

CRIMINALIZING SUPPORT FOR TERRORISM: A COMPARATIVE PERSPECTIVE

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In *Holder v. Humanitarian Law Project*¹ the U.S. Supreme Court held, six to three, that the federal crime of knowingly providing “material support or resources to a foreign terrorist organization”² is constitutional, at least as applied to the particular forms of support that the plaintiffs sought to provide.³ This essay examines the legal and constitutional issues arising in *Holder v. Humanitarian Law Project* from a comparative perspective and, in particular, in light of developments in the United Kingdom and in European law. Part I begins with a brief overview of counter-terrorism law in the UK. Part II examines the role played specifically by criminal law in the UK’s struggle against terrorism. Part III examines the aspects of UK and European counter-terrorism law, which most sharply reflect on the issues arising in *Holder*.

The *Holder* plaintiffs, two U.S. citizens and six domestic organizations, wished to support the lawful and nonviolent activities of two groups that the Secretary of State had designated as “foreign terrorist organizations”: namely, the Kurdistan Workers’ Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE). These groups aim to establish independent states, respectively, for Kurds in Turkey and for Tamils in Sri Lanka. Both groups engage in political and humanitarian activities, but both groups also have committed terrorist attacks, some of which have harmed U.S. citizens.⁴

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1. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

2. 18 U.S.C.A. § 2339B(a)(1) (West 2010).

3. *Holder*, 130 S. Ct. at 2720 (The opinion of the Court was delivered by Chief Justice Roberts, joined by Justices Stevens, Scalia, Kennedy, Thomas, and Alito. Justice Breyer filed a dissenting opinion, in which Justices Ginsburg and Sotomayor joined.).

4. *Id.* at 2713.

Material support is legislatively defined to include “any property, tangible or intangible, or service . . . , training, expert advice or assistance . . . ,” among other matters.⁵ The plaintiffs challenged the constitutionality of the material support provision on two grounds: first that it was impermissibly vague, contrary to the Fifth Amendment’s Due Process Clause, and second that it violated their First Amendment right to freedom of speech and association.⁶ The plaintiffs in *Holder* wished to train PKK members to use international law to resolve disputes peacefully; they wished to teach PKK members to petition the United Nations and other representative bodies for relief; and they wished to engage in political advocacy on behalf of Kurds living in Turkey and Tamils living in Sri Lanka.⁷

The Supreme Court was unanimous that the first basis of the plaintiffs’ case must fail. The relevant legislative terms were held easily to satisfy the test laid down in *United States v. Williams*⁸ that a statute is not unconstitutionally vague if “a person of ordinary intelligence” is given “fair notice of what is prohibited”⁹ The plaintiffs’ First Amendment arguments, however, divided the Court. The majority emphasized that 18 U.S.C.A. § 2339B¹⁰ does not prohibit the independent advocacy of a cause that is shared by a foreign terrorist organization; what it prohibits is *support* (as defined) for such a group.¹¹ On this interpretation, the plaintiffs were permitted under the statute to *say* anything they liked.¹² Support was criminalized under section 2339B because Congress had found that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”¹³ In the Court’s opinion, this view was justified by the record:

Material support meant to “promot[e] peaceable, lawful conduct” . . . can further terrorism by foreign groups in multiple ways.

5. 18 U.S.C.A. § 2339A(b)(1) (West 2010).

6. *Holder*, 130 S. Ct. at 2714.

7. Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1180–84 (C.D. Cal. 1998).

8. *United States v. Williams*, 553 U.S. 285 (2008).

9. *Id.* at 304.

10. 18 U.S.C.A. § 2339B (West 2010).

11. *Holder*, 130 S. Ct. at 2728 (emphasis added).

12. *Id.*

13. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (1996).

“Material support” is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups – legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks.¹⁴

Justice Breyer dissented on this point, stating that he could not agree that the “Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations’ lawful political objectives.”¹⁵ The dissent argued that 18 U.S.C.A. § 2339B was required to be interpreted such that it included a *mens rea* requirement, as follows:

[T]he defendant would have to know or intend (1) that he is *providing* support or resources, (2) that he is providing that support to a *foreign terrorist organization*, and (3) that he is providing support that is *material*, meaning (4) that his support bears a significant likelihood of furthering the organization’s terrorist ends.¹⁶

The dissent would have remanded the cases before the Court so that lower courts could have applied this reading of section 2339B to the plaintiffs’ proposed activities.¹⁷ The dissent’s interpretative stance is addressed further at the end of this essay.

