

Note on Emergency Legislation (Release of Terrorist Offenders)

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I. Introduction

1. After the Fishmonger's Hall murders on 29 November 2019, and the potentially fatal attacks at HMP Whitemoor on 9 January 2019 and Streatham on 2 February 2020, the Government was right to bring forward emergency legislation. These incidents amounted to three attacks within a 10 week period by individuals who had previously been convicted of terror offences, in each case reportedly wearing fake suicide belts. Leaving aside issues of public confidence, there was in my view a need to disrupt the momentum of further possible copycat attacks.
2. The purpose of this Note is to set out my independent analysis of the Terrorist Offenders (Restriction of Early Release) Bill, due to be debated in the House of Lords on 24 February 2020, in the hope that it assists public debate on and understanding of the proposed legislative changes. I raise questions about the effectiveness of some aspects of the Bill as they affect existing prisoners.
3. I consider that the effect of sentences passed under the Terrorism Acts falls within my remit as Independent Reviewer of Terrorism Legislation, and therefore I would propose to report on the impact of these changes (and of the changes likely to be made by the more sizeable Counter-Terrorism Sentencing Bill later in the year) in one of my forthcoming annual reports, most likely my report on the Terrorism Acts in 2020. My Terrorism Acts in 2018 Report is still unpublished, and I propose to complete my report on the Terrorism Acts in 2019 in about October or November this year.
4. This Note addresses:
 - II. The Purposes of the Emergency Legislation
 - III. Concrete examples
 - IV. Existing Prisoners: Risk Management and Justification.

II. The Purposes of the Emergency Legislation

5. The Terrorist Offender (Restriction of Early Release) Bill demonstrates two main purposes, which it achieves by creating a new release regime (Clause 1) and disapplying existing release mechanisms (Clause 2)¹.
6. Firstly, it ensures that all individuals convicted of terrorism offences, save for the most minor², are screened³ by the Parole Board before any possibility of release prior the expiry of their sentence. This includes offences which, whilst not committed under

¹ References in this Note are to provisions affecting England and Wales; parallel provision is made for Scotland in Clauses 3 and 4.

² Carrying a maximum sentence of two years or less, such as wearing the uniform of a proscribed organisation; see <https://www.gov.uk/government/news/end-to-automatic-early-release-of-terrorists>.

³ Formally speaking, the Parole Board decides whether to direct release.

terrorist legislation, were found by the trial judge to be terrorist-related⁴. The offences are listed in Schedule 1 to the Bill.

7. This is already the case for any offender identified by the sentencing judge as dangerous and given an extended sentence⁵; or who have received sentences for offenders of particular concern⁶. Since April 2019, almost all terrorist offenders should have received, at the very least, a sentence for offenders of particular concern⁷. It follows that the principal impact of this first change is for those existing terrorist prisoners who have previously been given standard determinate sentences, and who are – as the law currently stands⁸ - entitled to automatic release on licence at the half way point without any involvement by the Parole Board⁹.
8. The Parole Board is only able to direct release only where it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined¹⁰. In considering release the Parole Board considers whether the individual presents a risk to 'life and limb'¹¹.
9. In practice, this is not limited to considering whether the individual will personally carry out an attack like Fishmonger's Hall or Streatham; it may include whether, for example by disseminating terrorist propaganda, the individual's actions present a risk to life and limb through inspiring third parties to carry out attacks. It is therefore worth noting that, although designed to address attacks being carried out by offenders¹², the impact of the legislation is wider.
10. The number of terrorist cases out of the total number considered by the Parole Board annually is very small but these cases are complex and challenging¹³. Cases may require the attention of specialised panel members, and the use of special procedures under the Parole Board Rules 2019. It is difficult to assess risk, particularly in terrorist cases, and probation officers - who recommend release or continuing detention, subject to the ultimate decision of the Parole Board - will need to be ready to prepare these cases effectively and in a timely manner. As a matter of fairness, individuals must have a genuine opportunity for the Parole Board to conclude that they are not dangerous.
11. Secondly, the effect is to delay consideration by the Parole Board, and therefore any possibility of release, until two thirds of the sentence have been served in prison. This

⁴ Section 30 Counter-Terrorism Act 2008.

⁵ Section 226A or 226B Criminal Justice Act 2003.

⁶ Section 236A Criminal Justice Act 2003.

⁷ Since amendments to Schedule 18A made by the Counter-Terrorism and Border Security Act 2019 were brought into force; although Schedule 18A does not include all terrorist offences such as funding offences.

