

Prisoners (Disclosure of Information About Victims) Bill – European Convention on Human Rights

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Prisoners (Disclosure of Information About Victims) Bill (“the Bill”). On introduction in the House of Commons, Minister Philp made a statement under section 19(1)(a) of the Human Rights Act 1998 (“HRA 1998”) that in his view the provisions of the Bill are compatible with Convention rights.
2. Only the clauses which contain substantive ECHR issues are discussed. The Department considers that the clauses of this Bill which are not covered by this memorandum do not give rise to any substantive ECHR issues.

Summary of the Bill

3. The Bill will give effect to the commitment to deliver a ‘Helen’s Law’. It will provide that, when applying what is known as the ‘release test’ for prisoners serving a life sentence for murder or manslaughter, who are eligible for release on licence, and the offender has not disclosed the location of the victim’s remains, the Parole Board must take that into account in determining that prisoner’s suitability for release.
4. Parallel provision is also made for prisoners serving an extended determinate sentence under section 226A or B of the Criminal Justice Act 2003 for manslaughter, so that the Parole Board must take into account the same matters in those cases too, when it considers release prior to the offender’s automatic release at the end of his custodial period. The Bill also provides that when applying the same release test for prisoners serving an extended determinate sentence for the offence of taking or making indecent images of children, where the offender has not disclosed the identity of the child who is the subject of the image, the Parole Board must take that into account in determining that prisoner’s suitability for release. Similar provision is also made for predecessor sentences to the current extended determinate sentence.

Bill provisions

Life prisoner's non-disclosure of information about victim's remains

8. Clause 1 amends the Crime (Sentences) Act 1997 to insert a new section 28A. This will provide that where the Parole Board is making a release decision using the 'release test' under section 28(6)(b), relating to prisoners meeting the statutory criteria above at paragraph 1, they must take into account the prisoner's non-disclosure and any reason for it.
9. The section 28(6)(b) 'release test' is that the Board must be "satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined." The release test applies to all life and indeterminate sentences as defined under section 34 of the Crime (Sentences) Act 1997.

Extended determinate sentence prisoner's non-disclosure of information about victim's identity

10. Clause 2(2) amends the Criminal Justice Act 2003 to insert a new section 246B into the Criminal Justice Act 2003. This has the same effect as new section 28A in respect of those prisoners who have been sentenced to an extended determinate sentence for manslaughter. Extended determinate sentence prisoners can apply for Parole Board release after they have served two thirds of their custodial term before automatic release at the end of that term. This new section 246B provides that in such cases where the offender has not disclosed the location of the victim's remains, the Parole Board must take that into account in determining that prisoner's suitability for release.
11. Clause 2(2) also inserts a new section 246C into the Criminal Justice Act 2003. This will provide that where the Parole Board is making a release decision using the 'release test' under section 246A(6)(b), relating to prisoners serving an extended determinate sentence for the offence of taking or making indecent images of children, where the offender has not disclosed the identity of the child who is the subject of the image, they must take into account the prisoner's non-disclosure and any reason for it.
12. The section 246A(6)(b) 'release test' is that the Board must be "satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined." This release test applies to all extended determinate sentences imposed pursuant to sections 226A or 226B of the 2003 Act.

13. As with the new section 28A and 246B, where the Parole Board can reasonably ascertain that an offender holds information about the identity of the child who is the subject of the image, and is refusing to disclose that information, such a refusal will be caught by the new provision.
14. All these new provisions will not fetter the discretion of the Parole Board in relation to the release test, nor unnecessarily exclude consideration of other occasions where no disclosure has been made.

ECHR Analysis

15. Article 5 is engaged because offenders who meet the statutory criteria may be detained in prison for a longer period of time as the result of the provision. Article 7 is not engaged because whilst the provisions will be applied retrospectively to all relevant offenders who already have life or extended determinate sentences imposed at the point of commencement, the provisions do not affect the penalty imposed by the court.

Article 5

16. All offenders caught by the new provisions are subject to release at the discretion of the Parole Board. Offenders who do not disclose the specified information, where the Parole Board is satisfied they have such knowledge which has not been disclosed, and that non-disclosure affects the decision the Board must make on risk, may be subject to a no release decision and further detained. Therefore, Article 5 is engaged. However, it is the Ministry of Justice's position that there is no interference with Article 5, either on its own or in conjunction with Article 14 (prohibition on discrimination).
17. The Parole Board determine the release of life and extended determinate sentence prisoners in an Article 5(1)(a) compliant process by having regard to the prisoner's risk via the release test (*Hall & Anor v Parole Board of England & Wales [2015] EWHC 252 (Admin) [36], R. (on the application of Wells) v Parole Board for England and Wales [2009] UKHL 22*). The drafting of the sections ensure that this safeguard is unchanged in substance, but simply that a particular element in determining the relevant risk must be considered – therefore preserving the Article 5 compliance of the Parole Board release test.

18. The new sections do not functionally affect the release test in a way where additional detention could be imposed, more than what could be currently provided for under the current release test. These considerations were already open to the Board to consider in these cases (and, in the case of the murder/manslaughter clause, already contained in Parole Board Guidance as a mandatory consideration).
19. Given this, it is also considered that the provisions do not practically impose different treatment on the relevant cohort of prisoners who the provision will affect, versus other prisoners serving the same sentences for different offences, and so do not engage Article 14. Further for Article 14 to be engaged there would need to be differential treatment by reference to a prisoner's "status". Here a distinction is not principally being drawn between sentence types or between prisoners convicted of particular offences. Rather, in substance any distinction is by reference to the particular circumstances of the offender's case ie if the victim's remains cannot be found or the subject of images cannot be identified. That would not appear to be status within the terms of *Stott v Secretary of State for Justice [2018] UKSC 59*; nor could other prisoners be said to be in an analogous position. In any event, it is considered that any potential difference in treatment would be justified.
20. Offenders subject to the new sections will be subject to the same Article 5(4) safeguards as all other life and IPP prisoners. Parole Board decisions are amenable to judicial review, adding extra judicial oversight. Under the relevant provisions, the case will be considered by the Board again within the next 24 months and will continue to be so reviewed for the duration of the sentence.
21. It is therefore the Ministry of Justice's position that the processes and safeguards in place prevent an unlawful interference with Article 5.

Article 7

22. When imposing an indeterminate sentence, the court will set a minimum term (tariff) which is the punishment (punitive) element of the offence. An offender can only be considered by the Parole Board for release on expiry of the minimum term at which point the offender is serving the preventative part of the sentence and further detention requires independent oversight. There is an established body of case-law to the effect that release provisions are the administration of the sentence and do not form part of the penalty for the purposes of Article 7 - *Uttley v UK* (Application No. 3694/03) *Csoszanski v Sweden* (Application No. 22318/02), and *M v Germany M v Germany*

(Application 19359/04), *R(Uttley) v Secretary of State for the Home Department* [2003] EWCA Civ 1130. Similarly, with an extended determinate sentence the sentencing Court determines the appropriate custodial period. Parole Board authorised release under section 246A is release earlier than that point. Consequently, release within the sentence is not an additional penalty.

23. As these new provisions do not form part of the offender's 'penalty' within the meaning of Article 7, it is therefore considered that Article 7 is not engaged.

Ministry of Justice
3rd January 2020