I. COUNTER-TERRORISM LAW IN THE UNITED KINGDOM

Configuring the justice and the fairness of counter-terrorism legislation has been among the highest profile problems of constitutional law in the United Kingdom since the turn of the new century. This is not because either terrorism or counter-terrorism is new to the United Kingdom: unlike the United States, the UK

14. *Holder*, 130 S. Ct. at 2725.

15. *Id.* at 2731.

16. *Id.* at 2740–41.

17. *Id.* at 2742. Note, *Holder* resolved two consolidated cases—*Holder v. Humanitarian Law Project* (No. 08-1498) and *Humanitarian Law Project v. Holder* (No. 09-89), both of which addressed the scope of section 2339B.

possessed considerable experience of having to deal with terrorism (principally in connection with Northern Ireland) long before 9/11. Rather, it is the sheer quantity of counter-terrorism measures that are now in force in the UK and, in particular, the novelty of a number of these measures, which have proven problematic. The difficulties have been compounded by the fact that when courts in the UK are grappling with constitutional and legal issues, they must take into account both the UK's own domestic law and the law of the European Union, as well as the relevant case law of the European Court of Human Rights. Both the EU courts (now known as the European Court of Justice and the General Court)¹⁸ and the Council of Europe's European Court of Human Rights enjoy a growing influence in the area of counter-terrorism.¹⁹

The modern story of the UK's peacetime counter-terrorist legislation dates from 1974 when, in response to a series of IRA pub bombings, the Prevention of Terrorism (Temporary Provisions) Act 1974 (1974 Act) was passed.²⁰ The 1974 Act listed the IRA as a "proscribed organization" and made it a criminal offense to belong to, to profess to belong to, or to solicit or invite financial or other support for, a proscribed organization.²¹

The 1974 Act was quickly supplemented with further counter-terrorism legislation, notably the Northern Ireland (Emergency Provisions) (Consolidation) Act 1978.²² Despite the words "temporary provisions" appearing in the title of the 1974 Act, the legislation was frequently renewed. By the late 1990s it had become the government's view that, despite the apparent successes of the Northern Irish peace process, permanent counter-terrorist legislation

18. These are the names used by the Treaty of Lisbon, which came into force in December 2009. Before Lisbon the EU's courts were known as the European Court of Justice and the Court of First Instance.

19. The European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) are frequently confused for each other, but they are separate entities which enforce different legal regimes (EU law on the one hand, the European Convention on Human Rights on the other). The European Convention on Human Rights (ECHR) is a creation not of the European Union but of the separate organization, the Council of Europe. The role of the ECJ within UK law is determined by the European Communities Act 1972; the role of the ECtHR within UK law is determined by the Human Rights Act 1998. For a full account, see COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION* ch. 5 (7th ed. 2011).

20. See David Bonner, *Responding to Crisis: Legislating against Terrorism*, 122 L.Q. R. 602 (2006).

21. Prevention of Terrorism (Temporary Provisions) Act 1974, ch. 56, § 1 (U.K.).

22. Northern Ireland (Emergency Provisions) Act 1978 (Repealed 27.8.1991), ch. 5 (U.K.).

would be required, not specifically for Northern Ireland but for the whole of the United Kingdom. The result was the Terrorism Act 2000.²³ Still in force, this substantial piece of legislation was designed to be a comprehensive code of the UK's counter-terrorism law. It provides the legal definition of terrorism used in UK law; it makes extensive provisions concerning proscribed organizations; it extends the criminal law to deal with a number of specific terrorist offenses; and it confers extended powers on the police, as well as legislating for a range of other matters.²⁴

The Terrorism Act 2000 did not, however, long remain a comprehensive code of the UK's counter-terrorism law. Within a few weeks of 9/11, Parliament had passed the Anti-terrorism, Crime and Security Act 2001²⁵ and, in the years since, the Prevention of Terrorism Act 2005,²⁶ the Terrorism Act 2006,²⁷ and the Counter-terrorism Act 2008²⁸ have been added. The quantity of this law is staggering, but so too are some of the powers it confers. Let us take just one example: the Prevention of Terrorism Act 2005 created a new scheme of "control orders." Control orders are coercive orders that may be placed on an individual where the Secretary of State (a) has "reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity" and (b) "considers that it is necessary . . . to make a control order imposing obligations on that individual."²⁹ Control orders may be draconian in their effects, imposing lengthy curfews, grave restrictions on freedom of movement and extraordinary interferences with an individual's private, social, and family life. No criminal offense need be committed before a control order may be made, and the courts have held that control orders, despite their gravity and severity, are not criminal sanctions; they are said to be preventative rather than punitive.³⁰

23. Terrorism Act 2000, ch. 11, §§ 1–131, schs. 1–15 (U.K.).

24. For a detailed commentary, *see* HELEN FENWICK, CIVIL RIGHTS: NEW LABOUR, FREEDOM AND THE HUMAN RIGHTS ACT ch. 3 (2000).