⁸ I have published a Note explaining the existing sentencing law at <https://terrorismlegislationreviewer.independent.gov.uk/release-of-terrorist-offenders-note-on-the-law/>.

⁹ Certain historic extended sentence prisoners would also be affected, see section 246A(2).

¹⁰ Clause 1(5) of the Bill, mirroring s246A(6)(b) for existing extended sentences and s244A(4)(b) for offenders of particular concern.

¹¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723722/MCA_guidance_v19.2_12_June_2018.pdf.

¹² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864907/to-bill-factsheet.pdf.

¹³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864910/to-signed-impact-assessment.pdf, at paragraph 35.

principally affects standard determinate sentence prisoners, who would otherwise be entitled to release, and offenders of particular concern, who would otherwise be entitled to have their cases considered by the Parole Board, at the half way stage. The effect is to align the position of all terrorist offenders with those subject to extended determinate sentences whose cases are already considered by the Parole Board not before two thirds of the sentence have expired¹⁴.

12. As the law currently stands, any terrorist offender will be on licence until the conclusion of their sentence. Standard determinate sentence prisoners are released at the half way point, and on licence for the remaining half of their sentence. Those subject to sentences for offenders of particular concern are subject to a licence period of at least one year following their release. Extended determinate sentence offenders are subject to a special licence period of at least 8 years following their release.
13. There are two effects of a licence. Firstly, a licence will be made subject to conditions such as an obligation to live at Approved Premises (in a location chosen by the authorities, where the individual may be subject to a strict curfew and controls on their behaviour before being allowed to live at an ordinary address) or wearing an electronic tag¹⁵. Secondly, an offender subject to licence may be recalled to prison by the Secretary of State (acting through the National Probation Service which manages terrorist offenders in collaboration with the police and prison service)¹⁶ if the individual is not of good behaviour¹⁷.
14. Additional post-sentence monitoring measures are contained in the terrorist notification provisions of the Counter-Terrorism Act 2008, which applies to most terrorist offenders, and which is administered by police sometimes known as "Part 4 officers"¹⁸. The impact of these is far more limited than the control on offender's behaviour through their licence. Post-sentence supervision exists for those serving sentences of less than 2 years¹⁹, but is again of more limited impact in terms of controlling risk.

III. Concrete Examples of Effect of Bill

15. The effect of these changes had they applied to Usman Khan and Sudesh Amman ²⁰ would have been as follows:
 - a. Usman Khan was sentenced to a standard determinate sentence of 16 years, and was released on licence after serving half, i.e. 8 years. Under the changes, he would have been entitled to apply for parole after 10 years 8 months. Unless the Parole Board decided that public protection no longer required his continuing imprisonment, he would have been entitled to unconditional release (i.e. without any licence) after 16 years.

¹⁴ Section 246A Criminal Justice Act sets out the release provisions for sentences under sections 226A and 226B.

¹⁵ Section 250 provides for the imposition of licence conditions. The range of licence conditions is very wide, and terrorist offenders are usually subject to very extensive conditions on release.

¹⁶ Under the MAPPAs arrangements I am currently reviewing.

¹⁷ Section 254.

¹⁸ After Part 4 Counter-Terrorism Act 2008.

¹⁹ Under sections 256AA-256C Criminal Justice Act 2003.

²⁰ Who carried out, respectively, the Fishmonger's Hall and Streatham attacks.

- b. Sudesh Amman was sentenced to 3 years 4 months, and was released on licence after serving half, i.e. 1 year 8 months. Under these changes, he would have been entitled to apply for parole after 2 years 2 months and 3 weeks. Unless the Parole Board decided that public protection no longer required his continuing imprisonment, he would have been entitled to unconditional release (i.e. without any licence) after 3 years 4 months.

16. Sudesh Amman's case was typical of standard determinate sentences imposed for many terrorist offences. He was convicted on 6 counts of possession of information likely to be useful to a terrorist²¹ and 7 counts of dissemination of a terrorist publication²². In the year ending September 2019, the most common principal offences resulting in convictions under terrorism legislation were possession of information likely to be useful to a terrorist (8 out of 41) and dissemination of terrorist publications (7 out of 41)²³. The most common sentences in this period for offences under terrorism legislation were between 1 and 4 years²⁴.

