As from: House of Lords SW1

18 February 2020

The Rt. Hon. Lord Keen of Elie QC
Ministry of Justice

By email only

Dear Lord Keen,

The Terrorist Offenders (Restriction of Early Release) Bill

Thank you for your All Peers' Letter of 13 February 2020, with its invitation to raise further questions with you directly.

The main objective of the Bill, which you define in your letter as "*to ensure terrorist offenders are not automatically released before the end of their sentence (or custodial term)*", has my full support. Though only six of the 196 terrorist prisoners in Great Britain released between 2013 and 2019 have since been convicted of further terrorist offences, according to your written answer to me of 11 February 2020, I understand that Government cannot turn a blind eye to recent atrocities by serving or recently-released terrorist prisoners, or indeed to what I can well imagine is the real possibility of further copycat attacks. For those reasons, I endorse the introduction of Parole Board oversight of early release, where it did not already exist.

While considering matters that may need to be raised in debate and/or by way of amendment at the end of this week, it would be helpful to me to have further information and reassurance on four points. I hope you can oblige.

Moving the release point

First, there is the issue of moving the first possible release from the half-way to the two-thirds point of sentence. There is force in the Government's legal advice that changes in the regime for early release do not fall within the scope of Article 7 ECHR: the sentence remission case *Del Rio Prada* was distinguished on that basis by the European Court of Human Rights in its recent inadmissibility decision in *Abedin v UK*. Nonetheless, it is a well-established principle of the common law that "*existing prisoners should not be adversely affected by changes in the sentencing regime after their conviction*": *R v SSHD ex p Stellato* [2007] UKHL 5, per Lord Brown of Eaton-under-Heywood at para 44. That principle continues to be acted upon when changes are made to the release point: see, most recently, the exemption for serving prisoners in The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020, Article 5.

Your All Peers' letter advances two reasons why this established principle is departed from in this Bill:

> "Moving the release point to two thirds is consistent with other release points for similar types of offenders and provides a greater period of incapacitation (one of the underlying reasons for terrorist sentencing)."

With respect, neither of these reasons seems convincing. As to the first reason, consistency with the rules applicable to other categories of offender may be a legitimate factor in sentencing reform, but does not amount to a justification for retrospective action. As to the second reason, the (retrospective) introduction of parole board review in all cases is sufficient to provide for a greater period of incapacitation where this is merited. A further retrospective change in the consideration point from half to two-thirds is not necessary for this purpose, and will result in the continued incarceration, without regard to their personal circumstances, of prisoners who pose no continuing threat to the public and who were told by the sentencing judge in accordance with the law then in force that they would be released at the halfway point.

I would appreciate your further explanation and comment.

<u>Non-application to Northern Ireland</u>

Secondly, and in view of the emphasis placed on consistency (above), I should like to understand better why the changes in the Bill will not apply to Northern Ireland. Naomi Long, Minister of Justice in the Northern Ireland Executive, said yesterday in the Assembly:

> "With respect to the provisions that have been made in Westminster under the emergency legislation, we consulted with the Ministry of Justice and the Northern Ireland Office and indicated that, whilst there were a number of issues about how sentences are constructed in Northern Ireland and, specifically, about any retrospectivity that might be incurred as a result of the changes proposed in Westminster, there was no barrier to the legislation being applied UK-wide. We made it clear that that was our preference. Indeed, in a conversation with the Justice Minister for England and Wales, Robert Buckland, I made it clear that that was my preference, because I was concerned about the risk of a two-tier system of approach being set up in the UK when it comes to the paroling of terrorist prisoners."

Please would you explain why, in the light of the views expressed by the Justice Minister for Northern Ireland, the Bill will not apply there?

<u>Management of risk from offenders released at end of sentence</u>

Thirdly, I would like better to understand how it is proposed to manage risk from offenders serving determinate sentences whom under the new arrangements the Parole Board thinks it necessary on the basis of public protection to keep in custody to the end of their sentences. I believe that release on licence, accompanied by stringent licence conditions and the possibility of recall to prison, can be an effective way of assessing the future risk from offenders nearing the end of their sentences.