25. Anti-terrorism, Crime and Security Act 2001, ch. 24 (U.K.).

26. Prevention of Terrorism Act 2005, ch. 2 (U.K.).

27. Terrorism Act 2006, ch. 11 (U.K.).

28. Counter-Terrorism Act 2008, ch. 28 (U.K.).

29. Prevention of Terrorism Act 2005, ch. 2, § 2(1).

30. *Sec'y of State for the Home Dep't v. MB*, [2007] UKHL 46, [2008] 1 A.C. 440.

II. TERRORISM AND THE CRIMINAL LAW

One may ask, why is any of this law necessary? Terrorism is a crime (in fact, and as we shall shortly see, it is many crimes). Given this, why does the state not simply rely on the criminal law to counter-terrorism? If there is sufficient evidence of involvement in terrorism to justify a control order, or to justify deportation, surely there is sufficient evidence to prosecute? Those convicted of terrorist offenses are going to suffer not merely from the inconveniences of being placed under a control order, or of being deported. They are going to serve long terms of imprisonment. Would this not be a more secure way of protecting the public?

The United Kingdom, like the United States, has tried to find ways of allowing the criminal law to play a greater role in countering terrorism. The British government routinely claims that criminal prosecution is its preferred means, but it seems it is not always possible to prosecute. For one thing, the criminal standard of proof is higher than the rather low threshold of “reasonable suspicion,” which is sufficient for a control order. For another, the rules as to disclosure in the law of criminal justice may be more burdensome on the state (and more generous to the defendant) than is the case in civil matters. And, the government is extremely reluctant to disclose material that risks revealing the extent of the Security Service’s and Secret Intelligence Service’s knowledge, the sources the Services rely upon, their working methods, and the like.

It may be objected that there is a fundamental flaw in seeking to rely on the criminal law as a major component of counter-terrorism strategy. This is that criminal offenses are generally prosecuted after they have been committed, and the government’s principal role in countering terrorism ought to be to prevent it, rather than to wait for an atrocity to kill and maim before seeking prosecutions. Such an objection would be misconceived, however, given the extraordinary array of offenses which now exist in relation to terrorism. The two most important statutes here are the Terrorism Act 2000 (2000 Act) and the Terrorism Act 2006 (2006 Act).³¹ The former continues the scheme of proscribed organizations (which dates back to the Prevention of Terrorism Act 1974). When the 2000 Act was passed, fourteen organizations were listed as being proscribed, all of them

31. Terrorism Act 2006, ch. 11, §§ 1–38, schs. 1–3 (U.K.).

connected with Northern Ireland. Since then, forty-six further organizations have been added, all of them alleged to be connected to international terrorism. Both the PKK and the LTTE (the two organizations with which *Holder v. Humanitarian Law Project* was concerned) are included on the list of proscribed organizations.³²

Sections 11–12 of the Terrorism Act 2000 make it an offense to “belong[] or profess[] to belong to” or “to invite[] support for” a proscribed organization.³³ It is an offense under section 15 of the 2000 Act for anyone to invite a person to provide money or other property, intending or having reasonable cause to suspect “that it may be used[] for the purposes of terrorism.”³⁴ Training in the making or use of firearms, explosives or certain other weapons is prohibited by section 54 of the 2000 Act.³⁵ The offense of inviting support for a proscribed organization (section 12) is similar to the provisions at issue concerning material support considered by the Supreme Court in *Holder*.

Additional criminal offenses were created by sections 57 and 58 of the Terrorism Act 2000. Under section 57 of the Act it is an offense to “possess[] an article in circumstances which give rise to a reasonable suspicion that [the] possession is for a purpose connected with . . . terrorism.”³⁶ It is a defense for a person charged with an offense under this section to prove that his possession was not for a purpose connected with terrorism.³⁷ The offense in section 57 is a serious crime: a conviction may result in a sentence of fifteen years imprisonment.³⁸ The offense consists of two elements, both of which must be proved by the state to the criminal standard (“beyond reasonable doubt”) in order to secure a conviction. That is to say, the state must first prove beyond reasonable doubt that the defendant

32. Terrorism Act 2000, ch. 11, sch. 2 (U.K.). On the criteria for proscription and de-proscription, see *infra* note 23. Note that in the UK both domestic and foreign organizations may be proscribed. In this regard, the statement in *Holder* that “[w]e also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations” is striking. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730 (2010).