17. The Government has estimated that around 50 offenders who would have been released automatically will be affected by this legislation²⁵ – this must be a reference to those sentenced to standard determinate sentences²⁶. Their release will be retroactively delayed until they have served at least two thirds of their sentence, and may be delayed until they have served the entirety of their sentence in prison. Prisoners who have been given sentences for offenders of particular concern will also be affected by the postponing of their right to apply for parole from half way to two thirds through their sentence²⁷.

IV. Existing Prisoners: Risk Management and Justification

18. As already set out, with some very minor exceptions these changes will apply irrespective of the nature of the terrorist offending. In my view the government is entitled to take a precautionary approach, and require all terrorist offenders to be screened by the Parole Board before release (the first purpose of the Bill).

19. This is because terrorist investigations - in which there may be good intelligence but not evidence of attack planning - often require early intervention and arrest before an attack or travel to fight overseas is carried out. This may result in relatively short sentences for individuals of serious terrorist risk.

²¹ Under s58 Terrorism Act 2000.

²² Under s2 Terrorism Act 2006.

²³ <https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-quarterly-update-to-september-2019>, Table C.03. The next most common were attack planning, membership offences, and fundraising offences each on 6.

²⁴ Ibid, Table C.04.

²⁵ <https://www.gov.uk/government/news/end-to-automatic-early-release-of-terrorists>.

²⁶ Offenders of particular concern, and those subject to extended determinate sentences already depend upon the Parole Board for release before the expiry of their term.

²⁷ Out of all current determinate, i.e. non-lifer, sentences, 43% are standard determinate sentence prisoners, and 26% are serving sentences for offenders of particular concern: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864908/to-equality-statement.pdf. The remaining 31% are serving extended determinate sentences.

20. On the other hand, some of those convicted under terrorism legislation and affected by this legislation will not, on analysis, present a risk to life and limb. I am aware of at least one case in which an offender, convicted of possession of material likely to be useful to a terrorist but now recently released, is not considered by the authorities to have been a risk of attack, or of inspiring attack by others.
21. In order to avoid **unintended consequences**, particular attention needs to be given to the position of *current serving* standard determinate sentence terrorist prisoners.
22. As discussed, standard determinate sentence offenders who are released automatically at half way remain on licence until the conclusion of their sentence. The effect of the Bill is that such offenders will not be released before the expiry of their sentence unless the Parole Board decides it is safe to do so. This means that some existing prisoners, and in particular the most dangerous offenders, may not be released until their sentence has expired. But because their sentence will have expired, they will be released unconditionally without any licence.
23. As set out above, licence and licence conditions provide a powerful (but not fool-proof) means of managing the risk posed by released terrorist offenders as they are released into the community, as most terrorist offenders will eventually be. The possibility of risky offenders being released without these controls gives rise to a **cliff-edge** in terms of managing their risk.
24. The Government has recognised this as a possible consequence²⁸ and has stated that offenders will be subject to other safeguards such as Terrorism Prevention and Investigation Measures (TPIMs) and Serious Crime Prevention Orders (SCPOs) as well as other existing measures²⁹.
25. There are only a handful of TPIMs in existence³⁰, and they are resource intensive to prepare and administer; SCPOs had not to my knowledge been used for terrorist offenders by the time I delivered my first annual Report to the Home Secretary in November 2019. Notification will apply to most terrorist offenders but is of more limited impact. It does not apply at all to those who have been made subject to a TPIM and have committed the criminal offence of breaching it³¹. So as things currently stand, a person who was sent to prison for breaching his TPIM, and who was now considered by the Parole Board under the proposed new laws too dangerous to release, would be released unconditionally at the end of their sentence without either licence or notification obligations.

²⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864910/to-signed-impact-assessment.pdf at para 42 and 49.

²⁹ <https://www.gov.uk/government/news/end-to-automatic-early-release-of-terrorists>.

³⁰ The last official figures show that at 31 October 2019, there were 3:
<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-10-08/HCWS1855>.

³¹ The offence is contained in section 23 TPIM Act 2011 and is listed in Schedule 1 to the Bill. However is not listed in section 41 of the Counter-Terrorism Act 2008. The solution is to exercise the power under section 41(3) to amend the offences to which the registration provisions apply.

