".

208. Article 41 appears in Chapter VII of the Charter of the United Nations which is headed "Action with respect to threats to the peace, breaches of the peace, and acts of aggression" and provides:

> "39. The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.
>
> …..
>
> 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the 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.
>
> 42. Should the Security Council consider that measures provided for in article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

209. In the cases of *A, K, M and G v Her Majesty's Treasury* [2008] EWCA Civ 1187, [2009] 3 WLR 25, the Court of Appeal, overruling Collins J [2008] EWHC 869 (Admin), [2008] 3 All ER 361, held by a majority (Sir Anthony Clarke MR and Wilson LJ) that both Orders were valid, subject only to the excision from the former Order of the words "or may be". Sedley LJ dissented on the issue of the validity of the Terrorism Order. The majority reasoning was that the Orders fell, subject to the excision, within the scope of section 1(1), that they were certain and proportionate and that their operation could be accompanied by sufficient procedural safeguards to preclude any objection to their validity at common law or under the Human Rights Act 1998. Against those conclusions, appeals have been brought with leave by A, K, M and G (who, in the light of our ruling on the first day of the appeal, can be given his full name, Mohammed al Ghabra). In the case of *R (HAY) v Her Majesty's Treasury* [2009] EWHC 1677 (Admin), Owen J held, in the light of the Court of Appeal's reasoning in *A, K, M and G*, that, on the particular facts in *HAY*, sufficient procedural safeguards could not be provided by the court, and that the Al-Qaida Order should be "quashed in so far as it applies to the claimant". On this appeal, the Treasury seeks to uphold the validity of the Order in relation to HAY, while HAY cross-appeals on the ground that the judge ought to have quashed the Order generally.

210. Lord Hope has set out the background to and salient terms of the Terrorism Order 2006 and the Al-Qaida Order in paras 21 to 27, and the circumstances and effect of application of these Orders to A, K, M, G and HAY in paras 1 to 4 of his judgment. A, K, M and G were each made the subject of a direction by the Treasury under article 4 of the Terrorism Order 2006. They were entitled to challenge the

Treasury's direction under article 5(4)(a) of that Order. In late October 2009 (subsequent to the hearing of these appeals), their designations under the Terrorism Order 2006 were revoked and replaced, as Lord Hope recounts in para 27, by designations under the Terrorism (United Nations Measures) Order 2009 (SI 2009/1747), which was itself framed to replace the Terrorism Order 2006. For the reasons which Lord Hope gives in para 28 and without pre-judging any contrary argument which may be raised, this redesignation does not appear to make the central issues argued before us under the Terrorism Order 2006 either academic or of past interest only. G and HAY were persons designated by the Sanctions Committee and were accordingly covered without more by article 3(1)(b) of the Al-Qaida Order. They were not entitled to bring any challenge under article 5(4)(a) of the Al-Qaida Order, since that applies only to persons covered by virtue of a Treasury direction. G's application to the court under article 5(4)(a) of the Al-Qaida Order was thus treated by Collins J as an application for judicial review. HAY's application was brought from the outset as an application for judicial review.

Section 1(1) of the 1946 Act

211. The primary argument of the appellants A, K, M and G, supported by the interveners JUSTICE, is that, notwithstanding the wide wording of section 1(1), the Terrorism Order 2006 was by its nature a measure falling outside the scope of section 1(1). Section 1(1) was, they submit, conceived with measures in mind arising from disputes between states, while the Terrorism Order 2006 was an executive order directed in the first place to individuals and interfering with their fundamental rights in a manner which could not, as a matter of constitutional propriety, have been contemplated without legislation in Parliament. A similar argument is mounted in respect of the Al-Qaida Order, reinforced by the consideration that, in that case, the Order purports to introduce into domestic law asset freezing provisions which apply automatically to persons designated by an international committee (the Sanctions Committee) whose designations are not subject to any direct challenge in domestic law.

212. Section 1(1) of the 1946 Act was introduced to provide a quick and simple means by which the United Kingdom could honour its international obligations and impose upon its citizens the duty to comply with decisions of the Security Council under article 41 of the United Nations Charter. In these circumstances, I agree with views expressed in the Court of Appeal in *Oakley Inc v Animal Ltd (Secretary of State for Trade and Industry intervening)* [2005] EWCA Civ 1191; [2006] Ch 337. The Court there said that the power under the European Communities Act 1972 to give effect to this country's international (Community) obligations was a power *sui generis* and should not be construed narrowly. The same applies to the power conferred by section 1(1) to give effect to Security Council Resolutions under article 41. In considering whether the general language of section 1(1) extends to the implementation of any such Resolution, however radical its effect on individual rights, it is nonetheless of some relevance that section 1(1) involves purely executive action, to implement inter-governmental decisions taken in the Security Council, free in each case of any procedure for direct Parliamentary scrutiny.

213. Not surprisingly, article 41 itself illustrates its application in its second sentence by reference to the interruption of economic relations or communications and the severance of diplomatic relations – familiar measures directed against states. In the debates in Parliament, these examples were cited by the Lord Chancellor (Hansard 12 February 1946, col 375) and by the Minister of State in the Commons (Hansard 5 April 1946, col 1516). But section 1(1) of the 1946 Act expressly contemplates that sanctions against another state may, in order to be effective, require to be supported at the domestic level by criminal prohibitions addressed directly to and enforceable against persons (individual or corporate). The present appeal concerns measures taken at the international level, but addressed to and enforceable against non-state actors and individuals, and the issue is how far section 1(1) enables effect to be given to such measures.