33. Terrorism Act 2000, ch. 11, §§ 11(1), 12(1)(a). In this respect it appears there is a difference between proscription in the UK and designation as a foreign terrorist organization in the U.S.: 18 U.S.C.A. § 2339B does not criminalize mere membership in a foreign terrorist organization. See *Holder*, 130 S. Ct. at 2718 (“Section 2339B does not criminalize mere membership in a designated foreign terrorist organization.”).

34. Terrorism Act 2000, ch. 11, § 15(1)(b).

35. *Id.* at § 54.

36. *Id.* at § 57.

37. *Id.*

38. *Id.*

was in possession of an article, and the state must then prove beyond reasonable doubt that the circumstances of the defendant's possession of the article gave rise to a reasonable suspicion that he possessed it for a purpose connected with terrorism.³⁹ Even if the state can prove both elements of the offense to the criminal standard of proof, this may nonetheless not result in a conviction, for the defendant may be able to prove that, notwithstanding any reasonable suspicion to the contrary, his possession of the article was not in fact for terrorist purposes.⁴⁰ Section 58 of the Terrorism Act 2000 makes it an offense to "collect[] or make[] a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism."⁴¹ Under this section it is also an offense to possess a document or record containing such information.⁴² An offense under this section is punishable by up to ten years imprisonment.⁴³ It is a defense for a person charged under section 58 to prove that he had a "reasonable excuse for his action or possession."⁴⁴

The reach of the criminal law was further extended under the Terrorism Act 2006. Under section 1 of the 2006 Act it is an offense to publish a statement by which a person either "intends members of the public to be directly or indirectly encouraged . . . to commit, prepare or instigate acts of terrorism" or is reckless as to whether the statement will have such an effect.⁴⁵ Section 1 further provides that every statement which "glorifies the commission or preparation (whether in the past, in the future, or generally) of such acts" is expressed to fall within the scope of the offense.⁴⁶ It is to be noted that this offense can be committed without any person in fact being encouraged or induced to engage in an act of terrorism. The maximum sentence for a conviction under this section is seven years imprisonment.⁴⁷

39. *Id.*

40. *Id.* The construction of the section 57 offense caused some problems, with courts finding it difficult to establish which burdens of proof fell on which parties; the construction of the offense summarized here is that which was laid down by the House of Lords in the leading case of *R v. G* [2009] UKHL 13, [2010] 1 A.C. 43.

41. Terrorism Act 2000, ch. 11, § 58(1)(a).

42. *Id.* at § 58(1)(b).

43. *Id.* at § 58(4)(a).

44. *Id.* at § 58(3).

45. Terrorism Act 2006, ch. 11, § 1(1)(b)(ii) (U.K.).

46. *Id.* at § 1(2)(a).

47. *Id.* at § 1(7)(a).

This is an offense that is designed to have an impact on free speech. The offense is likely to survive any challenge brought in the British courts on the basis of Article 10 ECHR, which protects freedom of expression.⁴⁸ Under the ECHR, freedom of expression is not an absolute right, but is qualified. Interferences with freedom of expression will be lawful if they are prescribed by law; if they are proportionate; and if they serve some listed public interest, such as safeguarding national security or public safety. These tests are likely to be satisfied with regard to this offense. Even if the offense survives judicial scrutiny, prosecutors bringing charges under section 1 must ensure that their use of the provision is proportionate. Any disproportionate use of the offense would be liable to be struck down as incompatible with Article 10: such an outcome would render a particular prosecution unlawful, but it would not affect the legislation itself.

Further offenses were created by sections 5 and 6 of the Terrorism Act 2006. Section 5 makes it a crime to engage “in any conduct in preparation for” committing, or assisting another person to commit, an act of terrorism.⁴⁹ This offense is punishable by imprisonment for life.⁵⁰ Under section 6 it is an offense either to provide or to receive “instruction or training . . . for or in connection with the commission or preparation of acts of terrorism.”⁵¹ The maximum sentence for this offense is ten years imprisonment.⁵²

III. CRIMINALIZING SUPPORT FOR TERRORISM

As noted in Part II, under section 12 of the Terrorism Act 2000 it is a criminal offense in the United Kingdom to invite support for a

48. To my knowledge, no such challenge has been attempted.

49. Terrorism Act 2006, ch. 11, § 5(1).

50. *Id.* at § 5(3).

