

**TERRORIST OFFENDERS (RESTRICTION OF EARLY RELEASE) BILL
2020**

ECHR MEMORANDUM

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Terrorist Offenders (Restriction of Early Release) Bill 2020 (“the Bill”). On introduction in the House of Commons, Minister Buckland 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.

Summary of the Bill

2. The Bill functions to change the release arrangements for prisoners serving sentences for relevant terrorism offences. In the case of those serving standard determinate sentences, the automatic release point at the halfway point of the sentence will be abolished and replaced with a two-thirds point referral to the Parole Board.
3. In the case of those serving a special custodial sentence for offenders of particular concern (SOPC), referral to the Parole Board at the halfway point will be replaced with referral to the Parole Board at the two-thirds point of the appropriate custodial term.
4. In the case of those serving extended determinate sentences (EDS) where there is an automatic release at the two-thirds point, the automatic nature of the release will be replaced with referral to the Parole Board.
5. In the case of prisoners serving extended sentences for public protection (EPP), which have an automatic release point at the halfway point of the appropriate custodial term, that will be abolished and replaced with a two-thirds point referral to the Parole Board.

6. For offenders serving sentences pursuant to Scottish provisions, in the case of offenders serving short-term prison sentences of under 4 years in Scotland, automatic release at the halfway point of the custodial term will be abolished and be replaced with a two-thirds point referral to the Parole Board. For offenders serving long-term prison sentences of over 4 years, and extended sentences, discretionary release at the halfway point of the custodial term will be abolished and be replaced with a two-thirds point referral to the Parole Board.
7. In all the above cases, it will be at the discretion of the Board whether to direct release before the end of the custodial term, when the Board considers it is no longer necessary for the protection of the public that the offender should be confined.
8. These changes will apply to offenders who have been sentenced before the commencement date. Therefore, some prisoners currently serving the custodial part of their sentence will now spend longer in prison until they can be considered for release, and some will have lost a right to automatic release before the end of their custodial term or sentence, some both. All will now be liable, unless released earlier by the Board, to serve until the end of their custodial term or end of sentence (depending on the type of sentence they are serving).

Bill provisions

9. The Bill functions to change the release arrangements for prisoners serving sentences for relevant terrorism offences, as described above.
10. Convention rights at issue in the Bill are liberty and security of person (Article 5); retrospective criminal laws (Article 7); Article 8 (right to private and family life) and Article 14 (discrimination).
11. 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. However, there is no breach of Article 5 as detention at all times will be in accordance with

the sentence of imprisonment as imposed by the court. Article 7 is engaged but not breached because whilst the provisions will be applied retrospectively to all relevant offenders who already have these sentences imposed at the point of commencement, the provisions do not alter the length of the sentence, and therefore the penalty, already imposed by the court. The changes will only affect the administration of the pre existing sentence. Article 8 is engaged as under the proposals a prisoner will spend longer, or potentially longer, in prison which is an interference to the right of a family life. However, there is no breach of Article 8 because the imposition, and the serving, of a prison sentence is a proportionate interference with that right. Article 14 is engaged as, coupled with Article 5, the proposals will provide for different treatment in relation to the release of prisoners serving analogous sentences. However, the type of offending is not analogous and any differential treatment is justified by the nature and consequences of the offending.

ECHR Analysis

Article 5

12. All offenders caught by the new provisions will now be subject to release at the discretion of the Parole Board and eligibility for release will not be until the two-thirds point of the sentence.. They may be subject to a no release decision by the Parole Board and further detained until the end of their custodial term or sentence. Therefore, Article 5 is engaged. However, it is the Department's position that there is no interference with Article 5.

13. The whole of a determinate sentence of imprisonment is the punishment/penalty imposed by the court for the commission of an offence. The sentence is imposed by an independent court and any detention during that period is therefore in accordance with Article 5(1)(a). The Supreme Court case *Brown v the Parole Board for Scotland and others* [2017] UKSC 69 is authority that the whole of the custodial period of an extended sentence is the penalty part of the sentence. That case found that, in accordance with Article 5, arbitrary detention could only arise for a recall to custody in the extended licence period of the sentence. The extended

licence period, like the post tariff period for indeterminate sentences, is the preventative part of the sentence as opposed to the custodial period which is the penalty part. *Brown* also confirmed the Supreme Court case of *R (Whiston) v Secretary of State for Justice [2014] UKSC 39* which found that Article 5(4) did not apply to recall to custody for standard determinate sentences during any part of the sentence because the whole of the sentence was covered by the original sentence of the court under Article 5(1)(a) as the penalty/punishment for the offending. Under *Whiston* and *Brown* there is no need for the provision of an independent review of such detention, however the Department has provided additional safeguards with Article 5(4) compliant review of detention from the two-thirds point of the sentence by the Parole Board – an independent court-like body.

14. The impact on offenders who are already serving a term of imprisonment will be greater, in that they will have expectations relating to their release. However, whilst the impact may be greater the nearer to their expected release date, the justification for the interference remains the same.

15. It is the Department's position that the changes will not unduly interfere with the sentence passed by the judicial authority owing to the judicial principle that early release, licence and their various ramifications are irrelevant considerations on sentencing (*R v Round [2009] EWCA Crim 2667*, *R. v Bright [2008] EWCA Crim 462*). It is established case-law in a line of authorities up to the Court of Appeal that a Court should pass a sentence which is commensurate to the offending behaviour in relation to the offence committed, without consideration of any possible early release. That consideration is within the remit of statute or executive policy as Parliament directs.

