

Note on Terrorism Clauses in the National Security Bill

Introduction

1. This Note addresses two proposals in Part 3 of the Bill that relate to terrorists or terrorist risk. These are:
 - Freezing and forfeiture of litigation awards.
 - Restriction on civil legal aid.
2. In summary, the forfeiture measure goes further than necessary to deal with terrorist risk, whilst the restriction on access to civil legal aid is a purely symbolic measure that breaks new ground in the treatment of terrorist offenders and may be counter-productive in matters such as housing, mental health and debt.

Freezing and forfeiture of litigation awards

3. Clause 61 and Schedule 10 create a new bespoke freezing and forfeiture regime for damages awarded in civil proceedings.
4. The proposal is that any civil court which has made an award of damages has power, on application by a Minister of the Crown, to freeze an award of damages if there is a “real risk” that these monies will be used “for the purposes of terrorism”¹. In due course the Court may forfeit these damages if it remains so satisfied². Forfeited damages are paid to the government’s Consolidated Fund³.
5. The Bill is intended to apply only to “an order made by a court awarding damages”⁴. It does not apply to other monies such as out-of-court settlements.

Analysis

6. As acknowledged by the Bill’s Explanatory Notes⁵, the proposal is additional to the freezing and forfeiture regime that already exists under Part 1 of and Schedule 1 to the Anti-Terrorism, Crime and Security Act 2001, which enables the forfeiture of monies that are “intended to be used for the purposes of terrorism”⁶. Every month

¹ Schedule 10 para 1. The purposes of terrorism are as defined by the Terrorism Act 2000: para 4. They therefore do not include funding a website to encourage terrorism, unless done for the benefit of a proscribed organisation.

² *ibid*, para 3(3).

³ *Ibid*, para 3(4).

⁴ *Ibid*, para 1(3).

⁵ Para 46.

⁶ Section 1(1)(a) ATCSA 2001.

there are roughly 4 applications for forfeiture under this Act which are ongoing before the Magistrates' Court⁷.

7. The new measures are intended to be available in any civil proceedings where damages may be awarded: including, for example, in a contract claim between two private parties before the County Court.
8. In practice, however, it may be that they are really intended for High Court civil cases in which the Court is already dealing with cases with a terrorist aspect, for example a claim in which a convicted terrorist is applying for damages against the intelligence agencies:
 - The Ministry of Justice's Impact Assessment suggests that this is the scenario which inspired the new measures⁸.
 - If so, freezing and forfeiture will only arise if the damages have not already been reduced to zero under Clauses 58-60 of the National Security Bill, which will if enacted enable the Court to reduce damages in national security proceedings where the claimant has been involved in connected terrorism-related conduct.
9. Given that there is no greater operational risk from court-awarded damages than other monies such as lottery wins, it must be asked why a further regime is required.
10. One plausible answer is that this avoids having to initiate separate court proceedings where a senior judge is already seized of the matter and is aware of the full national security dimensions of the case because, for example, the intelligence agencies are involved in closed material proceedings under the Justice and Security Act 2017.
11. In this vein, the Ministry of Justice's Impact Assessment refers to the need for "a process within existing court proceedings" that "enable damages to be frozen at the point of award" to address "the risk of funds being instantly spirited away"⁹.
12. If this is the policy aim, it would be sufficient to enable the court seized of the damages claim to adapt the procedures available under the ATCSA 2001 without the need to initiate new proceedings in the Magistrates' Court. However, the new provisions *also* introduce a lower threshold than under the 2001 Act: it need not be shown that the damages are "intended to be used", only that there is a "real risk" that they will be used for the purposes of terrorism.
 - A lower threshold may be justified for an interim freezing measure but final deprivation of property based on an assessment of risk is novel.
 - Assessment of terrorist risk is not only imprecise, but it is quintessentially a matter for the authorities in the light of considerations of national security and

⁷ Terrorism Acts in 2020 at 8.55.

⁸ Para 3.

⁹ At paras 27, 29.

public safety, on which a Court will accord the authorities appropriate respect for reasons of institutional competence and democratic accountability¹⁰.

- It follows that this measure not only makes it easier to deprive individuals of damages to which a court has found they are entitled, but it passes an advantage to the authorities who are most likely to be the defendants in proceedings in which this measures are invoked.
- Moreover, if damages awarded against the government are eventually forfeited they will be returned to the government via the Consolidated Fund.

13. In conclusion, reducing the possibility that civil damages, like any other monies, will be used for the purposes of terrorism is self-evidently important. However, this measure goes further than necessary. It also risks the impression that if the government is sued, it will have a special advantage in keeping hold of monies which is not available to other unsuccessful parties in civil proceedings.

Restrictions on Legal Aid.