51. *Id.* at § 6(1).

52. *Id.* at § 6(5). A quarterly report is published by the government giving overall numbers of terrorism charges and convictions (the published numbers do not give an offense-by-offense breakdown). In 2008, twenty-nine charges were laid under the UK's terrorism legislation, and there were twelve convictions. In 2009, the figures were twelve and two respectively. Since 9/11 there have been 266 charges laid under the terrorism legislation, resulting in 122 convictions. *See HOME OFFICE STATISTICAL BULLETIN, OPERATION OF POLICE POWERS UNDER THE TERRORISM ACT 2000 AND SUBSEQUENT LITIGATION: ARRESTS, OUTCOMES AND STOPS AND SEARCHES*, <http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1010.pdf> (June 10, 2010). These figures do not include those arrested for a terrorism offense but charged with and/or convicted of an offense under other (non-terrorist) legislation. If these cases are added, the overall number of terrorism-related arrests in the UK since 9/11 is 1,817, leading to 402 terrorism-related charges and 235 terrorism-related convictions.

proscribed organization. In more detail, section 12 is in the following terms:

- (1) A person commits an offence if—
 - (a) he invites support for a proscribed organization, and
 - (b) the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 15).
- (2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is—
 - (a) to support a proscribed organization,
 - (b) to further the activities of a proscribed organization, or
 - (c) to be addressed by a person who belongs or professes to belong to a proscribed organization.
- (3) A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organization or to further its activities.
- ...
- (6) A person guilty of an offence under this section shall be liable—
 - (a) . . . to imprisonment for a term not exceeding ten years, to a fine or to both . . .⁵³

There has been very little litigation with regard to this provision. There has been no direct challenge to it in the way in which the “material support” provisions of U.S. law were challenged in *Holder v. Humanitarian Law Project*. This may be explained in part by the different litigation strategies that seem to be favored in the U.S. and the UK. In the United Kingdom, it is rare for a legislative provision to be challenged in the abstract. It is far more common for a party to challenge the way in which a provision is applied to it.

The most important case in connection with section 12 is *Secretary of State for the Home Department v. Lord Alton of Liverpool*.⁵⁴ This case was brought by an all-party group of thirty-five parliamentarians

53. Terrorism Act 2000, ch. 11, § 12.

54. *Lord Alton of Liverpool v. Sec’y of State for the Home Dep’t, Proscribed Organisations Appeal Commission (POAC)*, Nov. 30, 2007, ¶¶ 340, 359, available at <http://www.siac.tribunals.gov.uk/poac/Documents/outcomes/PC022006PMOIFINALJUDGMENT.pdf> (last visited Sept. 21, 2010).

who wished to arrange meetings at which support could be encouraged for the People's Mojahadeen Organization of Iran (PMOI).⁵⁵ PMOI was a proscribed organization, but the parliamentarians believed that the organization was no longer involved in terrorist activity and had become a peaceful political party advocating regime change in Iran.⁵⁶ Unless PMOI was de-proscribed, the parliamentarians would risk prosecution under section 12 were they to hold such meetings of support.⁵⁷ PMOI applied to the Secretary of State to be de-proscribed, but the Secretary of State refused its application.⁵⁸ Lord Alton and his fellow parliamentarians sought judicial review of the Secretary of State's refusal to de-proscribe PMOI.⁵⁹

Such cases are heard by the Proscribed Organizations Appeal Commission (POAC), a statutory tribunal established under the Terrorism Act 2000.⁶⁰ POAC ruled that the Secretary of State's refusal to de-proscribe the People's Mojahadeen Organisation of Iran was unlawful.⁶¹ POAC's decision was subsequently upheld on the Secretary of State's unsuccessful appeal to the Court of Appeal.⁶²

An organization may be proscribed only if the Secretary of State "believes that it is concerned in terrorism."⁶³ It was common ground in the PMOI case that the decision of the Secretary of State involved a two-part analysis: first, he had to determine, in the light of all the relevant evidence, whether he believed the organization was "concerned in terrorism."⁶⁴ Second, if he did so believe, he then had to consider whether or not his discretion to proscribe should be exercised.⁶⁵ It was also common ground that at the first stage the Secretary of State had to have reasonable grounds for believing that

55. *Id.* at ¶¶ 19–20.