214. That the line between measures against state and non-state actors is not as great as might appear is demonstrated by the history of Security Council Resolutions leading to the Terrorism and Al-Qaida Orders. Initially, the focus was on the control by the Taliban (described in Resolution 1267 as "the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan") of part of Afghanistan, accompanied by pretensions to control the whole country, and its making available the areas that it controlled to Al-Qaida for the purposes of international terrorism against other states. Subsequently, in the aftermath of the New York attacks, attention was widened in Resolution 1373(2001) to the threat to international peace caused by terrorist activity generally. This led in the United Kingdom on 9 October 2001 to the making under section 1(1) of the 1946 Act of the Terrorism (United Nations Measures) Order 2001 (the "Terrorism Order 2001") and on 14 December 2001 to the Anti-terrorism, Crime and Security Act ("ACTA") 2001. The Terrorism Order 2001 was the more limited predecessor of, and was revoked by, the Terrorism Order 2006. Later, by Resolution 1390 (2002), recalling previous Resolutions 1267, 1333 and 1363, the Security Council condemned both the attacks of 11 September 2001 and the Taliban ("for allowing Afghanistan to be used as a base for terrorists training and activities, including the export of terrorism by Al-Qaida network and other terrorist groups as well as for using foreign mercenaries in hostile actions in the territory of Afghanistan") and the Al-Qaida network and other associated groups (for multiple terrorist acts). Resolution 1390 and the later Resolution 1455 (2003) refer to the list drawn up by the Sanctions Committee as covering "Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them". Resolution 1390 led on 23 January 2002 to the Al-Qa'ida and Taliban (United Nations Measures) Order 2002, prohibiting the supply or delivery, agreement to supply or deliver and any act calculated to promote supply or delivery of restricted goods to Usama bin Laden, any person designated by the United Nations Sanctions Committee or to any member of, or group, undertaking or entity associated with, Al-Qaida or the Taliban and was later amended and supplemented by the Al-Qaida Order 2006. (The Terrorism Order 2006 and the Al-Qaida Order 2006 also reflect the passing on 20 December 2002 of Security Council Resolution 1452, deciding that Resolutions 1267 and 1390 do not apply to funds and other financial assets or economic resources determined by the relevant State to be necessary for basic or, in particular circumstances, extraordinary expenses.)

215. No doubt the threat to international peace by rogue states or states under rogue leadership was in the forefront of everyone's mind in 1945-46. But a threat to peace by an organisation which has succeeded in taking over a significant part of a state cannot sensibly be distinguished. Nor indeed can a threat posed by an international organisation which establishes itself outside the jurisdiction, or without taking over any particular part, of any state and presents a threat to international peace. Under article 39 of the United Nations Charter, it is the Security Council's role to identify the existence of a threat to international peace from any such organisation, not just from states. What matters is such a threat, not whether it originates in a traditional subject of international law. Earlier instances exist of Security Council Resolutions under Chapter VII directing states to take measures against non-state actors: for example, measures under Resolution 841(1993) to freeze within their territories funds of the de facto authorities in Haiti, as well as funds of the legitimate, though ousted government of President Aristide; measures under Resolution 864(1993) against the UNITA movement in Angola; measures under Resolution 1127(1997) to restrict entry into or transit through their territories by "senior officials of UNITA and … adult members of their immediate families" and providing that a Security Council committee should "draw up guidelines for the[ir] implementation …, including the designation of officials and of adult members of their immediate families" to be affected; and measures under Resolution 1171(1998) requiring states to prevent all arms sales to Sierra Leone, other than to the government, and to prevent entry into or transit through their territories of "leading members of the former military junta". The extension of such measures to "senior" or "leading" officials or adult members of their families is understandable. These are persons who can be identified with the relevant state or non-state actor, rather than mere agents. Had the United Nations existed during the Second World War, Chapter VII measures could have been directed to Hitler and his entourage.

216. Where the present Resolutions can be said to go further is that they are directed in the case of Resolutions 1267, 1333 and 1390 not only at particular non-state actors, the Al-Qaida organization and the Taliban and at Usama bin Laden, but at all "members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them", and in the case of Resolution 1373 at individuals engaging in terrorism. In the case of the latter, the means of identifying such individuals were to be established in domestic law, but in the case of the former the Resolutions provided for identification of the "associated" individuals, groups, undertakings and entities at the international level by the committee consisting of all Security Council members.

217. The appellants did not challenge - indeed they said expressly that they accepted - the legitimacy of Resolution 1373 under article 41 of the United Nations Charter. In any event, the legitimacy of such measures is not as such justiciable at a domestic level. It is all the same worth noting the opinion expressed by Sir Michael Wood in his first Hersch Lauterpacht lecture (delivered 7 November 2006) on *The Legal Framework of the Security Council* that:

> "Depending on the nature of the threat, such measures may be specific, addressed, for example, to the threat emanating from North Korea, or they may be general, addressed, for example, to the global threat from terrorist groups. I do not see any great principle involved here, though the circumstances in which general measures are considered necessary and appropriate may prove to be rare".

218. At a domestic level, the question does, however, arise as to how far all such measures are capable of being reflected by Orders in Council made under section 1(1) of the United Nations Act 1946. Essentially, the question is whether the power in section 1(1) is subject to implicit limitations, arising from the background against which it was passed and the need for express language to override what would otherwise be regarded as basic rights. A similar issue was raised by Hazel Fox (Lady Fox) in 1997 in relation to an order implementing the Resolution 827(1993), whereby the Security Council established the International Tribunal for the former Yugoslavia. The United Nations (International Tribunal) (Former Yugoslavia) Order 1996 (SI 1996/716), made in reliance on section 1(1), providing for, inter alia, the arrest and transfer out of the jurisdiction of individuals for trial to and sentence by the Tribunal. Hazel Fox described the Security Council's Resolution as "a wholly novel exercise of power" and questioned the legitimacy of the use of section 1(1) for the purpose of its implementation: *The objections to transfer of criminal jurisdiction to the UN Tribunal* (1997) 46 ICLQ 434. Professor Christopher Greenwood, as he then was, later responded, arguing that the wording of section 1(1) is unconfined: see V Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions: a Comparative Study* (2004, Martinus Nijhoff), 581, esp at pp 601-603.