14. Under clauses 62-3, convicted terrorists who have reached adulthood will face restrictions on their ability to secure publicly funded legal aid for civil proceedings, including family proceedings.

15. Convicted terrorists mean persons convicted of any of the offences listed in Schedule A1 of the Sentencing Code (England and Wales) or Schedule 1A of the Counter-terrorism Act (Scotland and Northern Ireland), or any offence found to have a terrorism connection, at any time after 19 February 2001 (the date on which the Terrorism Act 2000 came into force).

16. The restrictions last for 30 years for terrorist offenders who committed their offences as adults, and 15 years for those who committed their offences as children.

17. The automatic nature of the restrictions mean that they apply equally to an offender who receives a non-custodial sentence for a less serious terrorism offence¹¹ as to a person convicted of a mass casualty attack:

- There is no discretion either on the part of the sentencing court or the Secretary of State to determine whether the offence is of such a nature that restrictions are appropriate.
- Since there is no power to revoke, the restrictions apply equally to terrorists who have truly reformed.

¹⁰ R (Begum) v SIAC [2021] UKSC 7, at para 70.

¹¹ In the year to 31 December 2021, there were 11 non-custodial sentences imposed for terrorism-related offences: Home Office, Statistics on the operation of police powers, quarterly data tables (10 March 2021), Table C.04. Whilst it is conceivable that Table C.04 includes some sentences for offences that are not within Schedule A1 of the Sentencing Code (such as failure to comply with a Schedule 7 examination at a port or border), the phenomenon of non-custodial sentences (particularly for youths) for terrorism offences such as encouraging terrorism (section 1 Terrorism Act 2006), disseminating terrorist publications (section 2) or downloading terror manuals (section 58 Terrorism Act 2000) is well-documented.

18. The restrictions to legal aid do not completely prevent civil legal aid being granted to a convicted terrorist who will be able to apply the Director of the Legal Aid Agency for an “exceptional case determination”¹². This applies to cases where, subject to merits and means, it would otherwise breach or risk breaching Convention rights not to do grant legal aid¹³. This is a very narrow exception.

Analysis

19. According to the Ministry of Justice’s Human Rights Memorandum, the aim of the measure is “symbolic”, to reflect the significance of the bonds with the State and society that are broken by the commission of terrorist offences¹⁴.

20. It is not suggested that the measure is intended to reduce the risk of terrorism.

21. In general, terrorist offences are treated like other criminal offences, and terrorist offenders are not given a special status. Underpinning the UK’s first permanent terrorism legislation were the following principles:

- (a) Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure.
- (b) Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual.
- (c) The need for additional safeguards should be considered alongside any additional powers¹⁵.

22. Once a terrorist offender has completed their sentence, they are encouraged to reintegrate into society. From the public’s point of view, reintegration is the best counter-terrorist outcome. A terrorist offender who goes back into society and lives quietly presents a rosier prospect than one who needs perpetual monitoring.

23. Released terrorist offenders do present a particular risk. Special post-release measures for convicted terrorists – such as longer periods of supervision on licence¹⁶ and reporting obligations¹⁷ are justified on the basis that they are designed to reduce the risk of reoffending.

24. As far as I am aware, this is the first time that Parliament has been asked to consider automatic symbolic restrictions on offenders convicted under terrorism legislation. If enacted, terrorist offenders are to be treated differently from other criminal offenders

¹² Clause 62(7).

¹³ Section 10(3) Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹⁴ At para 94.

¹⁵ Lord Lloyd, Inquiry into Legislation against Terrorism (1996) at paragraph 3.1. The fourth principle refers to compliance with international law.

¹⁶ Part 1 Counter-Terrorism and Sentencing Act 2021.

¹⁷ Part 4 Counter-Terrorism Act 2008.

not on the basis of risk, but something else¹⁸. If this principle is accepted, it may be asked why future legislation should stop at restrictions on civil legal aid, and not apply to other civic payments provided in cases of need, such as housing benefit.

25. Even symbolic restrictions may have practical consequences. No released terrorist offender is going to reoffend merely because their access to civil legal aid is restricted. But legal advice and assistance is relevant to securing help on housing, debt and mental health. A homeless terrorist offender, or one whose mental health needs are unaddressed, will present a higher risk to the public¹⁹. There is a risk of unintended consequences.

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¹⁸ As for singling out terrorists for symbolic treatment, but not murderers or child abusers, the government points to the special character of terrorism offences as breaking the bond between citizen and state. Puzzlingly, the restrictions do not apply to other citizen-state bond-breaking offences such as the new offences of espionage and sabotage, created by the Bill and punishable by life imprisonment.

¹⁹ Hall, J., 'Terrorist Risk Offenders: Independent Review of Statutory Multi-Agency Public Protection Arrangements' (May 2020).