56. *Id.* at ¶¶ 22–23.

57. *Id.* at ¶ 20.

58. *Id.* at ¶ 31.

59. *Id.* at ¶¶ 32–37.

60. Terrorism Act 2000, ch. 11, § 5 (U.K.).

61. *Lord Alton*, POAC, ¶¶ 340, 359.

62. *Sec'y of State for the Home Dep't v. Lord Alton of Liverpool*, [2008] EWCA Civ 443, [2008] 1 W.L.R. 2341.

63. Terrorism Act 2000, ch. 11, § 3(4). The Terrorism Act 2006 added organizations which are engaged in "the unlawful glorification of . . . terrorism" to those which are "concerned in terrorism" for the purposes of the Secretary of State's powers as to proscription. Terrorism Act 2006, ch. 11, § 21 (U.K.).

64. *Lord Alton*, POAC, ¶ 67.

65. *Id.* at ¶ 68.

an organization is concerned in terrorism.⁶⁶ POAC's function therefore was "to assess whether the grounds relied on were reasonable in the light of all of the material before it."⁶⁷ The parties were not agreed as to how POAC should undertake this task. The appellants argued that, as various parties' human rights were directly in issue, POAC should adopt an intense standard of review; in particular, they argued, POAC should assure itself that the Secretary of State's decision was based on "an acceptable assessment of the facts."⁶⁸ The Secretary of State argued that human rights considerations entered only at the second stage, meaning that the first stage should be reviewed using only a low standard, such that POAC should intervene only if the Secretary of State had done something outrageous.⁶⁹ POAC ruled that its function was "to subject both stages of the decision making process to intense scrutiny."⁷⁰ POAC stated:

It is not our function to substitute our view for the decision of the Secretary of State. . . . It is our function, however, to scrutini[z]e all of the material before us carefully and to examine its strengths and weaknesses to see if it provides reasonable grounds for the Secretary of State's belief [that the organization in question is "concerned in terrorism"]

. . . .

We accept that appropriate deference has to be given to the Secretary of State in, for example, assessments of national security or on foreign policy issues We do not accept, however, that we can or should simply defer to the Secretary of State (or indeed the views of the intelligence services or his advisers) on all matters. It depends on the nature of the evidence or material being considered. Much of the material before this Commission relevant to the First Stage of the decision-making process is essentially factual and is of a type that Courts are familiar with assessing in ordinary litigation.⁷¹

66. *Id.* at ¶ 67.

67. *Id.* at ¶ 78.

68. *Id.* at ¶ 79 (emphasis omitted) (internal quotation marks omitted).

69. *Id.* at ¶ 82.

70. *Id.* at ¶ 113.

71. *Id.* at ¶¶ 116, 119.

Applying this standard of review, POAC devoted seventy pages of its judgment to a detailed analysis of the evidence as to whether PMOI was or was not at the material time concerned in terrorism.⁷² It concluded, contrary to the view of the Secretary of State, that it was not.⁷³ POAC criticized the approach adopted by the Secretary of State: rather than focusing on the question of whether PMOI was concerned in terrorism at the material time (that is to say, at the time when the Secretary of State made his decision to refuse to de-proscribe the organization), he had focused instead on the rather different question of whether PMOI had done enough clearly and unequivocally to show that its former terrorist operations had come to a permanent end.⁷⁴ The Secretary of State concluded that it had not, not least because insufficient time had elapsed to form a reasonable belief as to whether PMOI's apparent cessation of terrorist activities would become permanent.⁷⁵ POAC found, by contrast, that there was no evidence that PMOI possessed at the material time a "structure that was capable of carrying out or supporting terrorist acts"; that there was "no evidence of any attempt to 'prepare' for terrorism"; and that there was "no evidence of any encouragement to others to commit acts of terrorism."⁷⁶ From this it concluded that "the only belief that a reasonable decision maker could have honestly entertained" was that at the material time the PMOI was not concerned in terrorism and could therefore not lawfully be proscribed.⁷⁷

The Secretary of State appealed POAC's decision to the Court of Appeal.⁷⁸ His principal argument sought to attack POAC's criticism of the way he had approached the question of de-proscription.⁷⁹ His argument was as follows: that whether "PMOI was 'concerned in terrorism' depended critically on the intention of [PMOI's leaders] as to its future conduct"; that "[d]etermining [such] future intention . . .

72. *Id.* at ¶¶ 134–325.