16. It is, therefore, the Department's position that the processes and safeguards in place prevent an unlawful interference with Article 5.

Article 8

17. Prisoners who might have expected to be released earlier and automatically may suggest that the changes are a breach of their Article 8 rights. Those with

impending or imminent release will be more greatly affected than those who have not had an opportunity to re-establish private and family ties outside of the prison environment. However, any interference is a result of the sentence imposed and the offence committed by the offender. All offenders, whether those close to release at the point of imposition or further away, will still be serving the punishment part of their sentence, and as such, whilst the impact may be greater the nearer to release, the justification for the interference remains the same.

18. It is considered that any interference, including those more significantly affected, is justified as being in the interests of national security, public safety and the economic wellbeing of the country, for the prevention of disorder or crime, and for the protection of the rights and freedoms of others, owing to the significant risk to the public potentially posed by this cohort of offenders in the current environment.

Article 14

19. Quantitative data suggests that Asian/British Asian and Muslim individuals have been disproportionately affected by terrorism legislation relative to the percentage of Asian/British Asian and Muslim individuals in the total population. It is recognised that groups with certain protected characteristics are over-represented in this cohort. But any difference in treatment is based on the type of offending which can have catastrophic consequences and not on the personal characteristics of the offender. The new provisions will apply equally to all relevant terrorist offenders, regardless of race, religion or otherwise.

20. The Supreme Court in *Stott v Secretary of State for Justice [2018]* UKSC 59 found that sentence length was capable of being “other status” under Article 14. Discrimination. The contrary was found by the Supreme Court in *Clift v Home Department [2006]* UKHL 54 and the Grand Chamber ECtHR in *Gerger v Turkey App 24919/94*. *Stott* is not clear authority for a finding that offence type constitutes “status” under Article 14.

21. However, even if sentence type might be considered “status” for the purposes of Article 14 the Government nonetheless considers that any such differential

treatment justified. It is considered these measures are justified and are both proportionate and necessary as a public protection measure. It is noted that the changes apply to terrorist offenders of all types and not just one particular group.

22. Further, whilst the affected prisoners will be in an analogous position to those serving the same sentence they will not be in an analogous position in respect of the type of offending, which has particular impact and wide public protection issues. Despite the fact a risk of reoffending exists for any offender released from custody, terrorist offenders can be distinguished on the basis of immediate risk materialising in the form of an intention of doing serious, unpredictable harm to members of the public, and a corresponding desire on the part of some terrorists to martyr themselves at the hands of the police and security services. This means the particular and immediate risk of this cohort of offenders justifies a different approach.

23. It is evident from terrorist cases – again, as evidenced by the Streatham attack – that the index offences actually committed and therefore the sentence imposed, do not deal with or reflect the very high level of harm they may subsequently cause. This also distinguishes terrorist offenders from other types of offender who pose a serious risk to the public - a relatively short standard determinate sentence imposed upon a terrorist can mask that the individual could be much more dangerous than other offenders who receive similar sentences, because of the continuing risk presented by the ideology of some and their desire to do harm.

24. Accordingly, it is considered that any potential difference in treatment would be justified. The objective and reasonable justification for the different sentences and release provisions with reference to the instance case is the legitimate aim of protecting the public from dangerous offenders by ensuring they are kept in custody for a longer proportion of the penalty part of their sentence. It is a legitimate aim to protect the public, give more time for rehabilitation, and a purpose to work towards rehabilitation (to obtain discretionary release) and, where a prisoner does not do so, to detain them for the whole of the penalty part of the sentence.

25. It is therefore the Department's position that the processes and safeguards in place prevent an unlawful interference with Article 14.

Article 7

26. When imposing a determinate sentence such as the above sentences, the entirety of the fixed term is the punishment element of the offence. 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. Consequently, any changes early release is not an additional penalty.

27. The domestic courts and the ECtHR have consistently drawn a distinction between a measure that constitutes a 'penalty' and a measure that concerns the "'execution' or 'enforcement' of a penalty: release arrangements are part of the execution of the penalty, not the penalty itself. When the nature and purpose of a measure relate to a change in a regime for early release, this does not form part of the 'penalty' within the meaning of Article 7 (*Hogben v United Kingdom* (Application No. 11653/85, 3 March 1986); *Del Rio Prada v Spain* (Application No 42750/09, 21 October 2013 and recently again confirmed in *Abedin v the United Kingdom App* 54026/16).

28. Domestically, the changes are in line with the judgment in *R(Uttley) v Secretary of State for the Home Department* [2003] EWCA Civ 1130 in that it is a change to the administration of the sentence and not to the sentence itself as imposed by the court. That case concerned a post-sentence change in release provisions that required the applicant to be released on licence rather than unconditionally. The House of Lords found that there was no breach of Article 7 as early release provisions "mitigates rather than augments the severity of the sentence of imprisonment which would otherwise be served". The Supreme Court also affirmed

the position in *R v Docherty* [2017] 1 WLR 181 that the release conditions applied to a sentence are not part of the “penalty” for the purposes of Article 7.

29. Scottish prisoners serving a short-term sentence may be subject to a supervised release order (SRO) on release – a separate order providing for increased supervision in the community. Transitional provision has been made for those offenders to be released at the relevant point with no licence, and instead to serve their SRO to the end point of their custodial sentence. The Department considers that this provision alleviates any Article 7 issues of perceived double punishment or harsher penalty.

30. 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 breached.

Ministry of Justice
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