The Terrorism Order 2006 – general

219. The aim of section 1(1) was to enable the United Kingdom government to respond, with despatch, to any call by the Security Council "to apply any measures to give effect to any decision of that Council". Section 1(1) is in my view apt to cover Security Council decisions under article 41 requiring every state to take domestic measures against persons who that state identified as involved in terrorist activities. Section 1(1) expressly envisages that Security Council decisions under article 41 will, in order to be effective, require to be accompanied by prohibitions and sanctions addressed to domestic individuals or entities, and impacting, therefore, on rights or freedoms that they would otherwise have - particularly to make contracts and deal with or dispose of property. This might be the case either because the Security Council Resolution expressly so required, or because its effective domestic application appeared to the executive to make it necessary or expedient. On the face of it, therefore, it was open to the executive government to react by Order in Council to Security Council Resolutions 1267 and 1373 and their successive resolutions in the same series, by introducing provisions freezing the assets of persons who were identified at the domestic level as terrorists, and thereby enabling measures required by article 4(2) of Resolution 1267 and article 1 of Resolution 1373 to be effectively applied in the United Kingdom.

The Terrorism Order 2006 – necessary or expedient

220. The essential question is whether the Terrorism Order 2006 was in terms which can be regarded as making "such provision as appears to [Her Majesty in Council] necessary or expedient for enabling those measures to be effectively applied". Before the Supreme Court, though it appears to a lesser extent below, considerable emphasis was placed upon the extent to which Parliament had been asked to enact and had enacted anti-terrorist measures by primary legislation (in particular the Terrorism Act 2000, passed on 20 July 2000, and ACTA 2001, passed on 14 December 2001) and the suggested "constitutional impropriety of the Government by-passing Parliament and deciding what powers to accord itself" through the Terrorism Orders 2001 and later 2006 and 2009. One can certainly feel concern about the development and continuation over the years of a patchwork of over-lapping anti-terrorism measures, some receiving Parliamentary scrutiny, others simply the result of executive action. However, the primary legislation does not implement all measures required by the United Nations Resolutions and the primary and secondary legislation are not actually inconsistent.

221. More particularly, Part III of the Terrorism Act 2000 introduced a series of offences relating to "terrorist property", defined to include money or other property likely to be used for the purposes of terrorism, as well as the proceeds of, or of acts carried out for the purposes of, terrorism. But these offences are all defined in terms which require *mens rea* such as an intention, knowledge or reasonable suspicion that money or other property will be used for terrorist purposes. In contrast, the Terrorism Orders 2001 and 2006 both included absolute prohibitions on certain dealings with designated persons. The 2001 Order included a precursor (article 3) to article 8 of the 2006 Order (article 3 was confined to making available "any funds or financial (or related services)"), as well as a precursor (article 4) to articles 4 and 7(1) of the 2006 Order (article 4 only gave power to the Treasury to direct that funds be not made available to any person by a person by, for or on behalf of whom such funds were held where the Treasury had reasonable grounds for suspecting that the latter person "is or may be" within one of the three categories matching article 4(2)(a), (b) and (d) of the 2006 Order).

222. As to the ACTA 2001, this was passed over two months after the Terrorism Order 2001. In theory at least, Parliament had the opportunity, when enacting the ACTA 2001 to consider whether the Terrorism Order 2001 should be allowed to continue in force. The same may be said in relation to the enactment of the Terrorism Act 2006. However there is little, if anything, to suggest that Parliamentary attention was ever focused on or drawn to this opportunity. The Explanatory Notes to the 2001 and 2006 Acts make no reference to the Terrorism Order 2001 or the Al-Qa'ida Order 2002. The Notes to the 2001 Act refer only to the previous power to freeze assets under the Emergency Laws (Re-enactments and Repeals) Act 1964, and debate in the House of Lords on 28 November 2001 took place on the scope of the power to freeze without reference to the existence of the Terrorism Order 2001 (Hansard 211128-14). (The possibility that financial sanctions agreed by the United Nations or European Union would be implemented in some way other than under the 2001 Act was briefly

mentioned at one point.) The Notes to the 2006 Act describe "previous counter-terrorism legislation" solely by reference to the previous statutes.

223. The extensive power to make freezing orders under Part 2 of ACTA 2001 is limited by pre-conditions, the first that the Treasury should reasonably believe that action to the detriment of the United Kingdom economy or constituting a threat to the life or property of one or more United Kingdom nationals has been or is likely, but the second, critically, that the person taking or likely to take such action is a foreign government or overseas resident. The Terrorism Orders 2001 and 2006 extend, and have regularly been used, in relation to purely domestic threats. It may well be thought desirable that such measures should be debated in Parliament alongside the primary legislation which Parliament did enact, and correspondingly undesirable that there should be developed and continued, as a result of executive Orders, a patchwork of measures that have and have not been debated in Parliament. But I cannot view the making of the Orders under section 1(1), or their continuation in force, as constitutionally improper merely because of these considerations. This however leaves open whether the measures introduced by executive Order were of a nature falling within the scope of section 1(1) of the United Nations Act 1946.

224. The argument in the courts below focused on the prescribed pre-conditions to the making of any direction under article 4, and, in particular, on the words "that the Treasury have reasonable grounds for suspecting that the person is or may be …". While Collins J and the Court of Appeal considered that the words "or may be" lowered the threshold too far, the majority in the Court of Appeal accepted that the executive "could properly conclude that it was expedient to provide that reasonable grounds for suspicion was an appropriate test" (paras 42 and 155-157). The Master of the Rolls observed that Resolution 1373 was "silent on the standard of proof to be satisfied on the question whether a particular person 'commits, or attempts to commit, terrorist acts …' before a state can freeze his assets within paragraph 1(c) or prohibit certain activities within paragraph 1(d)" (para 42).