73. *Id.* at ¶ 325.

74. *Id.* at ¶¶ 302, 334.

75. *See id.* at ¶ 333 ("[C]an the period of [five] years in which no terrorist attacks have been claimed be regarded as providing strong/convincing evidence that PMOI has abandoned such methods?" (internal quotation marks omitted)).

76. *Id.* at ¶ 348.

77. *Id.* at ¶ 349.

78. *Sec'y of State for the Home Dep't v. Lord Alton*, [2008] EWCA Civ 443, [2008] 1 W.L.R. 2341.

79. *See id.* at 2351 ("The critical ground of appeal is . . . [that POAC] should have shown deference to the Secretary of State's decision.").

was a matter of assessment or evaluation”; that in reviewing this matter POAC should have applied a lower standard of review and “should have shown deference to the Secretary of State’s decision”; and that, had POAC adopted such a standard, it should have found in favor of the Secretary of State.⁸⁰ The Court of Appeal had little difficulty in rejecting this argument. It agreed with POAC that “an organisation that has no capacity to carry on terrorist activities and is taking no steps to acquire such capacity . . . cannot be said to be ‘concerned in terrorism’” even if its leaders may have intended “to resort to terrorism in the future.”⁸¹

A different perspective on the criminalization of support for terrorism may be gained from recent case law of the EU’s courts. The most important judgment of the European Court of Justice (ECJ) in this field thus far is its famous decision in *Kadi v. Council*.⁸² Kadi’s assets were frozen under United Nations Security Council Resolution 1267.⁸³ Among other matters, UNSCR 1267 requires all states to “freeze the funds and other financial assets of individuals and entities . . . as designated” by a Sanctions Committee, established under UNSCR 1267 with the task of designating funds derived or generated from, and property owned or controlled by, the Taliban, Osama bin Laden or Al Qaida.⁸⁴ Under Regulation 881/2002 the Council of Ministers (an institution of the European Union) decided that designations under UNSCR 1267 would be implemented within the European Union at EU level, rather than severally by the EU’s twenty-seven Member States. Article 2(1) of Regulation 881/2002 provides that “[a]ll funds and economic resources belonging to, or owned or held by, a natural or legal person . . . designated by the Sanctions Committee and listed in [the Annex to the Regulation] shall be frozen.”⁸⁵ Kadi was designated by the Sanctions Committee, he was added to the list in the Annex, and his assets in the EU were accordingly frozen under Article 2 of Regulation 881/2002.⁸⁶

Kadi brought legal proceedings in what is now the General Court (formerly the Court of First Instance), seeking annulment of the EC

80. *Id.*

81. *Id.* at 2355.

82. Joined Cases C-402 & C-415/05 P, *Kadi, Al Barakaat Int’l Found. v. Council*, [2008] E.C.R. I-6351.

83. *Id.* at ¶¶ 2–3.

84. *Id.* at ¶¶ 3–4.

85. *Id.* at ¶ 397.

86. *Id.* at ¶¶ 2–7.

Regulation as it applied to him.⁸⁷ Among other matters, he claimed that his fundamental rights had been violated—specifically, his right to be heard, his right to property, and his right to effective judicial protection.⁸⁸ The General Court ruled that it could not review the legality of Regulation 881/2002 against the standards imposed by fundamental rights in EU law, as the measure simply applied in the EU decisions that were taken at UN level by the Security Council’s Sanctions Committee.⁸⁹ While the Sanctions Committee might be bound by aspects of international law, it was not subject to EU law.⁹⁰ Kadi appealed to the Court of Justice, which allowed his appeal, ruling that Kadi’s right to be heard, his right to effective judicial protection, and his right to property had been violated.⁹¹

The ECJ’s statements in *Kadi* about the importance of fundamental rights within the EU legal order are striking, but it should be borne in mind that, even after the judgment, Kadi’s assets remained frozen.⁹² The Court gave the Council three months in which to comply with the requirements of the judgment—that is, three months in which to offer Kadi some form of hearing compatible with EU law.⁹³ Kadi duly received narrative summaries of the reasons provided by the UN Sanctions Committee as to why his assets should be frozen and he was able to comment on them.⁹⁴ His comments were considered by the EU’s authorities, who concluded that “the listing of Mr Kadi is justified for reasons of his association with the Al Qaida network.”⁹⁵ The European Commission therefore decided that Kadi’s assets should remain frozen.⁹⁶

Kadi brought fresh proceedings in the General Court, challenging the lawfulness of this decision. On September 30, 2010 that court ruled in Kadi’s favor, holding that “the mere fact of sending the applicant the summary of reasons cannot reasonably be regarded as

87. *Id.* at ¶ 8.

