Terrorist Offenders (Restriction of Early Release) Bill

House of Lords

Second Reading Briefing

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1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.

2. This briefing addresses the Terrorist Offenders (Restriction of Early Release) Bill,[1] ahead of the second reading of the Bill in the House of Lords. We have the following concerns regarding the Bill:

   - **We believe that the change from automatic release to release at the Parole Board's discretion amounts to a redefinition in the scope of the penalty imposed, and is therefore incompatible with Article 7 of the European Convention on Human Rights (ECHR).**

   - **The reliance on the discretion of the Parole Board risks incompatibility with the Article 5 ECHR right to liberty if the relevant prisoners have access to de-radicalisation programmes that will allow them to be considered for early release.**

   - **The prohibition on retrospective law is a fundamental aspect of the principle of the Rule of Law. A Bill which could threaten this principle should be scrutinised properly and is not appropriate for the emergency procedure.**

[1] HL Bill 99—EN.

Release of prisoner from the two-thirds point of the custodial period

1. Clauses 1 for England and Wales and 3 for Scotland introduce new provisions which require that a relevant prisoner[2] may only be released from the two-thirds point of the custodial period upon direction by the Parole Board. Currently relevant prisoners are entitled to automatic release at the mid-point of their sentence.

2. Article 7 of the European Convention on Human Rights states that:

> *1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law at the time when it was committed.* ***Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed****.* [*emphasis added*]

3. This Article entrenches the prohibition on retrospective punishment. The second sentence specifically dictates that, once an individual has been convicted of a crime and has been provided with a penalty, legislation which comes after the event cannot increase this penalty.

4. Although this Bill does not change the legal penalty that a prisoner will receive, it redefines the scope of the penalty imposed. Similar legislation was considered by the European Court of Human Rights in *Del Rio Prada v Spain.*[3] In this case, the Applicant's sentence was changed retrospectively from 30 years with opportunity for remission according to work done in detention, to 30 years with no opportunity for remission.

5. The Court held that at the time of the decision, the prisoner would have understood that although they may serve a maximum of thirty years, there was a chance for remission of the sentence. Removing the chance for remission of the sentence "led to the redefinition of the scope of the "penalty" imposed". Moreover, at the time the

[2] A prisoner who has been convicted of a terrorism offence specified in the new Schedule 19ZA, or any other offence in the schedule which the court deems to have a terrorist connection.

[3] (app no. 42759/09) ECtHR, 21 October 2013.

sentence was imposed, the prisoner had no reasonable expectation that it may change in nature. As such, to suddenly, unexpectedly and retrospectively redefine the scope of the penalty was in breach of Article 7.

6. *Welch v United Kingdom*[4] further shows that when deciding whether a provision violates Article 7, the Strasbourg Court has held that "[t]o render the protection offered by Article 7 (art. 7) effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision"[5]. In this case, a violation was found due to the retrospective application of the new penalty.[6]

7. This is supported by the House of Lords decision in *R (Uttley) v Secretary of State for the Home Department*[7] which stated "[w]hen considering how heavy a penalty has been imposed by the sentence it is necessary to consider the overall effect of the sentence." It also pointed out that "[t]he release of a prisoner on licence, albeit subject to onerous conditions, mitigates rather than augments the severity of the sentence of imprisonment which would otherwise be served."

8. When a penalty remains the same on the surface, but its substance is changed retrospectively to make it more severe, Article 7 is breached. As such, extending the point in the sentence at which a prisoner can be considered for parole, increases the severity of the sentence.

9. Clauses 1 and 3 of the Bill would redefine the scope of the penalties imposed on those currently serving sentences for terrorism offences. A prisoner convicted of a terrorist offence would have been entitled to expect their period in custody to be half of the maximum sentence imposed. However, the Bill changes the penalty retrospectively from release on licence at half the tariff to release on licence at two thirds of the tariff only where the Parole Board directs it. This redefines the scope of the penalty, changing it from what would have reasonably been expected when the sentence was passed.

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[4] (app no. 17440/90), ECtHR, 9 February 1995.

[5] *Ibid* para 27.

[6] This case concerned the retrospective application of a confiscation order as a punishment.

[7] [2003] EWCA Civ 1130.

10. As the summary of the Bill Briefing Paper published by the House of Commons states, this Bill was introduced "in response to the terrorist attacks on London Bridge in November 2019 and in Streatham in February 2020"[8]. This change was clearly a sudden decision and was not foreseeable for the relevant prisoners at the time their sentence was imposed.

11. As such, we are concerned that **this Bill will create a retrospective change in penalty for current prisoners in violation of Article 7 ECHR**.

Early release only by the Parole Board's discretion

12. The provisions introduced by Clauses 1 and 3 of the Bill also requires that a prisoner is only released early once the Parole Board has directed. This means that the prisoner will have to satisfy the Parole Board that they no longer pose a risk of offending.

13. The Parole Board's October 2019 guidance suggests that the three parameters used for this decision making are: "analysis of offending behaviour (the past); analysis of the evidence of change (the present); and analysis of the manageability of risk (the future)"[9]. The guidance also provides that "evidence of change" includes "engagement with programmes/therapy and other opportunities, educational and vocational achievements, and use of new skills"[10].

14. This requirement is similar to Imprisonment for Public Protection (IPP) sentences. These sentences required that a prisoner remained in custody indefinitely beyond their tariff until they had undertaken certain courses to demonstrate that they were not dangerous. In *James, Wells and Lee v United Kingdom*,[11] these sentences were held to be in breach of the Article 5 ECHR right to liberty. This was due to the considerable length prisoners served over their tariff due to relevant courses being unavailable.

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[8] Beard & Dawson, *Terrorist Offenders (Restriction of Early Release) Bill 2019-2020*, Briefing Paper 8821, House of Commons Library (11 February 2020)

[9] RADAR, *The Parole Board Decision-Making Framework*, October 2019, pg. 17.

[10] *Ibid*, pg. 18.

[11] (app nos 25119/09, 57715/09 and 57877/09) ECtHR, 18 September 2012.

15. Following the judgment in *James*, IPPs were repealed, but this change was not applied retrospectively. As such, many prisoners are still in prison on IPP sentences, having not been able to demonstrate to the Parole Board that they are suitable for release. The Prison Reform Trust and University of Southampton recently[12] found that current IPP prisoners are still reporting difficulties accessing required courses, with one prisoner quoted as stating:

> *"Prisoners are told they have got to do these courses. But either they are not available because they are full up, or they don't run them, or you have got to wait years for them … How are they supposed to achieve the unachievable?"*[13]

16. Given the current strains on our prisons, we consider that there is a serious risk that the proposals in this Bill will violate Article 5 ECHR by unlawfully extending custody due to a lack of appropriate rehabilitative courses. Prisoners must be provided with appropriate de-radicalisation courses so that they may meet the requirements of the Parole Board. **We ask for clarification from Government of what courses are available to these prisoners and how they may access them.**

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[12] Annison, & Straub, *A Helping Hand: Supporting Families in the Resettlement of People Serving IPPs*, 2019.

[13] *Ibid*, pg. 13.