225. In this context, because of the nexus with domestic law arising from the language of section 1(1) itself, it is necessary to form a view about the scope of Security Council Resolution 1373. I see its scope differently to the Master of the Rolls. The relevant wording of Security Council Resolution 1373 article 1(c) and (d) is directed at the prevention and suppression and the criminalisation and prosecution of actual terrorist acts; at the freezing of funds or 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" and of entities owned or controlled, or acting on behalf of or at the direction of such persons and entities; and at prohibiting nationals or persons and entities within their territories from making any funds, financial assets or economic resources or financial or related services available for the benefit of any such persons. This wording does not suggest that the Security Council had in mind "reasonable suspicion" as a sufficient basis for an indefinite freeze.

226. When, following the terrorist bombing on 14 February 2005 which killed former Lebanese Prime Minister Rafiq Hariri, the Security Council adopted Resolution 1636 (2005) under Chapter VII, it decided, "as a step to assist in the investigation of this crime and without prejudice to the ultimate judicial determination of the guilt or innocence of any individual", that "all individuals designated by the [international investigation] Commission [S/2005/662] or by the Government of Lebanon as suspected of involvement in … this terrorist act, upon notification of such designation to and agreement of the Committee [established by the Security Council for the purpose]" should be prohibited entry to or transit through states other than their own, and that all states should freeze all such individuals' funds, financial assets and economic resources. The absence of any similar reference to "persons suspected" in Resolution 1373 is notable.

227. Further, the freezing measures prescribed by Resolutions 1267, 1333 and 1390 (which in turn led to the Al-Qaida Order 2006) have been explained as "preventative in nature and … not reliant upon criminal standards set out under national law": see recitals to Resolutions 1735 (2006), 1822 (2008) and 1904 (2009). Resolutions 1735 and 1822 themselves called on states not merely to freeze the assets of individuals on the Sanctions Committee list, but also to prevent the supply, sale or transfer to such individuals of arms and related material. The latter would have to be proscribed at the domestic level, at which level issues would arise as to the standard of proof contemplated. The wording of the recitals to Resolutions 1735 and 1822, post-dating that of Resolution 1636 (2005), does not suggest that reasonable suspicion was contemplated as the appropriate test, but rather an ordinary civil standard of proof of relevant allegations.

228. In so far as the Court of Appeal justified its decision on the basis that the Security Council Resolutions contemplate indefinite freezing orders based not on proof but on reasonable suspicion, I therefore disagree. That is not the end of the matter, because of the power to make such provision as appears to Her Majesty in Council necessary or expedient for enabling the relevant Security Council Resolutions to be effectively applied. That undoubtedly justifies provisions going beyond those of the Resolutions, and expediency goes wider than necessity. To that extent, I cannot accept the description of section 1(1) given by Mr Fordham QC as a mere "transposition power". An example of such a provision under section 1(1) itself is found in *R v Her Majesty's Treasury, Ex p Centro-Com* [1994] CLC 628 (CA). The Order in Council there went beyond Security Council Resolution 757 (1992) relating to the conflict in the former Yugoslavia, in so far as it enabled the Treasury to prohibit the making of payments from funds held in the United Kingdom even of medical supplies and foodstuffs, and the Treasury determined that it would refuse permission for payment of all supplies (even supplies already made), other than medical supplies and foodstuffs supplied from the United Kingdom. The reason was the risk that payments were being made from funds held in the United Kingdom, for supplies from other countries which were ostensibly but were not in fact medical supplies or foodstuffs, and the impracticality of eliminating this risk in relation to goods supplied from abroad. The Court of Appeal (unanimous on this point) upheld the validity of the Treasury's determination in principle, with Glidewell LJ dissenting only in relation to its retrospective application to past supplies. The court mentioned that its decision did

not prevent the supply of medical supplies or foodstuffs from any country. It merely imposed a limitation on the origin of the funds which the purchasers could use to pay for such supplies.

229. In the present case, the Order as worded imposes an indefinite freeze on the use of funds or economic resources by any person designated by the Treasury for the purposes of the Order on the basis that the Treasury have reasonable grounds for suspecting that he is or may be (a) a terrorist or (b) a person identified in Council Decision 2006/379(EC) or (c)/(d) a person owned or controlled or acting on behalf or at the direction of any person so designated. Only on the basis that the Treasury did not have reasonable grounds for suspecting this, could a person seek under article 5(4) to set aside a Treasury direction made under article 4. The courts below held that the phrase "or may be" was outside the scope of the power in section 1(1), as lowering the threshold too far. Mr Swift for the Treasury does not concede that this conclusion was correct (though there has been no cross-appeal against it), but said frankly that the reason there was no cross-appeal in respect of the deletion of the words "or may be" was because the Treasury did not really need to, if it had the words "have reasonable grounds for suspecting".

230. In my opinion, there is an objective limit to the extent to which section 1(1) permits the executive by Order in Council to enact any measure that appears to it expedient to enable the effective application of the core prohibition mandated by Resolution 1373 and summarised in para 225 above. A measure cannot be regarded as effectively applying that core prohibition, if it substitutes another, essentially different prohibition freezing the assets of a different and much wider group of persons on an indefinite basis. I accept that it could have been regarded as necessary or expedient to freeze the funds and economic resources of suspects on a temporary basis, in order to ensure the effectiveness of any permanent freezing order, once their terrorist activity had been shown or they had had, at the least, the opportunity of disproving it to a civil standard. I also accept that the indefinite freezing of funds and economic resources of suspects may make it probable that the group of persons whose funds, etc. are frozen will include more actual terrorists, etc. But it does so by changing the essential nature and target of the freezing order. That being the case, it is no longer possible to say that the Order is either necessary or expedient "for enabling those measures [those decided by Resolution 1373] to be effectively applied". It is enabling or applying different measures. Further and in any event, since the Treasury's case involves interpreting the words "necessary or expedient" in section 1(1) of the United Nations Act 1946 as authorising a major inroad, on the basis of reasonable suspicion alone, into the rights of individuals to dispose of their assets and live their lives free of executive interference, the principle of legality, which I discuss in more detail below in relation to the Al-Qaida Order, argues for the more limited interpretation.