88. *Id.* at ¶ 17.

89. *Id.* at ¶ 18.

90. *Id.*

91. *Id.* at ¶ 55.

92. *See* Commission Regulation 1190/2008, 2008 O.J. (L 322) 25 (EC) (“[T]he Court ordered the effects of Regulation (EC) No 881/2002 to be maintained, so far as concerns Mr Kadi . . . for a period that may not exceed three months running from the date of delivery of the judgment.”).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

satisfying the requirements of a fair hearing and effective judicial protection.”⁹⁷ The Court stated that “[i]t is essential that the applicant be shown the inculpatory evidence used against him . . . in such a way that he will have a fair opportunity to respond and to clear his name.”⁹⁸ As Kadi had been shown nothing like this amount of information, his right to a fair hearing had not been respected, and the Commission’s decision that Kadi’s assets should remain frozen was unlawful.

In a decision of the European Court of Justice⁹⁹ that was handed down two months before the U.S. Supreme Court’s decision in *Holder v. Humanitarian Law Project*, the ECJ appears to have made an important statement about the limits of counter-terrorism law in the European Union. The case is *R (M) v. Her Majesty’s Treasury*.¹⁰⁰ Like *Kadi*, it is concerned with the freezing of terrorist assets under UNSCR 1267 and Regulation 881/2002.¹⁰¹ M’s husband was designated under UNSCR 1267, and, as a result, his assets in the EU were frozen under Regulation 881/2002.¹⁰² Certain welfare and social security payments were made to M.¹⁰³ The question for the Court of Justice was whether these payments should be frozen.¹⁰⁴ The relevant UK authority (HM Treasury) was of the view that the payments should be frozen, on the basis that they were caught by Article 2(2) of Regulation 881/2002, which provides that “[n]o funds shall be made available, directly or indirectly, to, or for the benefit of”¹⁰⁵ a person designated by the Sanctions Committee.¹⁰⁶ The Court of Justice disagreed with the view of HM Treasury. The Court emphasized that the funds in question were used by M to meet the essential needs of the household and ruled that, in these circumstances, the benefit in kind that a designated person might indirectly derive from such welfare payments did not compromise the objective pursued by

97. Case T-85/09, *Kadi v. Comm’n*, 2010 EUR-Lex LEXIS 825 (Sept. 30, 2010).

98. *Id.*, para. 158.

99. Case C-340/08, *R (M) v. Her Majesty’s Treasury*, http://curia.europa.eu/jcms/jcms/j_6/ (search case number C-340/08; then follow link to judgment of Apr. 29, 2010).

100. Case C-340/08, *R (M) v. HM Treasury*, http://curia.europa.eu/jcms/jcms/j_6/ (search case number C-340/08; then follow link to judgment of Apr. 29, 2010).

101. *Id.* at ¶¶ 1–2.

102. *Id.* at ¶¶ 23–25.

103. *Id.* at ¶ 23.

104. *Id.* at ¶ 32.

105. Council Regulation 881/2002, 2002 O.J. (L 139) 9, art. 2, ¶ 2 (EC).

106. Case C-340/08, ¶¶ 33–37.

Regulation 881/2002.¹⁰⁷ That objective was “to stop designated persons gaining access to economic or financial resources that . . . they could use to support terrorist activities.”¹⁰⁸ Thus, funds which such persons could not so use were not caught by the terms of Regulation 881/2002.¹⁰⁹

Echoes of a similar, purposive, reading may be found in Justice Breyer’s dissenting opinion in *Holder*. Justice Breyer stated that he would read the material support provisions as “criminalizing First-Amendment-protected pure speech and association only where the defendant knows or intends that those activities will assist the organization’s unlawful terrorist actions.”¹¹⁰ As we have seen, no such purposive limitations are found in the United Kingdom’s various criminal offenses with regard to proscribed organizations and the like. It may be that, under the influence of EU law, such is the direction in which the UK’s counter-terrorism law may travel in the future. As things stand, however, the United Kingdom’s jurisprudence on the criminalization of support for terrorism is much closer to that held constitutionally permissible by the majority of the Supreme Court in *Holder*.

107. *Id.* at ¶¶ 60–63.

108. *Id.* at ¶ 62.

109. *Id.* at ¶ 63.

110. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2740 (2010) (Breyer, J., dissenting).