26. This cliff-edge does not apply to those subject to extended determinate sentences or to offenders of particular concern³² because they are already subject to an additional period of licence post-release.
27. One solution to the cliff-edge problem, not contained in the Bill, would be to retain the concept of automatic release prior to the end of the sentence. There is precedent for this approach: under the Criminal Justice Act 1991, those sentenced to 4 years or more (and therefore likely to include the more dangerous offenders), were entitled to apply for parole after half their sentence, and entitled to release after two thirds³³. In my view, risk management is better achieved by ensuring that existing prisoners are released on some period of licence, for example by requiring release on licence at the three quarters stage, or 6 months before sentence expiry, than by unconditional release.
28. A period on licence would empower the authorities to control their entry into the community by licence conditions enforced, for that limited period, by the possibility of recall to prison³⁴. There is a balancing exercise here: whilst such individuals would be at liberty slightly earlier, a licence is better than no licence. Counter-terrorism work often involves short-term tactical disruptions, and there is a need to focus on whether the loss of the ability to manage certain individuals on licence is compensated by the possibility of TPIMs or SCPOs for the most dangerous offenders.
29. **Parliament may therefore wish to consider** whether it is appropriate to change the law so that existing terrorist offenders may be released unconditionally without any licence (as in the current Bill), or whether some period of automatic release is preferable from a perspective of public safety.
30. The issue of justification – for changing the release date for existing prisoners – is addressed by the Government in its ECHR Memorandum³⁵. Most attention has been focussed on the specific prohibition on retroactive punishment³⁶, and whether delaying the release of standard determinate prisoners from half way (automatically) to no earlier than two thirds (if the Parole Board so directs) amounts to imposing a greater penalty than ordered by the sentencing court.
31. Even if prisoners must put up with whatever changing release provisions are applied to them prior to the expiry of their sentence³⁷, this delay will have an undoubted impact on individuals and their families, including those (see above), who do not in fact pose a risk of serious harm on release. If only from a moral fairness perspective, changing a prisoner's expected release date after sentence ought to be justifiable on public interest grounds. In particular, any change to the additional time spent in prison by *existing* terrorist offenders should be no greater than necessary than to protect the public.

³² Sections 226A, 226B and 236A Criminal Justice Act 2003.

³³ Section 33 Criminal Justice Act 1991. If an offender was recalled, they were next entitled to release after three quarters of their sentence: *ibid*.

³⁴ I leave aside any rehabilitative work that probation may be able to perform during this period.

³⁵ The Government's analysis of the lawfulness of the changes is in their memorandum at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864909/to-echr-memo.pdf.

³⁶ Article 7.

³⁷ Existing caselaw is supportive of the Government's position.

32. If the sole purpose of the new legislation were to ensure screening by the Parole Board before release, this could be achieved by permitting consideration by the Parole Board at the half way point rather than, as proposed, the two thirds point³⁸. The Government has pointed out that terrorist offenders may present a different risk from other type of offenders, but correctly recognises that some – not all - terrorist offenders are liable to carry out attacks on release³⁹. This can be dealt with by requiring the Parole Board to carefully consider their cases at the half way point.
33. It is said that keeping terrorist prisoners longer in custody will protect the public⁴⁰ (since they will be off the streets). But the question is whether keeping a non-risky prisoner longer in custody, rather than releasing them, will protect the public. Recent reporting on conditions in prison suggest that keeping prisoners in custody any longer than necessary may be to expose them to worse influences than if released. Shorter periods of licence also mean less chance of intervention by the Probation Service.
34. It is correct that the choice of two thirds aligns these offenders with existing release mechanisms for extended determinate sentences, and therefore has the benefit of consistency. On the other hand, there is a good precedent for the Parole Board considering release at half way, in sentences for offenders of particular concern⁴¹. I am not aware of any other reasons being advanced, such as the need for a longer period of time to plan for the contingency that a terrorist prisoner may be released by the Parole Board.
35. **Parliament may therefore wish to consider** whether refusing to allow *existing* standard determinate sentence prisoners, and those subject to sentences for offenders of particular concern, to apply for parole until two third of their sentence is the best means of reducing the risk to the public.
36. Indeed, unless there is a clear justification for retroactively changing the earliest release date for this particular set of prisoners, it sets an uncomfortable precedent for retroactive alterations to the release dates for other offenders who are currently serving sentences of imprisonment. In summary, whilst consideration by the Parole Board of all terrorist offenders prior to release is sensible and to be welcomed, it is unclear to me why this consideration needs to be delayed until two thirds of the sentences of prisoners – who would otherwise have been released after one half – have elapsed.

19 February 2020

³⁸ Under Clause 1(8)(a), and as is currently the case with sentences for offenders of particular concern.

³⁹ Memorandum at paragraphs 22 to 23.

⁴⁰ Ibid at paragraph 24.

⁴¹ Section 236A.