231. For these reasons, I consider that the Terrorism Order 2006 was outside the power conferred upon the Treasury under section 1(1). It was not submitted that, in these circumstances, not only the words "or may be" but also the words "that the Treasury have reasonable grounds for suspecting" in article 4(2) could be blue-pencilled, so as to leave the Order valid on that changed basis. But, in any event, such

a suggestion would, even if accepted, have made no difference to the appeals of A, K, M and G in respect of the Terrorism Order 2006, since their designation was based on too relaxed a test. In these circumstances, I consider that we should allow the appeal in respect of this Order, declare that the Order was ultra vires and quash it. Since A, K, M and G are all now subject to designation under the Terrorism Order 2009, which could only be quashed in separate proceedings, there is no point in staying the operation of our order quashing the Terrorism Order 2006 for any period.

The alternative grounds of challenge to the Terrorism Order

232. I add some words on the alternative grounds on which the appellants sought to challenge the Terrorism Order 2006. They were presented under the heads of certainty and proportionality, in each case in reliance on the Human Rights Convention. The prohibitions in articles 7(1) and 8(1) of the Order were said to amount to an unlawful interference with Convention rights, particularly the right to peaceful protection of possessions protected by article 1 of Protocol 1 and the right to respect for private and family life protected by article 8. The same prohibitions, in combination with the criminal sanctions provided by articles 7(3) and 8(2), are said to have been insufficiently certain to comply with article 7 of the Convention. Three particular aspects of alleged uncertainty are identified: the first, the scope of the prohibition in article 7(2)(d) in respect of "any person acting on behalf or at the direction of a person referred to sub-paragraph (a) or (b)"; the second, the scope of the words "make … economic resources … available, directly or indirectly" in article 8(1); and the third, the scope of the further words in that article "to or for the benefit of a person referred to in article 7(2)".

233. The requisite standard governing certainty under article 7 was summarised by the European Court of Human Rights in *Kafkaris v Cyprus* (2008) 49 EHRR 877 as follows:

> "141. Furthermore, the term 'law' implies qualitative requirements, including those of accessibility and foreseeability (see, among other authorities, *Cantoni v France*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p 1627, para 29; *Coëme v Belgium*, cited above, para 145; and *EK v Turkey* (2002) 35 EHRR 1344, para 51). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (see *Achour v France* (2006) 45 EHRR 9, para 41). An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission (see, among other authorities, *Cantoni*, cited above, para 29). Furthermore, a law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a

given action may entail (see, among other authorities, *Cantoni,* cited above, p 1629, para 35; and *Achour*, cited above, para 54).

142. The Court has acknowledged in its case-law that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, *mutatis mutandis*, *Sunday Times No 1*, cited above, p 31, para 49, and *Kokkinakis,* cited above, p 19, para 40). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see, *mutatis mutandis*, *Cantoni*, cited above). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen" (see *SW v United Kingdom*, cited above, para 36, and *Streletz, Kessler and Krenz v. Germany* GC, nos 34044/96, 35532/97 and 44801/98, para 50, ECHR 2001-II)."

234. Judged by these standards, I agree with the Court of Appeal's reasoning and conclusion that the relevant provisions of articles 7 and 8 were and are sufficiently certain to be valid. That difficult cases may arise is not the point. Further, both under domestic law and under the jurisprudence of the European Court of Human Rights, criminal law provisions will, in case of real doubt, be construed restrictively, in the accused's favour: see *Kafkaris*, para 138. Among other points, it is relevant to note that article 7(1) read with 7(2)(d) is addressing a situation where a person (A) deals with funds or economic resources belonging to, owned or held by a person (B) acting on behalf or at the direction of a terrorist or designated person (usually C, though it could be A) rather than with funds owned or held by A. In relation to "make … economic resources … available" in article 8(1), it is relevant to note that "economic resources" are defined to mean "assets … which are not funds, but can be used to obtain funds, goods or services". This would be unlikely to be the case in respect of a number of the examples canvassed in argument (supply of a cooked meal or a bed for the night, for example). The appellants were able to point to the stringent interpretation of the words "for the benefit of", for which the Treasury has argued under Council Regulation (EC) 881/2002 in *R(M) v HM Treasury (Note)* [2008] UKHL 26; [2008] 2 All ER 1097. The interpretation advanced there by the Treasury would, if correct, preclude the payment (without Treasury licence) to the wife of a designated person of social security benefits, enabling her to expend money on domestic expenses such as buying household food, from which the designated person would derive a benefit in kind. The House of Lords, in referring that issue to the European Court of Justice, expressed its own clear view that the Treasury's interpretation should be rejected as unnecessarily and overly wide.

235. I am at present also unpersuaded that the content of the Orders could be challenged on grounds of lack of proportionality, although I need express no final view about this. Combating terrorism, and the freezing of funds or resources which can be used for terrorist purposes, are undoubtedly matters of first importance. Those introducing legislative measures in this area have to make a judgment as to the nature and stringency of the measures required. The severity of impact of the freezing order provisions in the Terrorism Orders 2001 and 2006 on designated individuals in respect of whom there is only a "reasonable suspicion" of terrorism and on others such as members of their families is relevant when considering whether such measures could be introduced as delegated legislation under section 1(1) of the 1946 Act. But, assuming this otherwise to be permissible, designation was not automatic and the Treasury was under the Terrorism Order 2006 empowered to grant licences to make available or deal with funds or economic resources in a manner which would otherwise be prohibited. The appellants complained about the stringency with which and way in which the Treasury has in fact operated its licensing system, but this does not appear as a complaint which can affect the validity of the Orders themselves, as opposed to the propriety of the Treasury's interpretation or use of its powers under the Orders. The latter aspect is not in issue before us.

