

DUE PROCESS AND ANTI-TERRORISM INITIATIVES WORLDWIDE – RECENT DEVELOPMENTS

By: Terrance S. Carter B.A., LL.B. and Nancy E. Claridge, B.A., M.A., LL.B.
Assisted by: Sean S. Carter B.A., LL.B.

A. INTRODUCTION

In recent months, there have been several developments internationally concerning charities and challenges to anti-terrorism legislation and administrative action. Both a report by a panel of the International Commission of Jurists and two U.S. federal court decisions regarding charities facing allegations of connections with terrorist activities seem to signal an increasing recognition of the need to protect basic due process rights, the rule of law and a more open and transparent process generally when carrying out anti-terrorism initiatives both internationally and domestically.

B. REPORT BY THE EMINENT JURISTS PANEL OF THE INTERNATIONAL COMMITTEE OF JURISTS

On February 16, 2009, the International Commission of Jurists (“ICJ”) released the Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights: *Assessing Damage, Urging Action* (the “Report”). The Report is the result of a three-year project of the Eminent Jurists Panel, an independent panel established by the ICJ to undertake an extensive global survey of counter-terrorism action and its impact on the rule of law, justice and human rights worldwide (the “Panel”). The Panel is composed of judges, lawyers and academics from all regions of the world, including the former President of Ireland, Mary Robinson, and the Former Chief Justice and first President of South Africa’s Constitutional Court, Justice Arthur Chaskalson. The Report is available online at: <http://ejp.icj.org/IMG/EJP-Report.pdf>.

The Panel found that many governments “have allowed themselves to be rushed into hasty responses to terrorism that have undermined cherished values” and these responses pose “serious challenges” to the basic international legal frameworks of human rights and the rule of law. The Report is critical of the process of “listing” individuals and organizations because it is “often based on unsubstantiated secret information that cannot be contested”. The Report notes an increasing accountability gap that has arisen due to the growth of intelligence agency powers without the necessary corresponding oversight, and highlights the “problem of the permanence of anti-terrorism ‘emergency’ laws”. The Report also considers the problems surrounding the various definitions of “terrorist activities” and is critical of the “war paradigm” with regards to anti-terrorism initiatives worldwide.

Members of the Panel travelled to over forty countries to hear testimony from experts and witnesses, and held hearings in Canada in the Spring of 2007. Many of the issues that were the focus of the Panel’s investigation have direct implications for charities worldwide, including the definition of terrorism related offences, the “listing” of various entities and the exponential increase in information sharing and collection by government agencies worldwide.

A copy of the paper, “Canadian Charities: The Forgotten Victims Of Canada’s Anti-terrorism Legislation”, which was submitted as a part of presentation given by Terrance Carter at the Canada National Hearing before the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights in April 2007 is available online at: <http://www.carters.ca/pub/article/charity/2007/tsc0424.pdf>. The Report serves as an important reminder of the ongoing consequences and day-to-day realities of the unprecedented anti-terrorism legislative regime that has developed over the past eight years and the necessity of individuals and organizations to understand its potential implications.

C. RECENT U.S. COURT DECISIONS AFFIRM NEED FOR BASIC DUE PROCESS RIGHTS FOR U.S. CHARITIES

In a landmark decision in October 2008, a U.S. federal judge issued a temporary restraining order barring the U.S. Department of the Treasury (the “Treasury”) from designating KindHearts for Charitable Humanitarian Development (“KindHearts”), a U.S. charity, as a “specially designated global terrorist” (“SDGT”) without affording the organization basic due process. In February 2006, the Office of Foreign Assets Control (“OFAC”), a department of the Treasury froze the assets of the group “pending investigation” and executed a search warrant at the group’s headquarters and the residence of its president, seizing 150 boxes of

documents, paper files, computer hard drives, videotapes and other media. The investigation has yet to be completed and Kindhearts' assets remain frozen three years later.¹ When the Treasury froze KindHearts' bank accounts and seized all of its records, it did not provide formal notice with reasons for its actions, only stating generally that the assets "are blocked pending investigation" into whether the group is "controlled by, acting for or on behalf of, assisting in or providing financial or material support to, and/or otherwise being associated with Hamas." On May 25, 2007, Treasury notified KindHearts' attorneys that it had "provisionally" decided to designate the group as a SDGT, but no further action has been taken.

Under the current U.S. regulatory regime, KindHearts does not have the right to a hearing where it can confront the evidence against it and there are no provisions for independent review of Treasury's decisions. In light of this, KindHearts initiated a legal challenge on October 9, 2008, in the United States District Court for the Northern District of Ohio challenging the constitutionality of the Treasury Department's process. The temporary restraining order effectively maintains the *status quo* while KindHearts' constitutional challenge proceeds through the courts; however, the order is currently under appeal.

Following the seizure of KindHearts' records, the government obtained an *ex parte* order severely restricting the circumstances under which counsel for KindHearts could have access to copies of the seized materials. Although the government sought an amendment to the protective order following the institution of the lawsuit by KindHearts, the group brought a motion to vacate or modify the amended protective order.

In a decision released January 30, 2009,² Judge James G. Carr of the U.S. District Court granted the motion to vacate, requiring the government to commence producing copies at its expense of all seized materials to KindHearts' lawyers. Judge Carr indicated he had grave concerns with regard to the impact of the protective order on the group's due process and Sixth Amendment rights to enjoy fair and adequate representation by counsel, as a paramount impediment to enjoyment of those rights is legal counsel not having access to all documents and the inability to have meaningful consultation with clients concerning the same. Judge Carr wrote that "[i]f counsel is to play a meaningful role in opposing and seeking to avoid such designation, and otherwise to protect KindHearts in the face of OFAC's past and potential future actions, they must be able to consult with informed representatives of KindHearts. As long as the current order is in place, they cannot do so." In a similar decision relating to U.S. charities and terrorism related investigations, a federal judge of the

¹ Kay Guinane, "Judge Says Shuttered Charity Must be Given Due Process" *OMB Watch* available at: <http://www.ombwatch.org/node/3816>

² *In re Search of KindHearts for Charitable Humanitarian Dev.*, 2009 U.S. Dist. LEXIS 9055 (N.D. Ohio Jan. 30, 2009).

U.S. District Court in Oregon ruled on November 6, 2008 that the Treasury’s action in shutting down Al Haramain Islamic Foundation, Inc. in 2004 violated basic due process rights.³ The judge also ruled that the definition of “material support” of terrorist activities is constitutionally vague. This decision represents one of the first successful challenges by an SDGT on the basis that the listing process does not provide for adequate procedural or substantive safeguards.

D. CONCLUSION

It is important for Canadian charities to remember that the anti-terrorism legislation in Canada, which includes processes for the de-registration of charities and the “listing” of entities, is as robust and sweeping as those in the United States, and many of the same basic concerns regarding due process, vagueness of definitions and lack of access to evidence are potentially applicable in Canada. The Report by the Panel of the ICJ and the recent U.S. decisions highlight the ongoing concerns that both individuals and charitable organizations alike need to be aware of. Given the possibility of inadvertent contravention of anti-terrorism laws and the lack of a due diligence defence, charities need to be proactive in understanding how anti-terrorism legislation could apply to them and making all possible efforts to comply.

³ Kay Guinane, “Federal Court Says Treasury Action Shutting Down Al-Haramin Islamic Foundation Unconstitutional” *OMB Watch* available at: <http://www.ombwatch.org/node/9456>. See *Al Haramain Islamic Found., Inc. v. United States Dep’t of the Treasury*, 585 F. Supp. 2d 1233, 1269-1270 (D. Or. 2008).