The existing law permits offenders in appropriate cases to be placed on TPIMs at the expiry of their sentences, though I am not clear whether TPIMs have ever been used for this purpose. As strengthened in 2015 in accordance with my recommendations, TPIMs (though limited in duration for two years) may include equivalent onerous and restrictive measures to the former control orders, including relocation for up to 200 miles. The most recent quarterly figures reveal however that as of 31 August 2019, only three TPIM orders were in force.

Given the large number of current and former terrorist subjects of interest in the UK, are you and Home Office colleagues satisfied that TPIMs remain fit for purpose; that appropriate use is being made of their flexibility (including the use of "light-touch" TPIMs); and that they will be a suitable instrument for protecting the public as may be required from offenders released at the end of their determinate sentences under the arrangements proposed in the Bill?

Non-publication of Independent Reviewer's report

Fourthly, I regret that Parliament should be debating a counter-terrorism Bill without the assistance that would be provided by access to the most recent report of the Independent Reviewer of Terrorism Legislation. Under the Terrorism Act 2006, section 36(5):

> "*On receiving* a report under this section the Secretary of State must lay a copy of it before Parliament *as soon as the Secretary of State is satisfied that doing so will not prejudice any criminal proceedings*".

The Security Minister James Brokenshire MP gave the following undertaking in 2011 in relation to speed of publication:

> "There is no desire to sit on reports. It would be foolish and inappropriate for Government to do so, particularly with a report from an independent reviewer. … It is not our intention to sit on reports; that is not the practice. If it gives comfort to the Committee and to the public, reports received from the independent reviewer will be published on receipt or promptly – whatever the appropriate phrase is. This is what I would expect to happen, and I would expect any successor of mine to take the same approach." (Hansard (Public Bill Committee) vol 532 col 253, 30 June 2011).

Another former Security Minister, Hazel Blears MP, had just stated without contradiction in the same debate:

> "The words '*on receiving*' indicate a measure of immediacy, suggesting that on receipt of the report, it will be laid before Parliament."

Those statements were made before the addition to section 36(5) (by the Protection of Freedoms Act 2012) of the reference to the report being laid "*as soon as the Secretary of State is satisfied that doing so will not prejudice any criminal proceedings*", which further strengthens the legal imperative for rapid publication and expressly defines the only permissible justification for delay.

However, when asked by Lord Stunell recently when the report of the Independent Reviewer would be published, Baroness Williams of Trafford undertook only that it would be published "*in due course*" (HL Deb 3 Feb 2020, c1707). If the view is taking root within the Home Office that the timing of publication is a matter for their unfettered discretion, I hope that as a Law Officer you will disabuse them of it. Could you confirm?

The current Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, is reported in today's Independent as saying that he is "*increasingly concerned about continuing failure to publish my annual report on the Terrorism Acts*". His report appears to have been with the Home Office for well over three months. I was fortunate, until the very end of my second term as Independent Reviewer, to avoid delays on that scale to the publication of my reports. Delays in the publication of reports have always seemed to me one of the factors best calculated to diminish the effectiveness of independent review.

Could you confirm that my understanding of the applicable law is correct, and will you commit the Government in Monday's debates to the prompt publication of the current and any future reports of the Independent Reviewer of Terrorism Legislation?

I am sorry to land these requests on you during recess and at short notice: but I suppose that goes with fast-track legislation. Because the subject-matter of this letter overlaps in part with the responsibilities of the Home Office, I have asked your private secretary to copy it also to the private office of Baroness Williams of Trafford.

I am in your hands as to how you choose to reply, in writing or in person, but would appreciate an answer to my first point in particular by close of business Thursday.

Yours sincerely,

David Anderson

Lord Anderson of Ipswich KBE QC