236. The appellants in their printed case also sought in relation to the Terrorism Order 2006 to rely upon the absence of any statutory provisions for the use of closed material by way of the special advocate procedure, and for the disapplication of the statutory prohibition under section 17 of the Regulation of Investigatory Powers Act ("RIPA") 2000. The Counter-Terrorism Act 2008 now makes express provision covering both points (ss.67-69). The original designations under the Terrorism Order 2006 were quashed, as a result of the conclusion in the courts below that the words "or may be" were inadmissibly included in the Order. Fresh designations were made after the Court of Appeal's decision, and have in turn been replaced by those now in existence under the Terrorism Order 2009. The procedures in the Counter-Terrorism Act 2008 would apply to any challenges to these fresh designations. The points raised below regarding the absence of an express special advocate procedure and the disapplication of section 17 of RIPA are therefore academic under the Terrorism Order 2006, and I need say no more about them in that connection.

The Al-Qaida Order

237. I turn to the Al-Qaida Order, relevant to both G and HAY. G and HAY are persons designated by the Sanctions Committee within article 3(1)(b), and subject accordingly to the prohibitions in articles 7 and 8, of the Order. It is at the heart of both the Treasury's and G's and HAY's cases that the application to them of such prohibitions was required by the Security Council Resolutions to which the Order was intended to give effect, and that, once their designation by the Sanctions Committee was accepted, the merits of their designation were and are a matter external to and incapable of challenge in any domestic court. The Treasury derives from this the conclusion that the making of the Order incorporating article 3(1)(b) was authorised and valid under section 1(1). G and HAY submit that, precisely because domestic law can in these circumstances offer them no effective recourse, the making of the Order

was invalid. In the case of G, where the United Kingdom had sought and obtained G's listing, it was held (at least by Wilson LJ: para 157) that effective recourse consisted in no more than "a merits-based judicial review of the executive's response to [G's] application that it should request or support his own request, for delisting by the Sanctions Committee". In the case of HAY, Owen J held, after reviewing the Court of Appeal's reasoning, that no effective recourse existed in respect of HAY, because of the lack of any certainty that he would be delisted, despite the United Kingdom's support, in circumstances where another unidentified state had sought his listing.

238. The appellants put their case on two distinct bases, one common law, the other based on the Human Rights Act. At common law, the submission is that section 1(1) cannot be taken to have contemplated or permitted Orders which would interfere with, or at all events violate, fundamental rights. Under the Human Rights Act, they recognise an obstacle in the reasoning in *R(Quark Fishing Ltd.) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 AC 529, particularly at paras 25 and 88, per Lord Bingham and Lord Hope, and in the decision in *R(Al-Jedda) v Secretary of State for Defence (JUSTICE intervening)* [2007] UKHL 58; [2008] AC 332. In *Al-Jedda* the House of Lords held, in the light of article 103 of the Charter, that a power to detain authorised by Security Council Resolution 1546 and successive further Resolutions under Chapter VII prevailed over the limitations on the power to detain otherwise contained in article 5 of the Convention (although a detainee's rights under article 5 were not to be infringed to any greater extent than was inherent in such detention: para 39, per Lord Bingham). G and HAY invite the Supreme Court to reconsider both these cases and to depart from them so far as necessary.

239. As noted above (para 218), section 1(1) of the United Nations Act 1946 contemplates that Orders in Council implementing Security Council Resolutions under Chapter VII may interfere with individual persons' rights to enter into contracts or to deal with or dispose of their business. The limitations imposed by the Al-Qaida Order on G's and HAY's rights to use their property and on their privacy or family life were not, as such, of a character falling outside the scope of the section 1(1) power to give effect to Security Council Resolutions. The real issue is whether section 1(1) permits the making of an Order which interferes with such rights on a basis which is immune from any right of challenge on the merits before a court or other judicial tribunal. G and HAY submit that section 1(1) does not embrace the making of an Order in Council which deprived them of any effective right of access to a court or judicial tribunal to challenge the basis upon which they had been categorised as associates of Al-Qaida or the Taliban, with the limitations on their rights to use their property and on their privacy and family life that followed from that categorisation. It is not suggested that the Sanctions Committee equates with a court or judicial tribunal, though steps have been taken to respond to the General Assembly's call in September 2005 on the Security Council "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exemptions" (UNGA Resolution 60/1 of 16 September 2005). The Committee's procedures are set out in Guidelines first adopted on 7 November 2002 and now current in a version adopted on 9 December 2008. The Committee usually meets in closed session, and it determines what information about

its proceedings or considered by it should be made public or otherwise disclosed. Its decisions are usually taken by consensus, but if none is achieved the matter may be submitted to the Security Council itself, which decides by majority. The Committee receives applications for removal of a name from the list either by states, or, through the "Focal Point" procedure established by Resolution 1730 (2006), from any person or entity on the list. But there is no judicial procedure enabling a person or entity affected to know and respond to the full case regarding it. The identity of the member state seeking a listing or seeking to uphold a listing may not even be known or disclosed to that person or entity. Under Resolution 1822 (2008) para 12, the member state proposing inclusion on the list identifies those parts of the detailed statement of case that may be publicly released, and about which the person affected should under para 17 be notified. The most recent Resolution 1904 (2009) adopted on 17 December 2009 reflects in a number of respects concerns expressed about the effects of the United Nations Resolutions and the Committee's procedures; it reverses the onus by deciding that "the statement of case shall be releasable upon request, except for the parts a Member State identifies as being confidential to the Committee, and may be used to develop the narrative summary of reasons for listing" to be published on the Committee's website (para 11); and it provides for an Ombudsperson ("an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions") to assist the Committee in delisting requests. But nothing in it affects the basic problems that there exists no judicial procedure for review and no guarantee that individuals affected will know sufficient about the case against them (or even know the identify of the Member State which sought their designation) in order to be able to respond to it.

240. G and HAY invoke under English law the statement of principle in Lord Browne-Wilkinson's speech in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 575C-D to the effect that:

> "A power conferred 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."

Lord Browne-Wilkinson dissented in that case only as to whether the principle applied on its particular facts. In *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131E-G, Lord Hoffmann developed the principle of legality in these terms:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 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 their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication 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."

In *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286, Viscount Simonds referred to the principle "that the subject's right of recourse to Her Majesty's courts for the determination of his rights" as a "fundamental rule" and as "not by any means to be whittled down". In *Ex p Pierson* Lord Browne-Wilkinson referred with approval to *R v Lord Chancellor, Ex p Witham* [1998] QB 575, where the right of access to the courts was treated as "a basic 'constitutional' right", the abrogation of which was not to be taken as authorised by the general words of a statutory provision, so that the setting of court fees at a level precluding access to the court by some litigants was not authorised by a general power to prescribe fees.

241. Applying the principles recognised in these cases, I put aside, as circular in this context, the submission made by Mr Swift for the Treasury that G's and HAY's right of access to a court is unaffected since the only right they have under the Al-Qaida Order is to challenge the fact of their listing or their identity with any listed person. That is a relevant submission once the court's adjudicative power is shown to be excluded or limited by some valid and applicable legislative provision or common law principle: *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 provides an example. But here the question is whether the Al-Qaida Order (or more particularly article 3(1)(b) of that Order) is valid. That depends upon whether section 1(1) of the 1946 Act enables the executive not merely to legislate in a manner which interferes with individual property rights - that is as such clearly contemplated by section 1(1) - but to restrict them so directly and radically as severely to curtail personal and family life on an indefinite basis, without affording any means of judicial recourse (domestic or international) to test the underlying premise of the restriction, namely "association" with an organisation identified by the Security Council as a threat to international peace.

242. In arguing for a negative answer to this question, G and HAY suggest as an analogy the reasoning and decision of the European Court of Justice in *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225. That case concerned Regulation 881/2002(EC), the aim of which, since the Community is not as such a member of the United Nations, was to ensure a uniform application of the United Nations Resolutions 1267 and 1390 within the member states of the Community. The Regulation set out in Annex I the names of persons

designated by the United Nations Sanctions Committee as associated with Al-Qaida and the Taliban and contained provisions mirroring those of the Security Council Resolutions freezing their assets.

243. The Court held that the European Community was an autonomous legal system, based on the rule of law and in which fundamental rights formed an integral part of the general principles of law which Community legislation had to observe if they were to be lawful (paras 282-284). One of the principles that formed "part of the very foundations of the Community" was "the protection of human rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights" (para 304); and this "principle of effective judicial protection" meant that "it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested Regulation" (para 336). This in turn meant that "the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action" (paras 336-338). The Court annulled the Regulation as far as it concerned Mr Kadi and his co-appellants in the absence of any procedure for communicating (or any communication) to them of the evidence against them and in the absence of any procedure for hearing them, before or after the decision on the merits of their inclusion in the list (paras 344-352 and 368-369).

244. Mr Swift points out that the decision in *Kadi* turned on the Court's view of the Community as an autonomous legal order (and not itself a member of the United Nations, although this factor does not appear explicitly in the Court's reasoning). The United Kingdom is, in contrast, a member of the United Nations, bound by its Charter, and committed in international law to giving effect to Security Council Resolutions under Chapter VII. Counsel for G and HAY, supported by Mr Fordham for Justice, point out in response that the United Kingdom takes a dualist view of international law, and that international law has no domestic effect unless and until implemented at a domestic level: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418. The force of this submission is weakened by the consideration that the whole purpose of section 1(1) is to address the consequences of the dualist view by facilitating the implementation at domestic level of the United Kingdom's international legal obligations under Chapter VII. Nevertheless, the issue remains, whether section 1(1) covers any and every Security Council Resolution that might be passed, including even a Resolution directed at what would otherwise be regarded as basic constitutional rights under domestic law.

245. In considering this issue, it is relevant background that the United Nations is itself an institution committed to the promotion of human rights. The preamble to the Charter reaffirms "faith in fundamental human rights" and article 1 includes among its purposes, in addition to maintaining international peace and security and developing friendly relations among nations:

> "3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction ……
> 4 To be a centre for harmonising the actions of nations in the attainment of these common ends."

It is also of note that the Security Council by Resolution 1456 on 20 January 2003 adopted the following "declaration on the issue of combating terrorism":

> "1. All States must take urgent action to prevent and suppress all active and passive support to terrorism, and in particular comply fully with all relevant resolutions of the Security Council, in particular resolutions 1373 (2001), 1390 (2002) and 1455 (2003):
> ……
> 6. States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law; …."

In its second report (S/2005/83) to the United Nations Sanctions Committee, the Analytical Support and Sanctions Monitoring Team established pursuant to Resolution 1526(2004) identified the challenges made to European Community and national measures implementing Security Council Resolution 1267 and acknowledged, as the High Level Panel before it had, that at that date:

> "The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly conflict with fundamental rights, norms and conventions" (para 53).

More recently, Resolution 1822 (2008) reaffirms "the need to combat by all means, in accordance with the Charter … and international law, including applicable international human rights, refugee and humanitarian law". Against this background, it is open to question at an international level how far the United Nations Security Council Resolutions can have been intended either to require member states to enact domestic legislation that would violate fundamental principles of human rights under their domestic constitutions or laws or to exclude domestic review of the compatibility of such legislation with such rights. Be that as it may, the relevant question at the domestic level is how far the United Kingdom Parliament in enacting section 1(1) of the 1946 Act can have envisaged that a Security Council Resolution could or would be used as the basis for introducing a domestic measure that would conflict with such rights.

246. The basic common law right at issue on these appeals is G's and HAY's right to access to a domestic court or tribunal to challenge the basis for including their names in the list of persons associated with Al-Qaida or the Taliban and so freezing their property with the severe personal consequences already indicated. This was also the limit of the equivalent right identified under European Community law by the Court of Justice in *Kadi.* There was no suggestion in *Kadi* that Mr Kadi was entitled to an opportunity to challenge the basic premise of Security Council Resolution 1267 and of Regulation 881/2002 (EC), viz that the Taliban (or Al-Qaida) was and is a terrorist organisation. In the traditional sphere of decision-making under article 41 (that is action, in the form of, say, sanctions, against a member state of the United Nations or against a non-state actor, such as the Taliban or Al-Qaida), a person affected by a domestic prohibition aimed at giving effect to such sanctions could not sensibly suggest that he had a fundamental right to access to a domestic court to challenge the premise of that prohibition. He could not demand access to a domestic court to challenge the proposition that the member state or non-state actor was in some way a threat to international peace meriting the imposition of sanctions.

247. Equally, a head of a state or senior minister or other person closely identifiable with (an *alter ego* of) a state or non-state actor could, I think, find it hard to suggest that he had any basic right to challenge the legitimacy of a Security Council Resolution requiring the sanctions to extend to his movements or his dealings with property. He could of course be expected to have a right of access to a domestic court to challenge any suggestion that the prohibition applied to him (eg that he was the head of state) or his activities or that he had infringed it. But, if one takes Usama bin Laden himself, who is identified in Resolutions 1267 read with 1333 as an individual whose assets are required to be frozen and appears on this basis in the United Nations list and in article 3(1)(a) of the Terrorism Order 2006, as well as in Annex I to Regulation 881/2002 (EC), it must be very doubtful whether the European Court of Justice would have held in *Kadi* that he should have a right to challenge his listing. Several points can be made about this. First, the listing of Usama bin Laden was directly determined by the Security Council's legally binding decision, rather than by any listing decision of the Sanctions Committee. Second, the position of Usama bin Laden, in relation to a non-state actor like Al-Qaida, parallels that of a head of state in relation to sanctions against a state; while, third, the origins and history of the Second World War are a sufficient demonstration of the potential threat to world peace which a single individual heading a state may pose. On this basis, if the question ever arose, section 1(1) of the United Nations Act 1946 could be seen as authorising the making of article 3(1)(a) of the Terrorism Order 2006 directed expressly at Usama bin Laden. But the present appeal does not require us to determine very remote and, as yet, entirely hypothetical situations.

248. The Security Council and Sanctions Committee are closely related. To describe the former as legislating and the latter as executing or adjudicating upon the implementation of measures determined by the former is hardly realistic. The former was delegating listing to the latter, composed of representatives of all states sitting on the former. In these circumstances, I do not think that the Al-Qaida Order was outside the scope of section 1(1) merely because it gave effect to a determination made by the Sanctions Committee, rather than the Security Council. But I do consider that there is

a relevant distinction between, on the one hand, measures directed at states or non-state actors such as Al-Qaida identified by the Security Council as threats to international peace, or at their acknowledged heads or alter egos, and, on the other hand, measures directed in entirely general terms at anyone associated with such non-state actors. In the case of the Terrorism Order, it was left to domestic legal systems to determine the identity of persons active as terrorists on whom the sanctions should bite. In the case of the Al-Qaida Order, the determination was undertaken by non-judicial process at the international level, by which member states were to be bound without more.

249. The words of section 1(1) are general, but for that very reason susceptible to the presumption, in the absence of express language or necessary implication to the contrary, that they were intended to be subject to the basic rights of the individual: see *Ex p Simms*, per Lord Hoffmann (above). In the event of the Security Council establishing under Chapter VII a régime requiring the internment of individuals (as was held to be the case in *Al-Jedda*), section 1(1) could hardly enable the executive by Order in Council to introduce provisions for such internment within the United Kingdom. As an extreme form of restriction of individual liberty, internment without the right to challenge its basis before any court or judicial tribunal would, if it were to be possible at all, at the least require primary legislation. Designation as an "associate" of a rogue state or non-state organisation under Resolutions 1267, 1333 and 1390, and the consequential freezing of assets, also has radical consequences for personal and family life. It is a matter which one would expect to be subject to judicial control, before or after the designation. So here, in my view, section 1(1) was and is an inappropriate basis for the Al-Qaida Order, freezing indefinitely the ordinary rights of individuals to deal with or dispose of property on the basis that they were associated with Al-Qaida or the Taliban, without providing any means by which they could challenge the justification for treating them as so associated before any judicial tribunal or court, at a domestic or international level. On this basis, I would hold that section 1(1) did not extend to authorise the making of article 3(1)(b) of that Order. I would allow the appeal of G and dismiss the Treasury's appeal in the case of HAY accordingly. Owen J in the case of HAY quashed the Al-Qaida Order only "insofar as it applies to" HAY. HAY cross-appeals against that conclusion, in my opinion with justification. The conclusion I have reached means necessarily that article 3(1)(b) of the Order is invalid generally and it should be so declared, subject to a stay of one month on the operation of this order in respect of HAY. There would appear to be no point in such a stay in respect of G's designation under the Al-Qaida Order, in view of his concurrent designation under the Terrorism Act 2009.

250. This makes it unnecessary to consider the alternative submissions developed under article 5 of the European Convention on Human Rights. The House's previous decision in *Al-Jedda* is about to be reviewed in proceedings brought by Mr Al-Jedda before the European Court of Human Rights. I would in these circumstances decline the invitation to re-consider that decision at this stage. It is also unnecessary to express any views on the fairness of the procedure available (particularly in the absence of any special provision for the use of special advocates), had it been the position that G and HAY were entitled under English law to challenge domestically the basis for their listing as associates of Al-Qaida or the Taliban.

Conclusion

251. I would therefore dispose of the appeals and make orders in respect of the Terrorism Order 2006 as indicated in paragraph 231 and the Al-Qaida Order as indicated in paragraph 249 above.