Written evidence from Professor Merris Amos (OOB0014)

Introduction

In accordance with section 19(1)(a) of the Human Rights Act 1998, the Overseas Operations (Service Personnel and Veterans) Bill was certified as compatible with the Convention rights given further effect by the Human Rights Act 1998 (HRA). The Ministry of Defence also prepared an ECHR Memorandum. The purpose of this submission is to subject the claim that the Bill is compatible with the European Convention on Human Rights (ECHR) and therefore the HRA to close examination.

Purpose of the Bill

In the summary description, it is stated that the Bill is to make provision 'about legal proceedings and consideration of derogation from the European Convention on Human Rights in connection with operations of the armed forces outside the British Islands.' The Explanatory Notes prepared by the Ministry of Defence give more detail:

- To provide 'greater certainty for Service personnel and veterans in relation to vexatious claims and prosecution of historical events', that occurred in the 'uniquely complex environment of armed conflict overseas'.
- To 'address issues that have partly arisen from the unforeseen expansion' of the ECHR to cover overseas military operations.
- To 'raise the bar' for prosecutions in relation to historical incidents 'that occur in the context of overseas operations 'requiring prosecutors to have proper regard to the uniquely challenging context'. To provide greater certainty that prosecutions will only go ahead in exceptional cases.

Part 1 - presumption against prosecution

Overview

Part 1 of the Bill regulates prosecutorial discretion in relation to a 'relevant offence'. These are defined as an offence under section 42 of the Armed Forces Act 2006 and an offence punishable with a criminal penalty by the law of any part of the UK. However, it is not a 'relevant offence' if committed against an individual who was, at the time, a member of the armed forces, Crown servant or defence contractor. Furthermore, in Schedule 1 a number of offences are excluded from the definition. There is a long list including sexual offences, child sex offences and human trafficking. Some offences are clearly omitted from this list such as murder, manslaughter, assault, and torture (section 134 of the Criminal Justice Act 1988).

Section 2 provides for a presumption against prosecution where three conditions are met: the alleged conduct took place outside the British Islands; the person was a member of the armed forces deployed on overseas operations; and more than five years has elapsed since the alleged conduct. Section 2 does not prohibit such prosecutions from taking place, but it is stated that it is 'exceptional' for such proceedings to be brought or continued.

Further matters which a prosecutor must give weight to are set out in section 3 if these 'tend to reduce the person's culpability or otherwise tend against prosecution'. These are the 'adverse effect' on the person of the conditions the person was exposed to during deployment

(examples are given); and where there has been a relevant previous investigation and no compelling new evidence, the 'public interest in finality'.

Even if a decision is made to prosecute, under section 5 the consent of the Attorney General for England and Wales or the Advocate General for Northern Ireland must be obtained. There is no extension to Scotland.

The confusion that will be created by the Bill is such that at the outset it is important to note that it is unlikely to meet the Convention test of legality.

Hypothetical examples

To better understand the application of Part 1 and Part 2 in practice, it is useful to employ some hypothetical examples and consider how the Bill would apply.

1. In January 2022 the UK deploys its armed forces to Country Y as part of a coalition of states attempting to end the civil war. On patrol, Soldier X, thinking he sees a sniper, panics and fires his weapon hitting a group of shoppers in the open-air market. Killed instantly are Alima, a 38-year old mother with two children, and Sharon an employee of UK Force Ltd, a defence contractor providing logistics support to the UK armed forces. Sharon was enjoying a day off. This is a difficult time for Amina's family and in the grief and chaos following her death it does not occur to them that can seek justice in the courts of the UK. Meanwhile, Sharon's family is immediately informed that the Royal Military Police are conducting an investigation. Two years later Soldier X is convicted of Sharon's manslaughter. Her family receives compensation under the Criminal Injuries Compensation Scheme. After five years the difference between the two families is stark. For the family of Sharon, there is no limitation period. The family of Alima has five years.

2. There have always been unsubstantiated reports that UK armed forces were involved in torture, killings and disappearances in Country Y. A new government is elected with a manifesto commitment to launch a full-scale public inquiry. The inquiry reports in 2029 more than seven years after the alleged acts took place. It concludes that over a specific time period, numerous incidents of abuse were inflicted on several detainees and that there is the potential for criminal prosecution of several suspects. In 2030 a mass grave is found in Country Y.

3. The final example is credited to Field Marshal Lord Guthrie, Chief of the Defence Staff 1997-2001. In his letter to The Times on 6 June 2020, he wrote that he was dismayed that the government was proposing to enact legislation that 'lets torturers off the hook.' As Lord Guthrie states 'we rightly expect that if a Briton is tortured abroad, the perpetrator should be punished, even after time has elapsed. The new legislation blocks the same process if a Briton stands accused of torturing others. This would be a stain on Britain's standing in the world.' As he concluded 'If we start down the slippery slope of arguing that rules apply to others, but not to ourselves, it is we who will suffer in the end.'

Regardless of the restrictions on HRA claims in Part 2 of the Bill, the HRA would apply directly to Part 1. The Convention rights engaged are considered in the following paragraphs.

Articles 2 and 3 – prosecutions

In relation to death, torture or serious injury, the Articles 2 and 3 duties to investigate are engaged by the limit on prosecutorial discretion. Whilst prosecution in the instances specified is not absolutely prohibited, its description as 'exceptional' creates a barrier. It is assumed the HRA applies to the death, or serious injury, occurring overseas and that the investigatory duties associated with Articles 2 and 3 must be met.

There is nothing in the bill limiting any investigation which may take place. What is important is the interference with prosecutorial discretion. Here the key judgment is *Da Silva v UK* (30 March 2016) which was the claim brought against the UK for the police shooting of Jean Charles de Menezes in 2005. It was argued that the decision not to prosecute any individuals following the shooting was in breach of Article 2. The European Court of Human Rights (ECtHR) confirmed the Article 2 procedural duty to carry out an effective investigation:

> A general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities.[230]

It confirmed that in order to be effective, an investigation must also be 'adequate'. This means that it must be 'capable of leading to the establishment of the facts, a determination of whether the forced used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible.[233] Where a suspicious death has been inflicted at the hands of a State agent, 'particularly stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation'.[234] The Court was clear that it cannot be inferred from these duties that Article 2 entails a right to have 'third parties prosecuted or sentenced for a criminal offence . . or an absolute obligation for all prosecutions to result in conviction'[238]. However, it specified that whilst granting deference to the national courts in the choice of appropriate sanctions, it would 'intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed'.[238]

> Where the official investigation leads to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect the right to life through the law. In this regard, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished . . . The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined.[239]

Making prosecution 'exceptional' removes the deterrent effect the Court refers to here. Life endangering offences may clearly go unpunished although here the facts are closer to Kolevi v Bulgaria (5 November 2009). There is an absence of sufficient guarantees for an independent investigation. Furthermore, the restrictions affect the independence of the Crown Prosecution Service (CPS). It was held in *Da Silva* that the fact the prosecutorial decision is taken by a public official is not problematic 'in and of itself, provided that there are sufficient guarantees of independence and objectivity.'[262] Here it is proposed to put in place an

'institutional deficiency' which would prevent the authorities from adequately securing the accountability of those responsible for the death - a failure in the prosecutorial system which would preclude those responsible for the death from being held accountable.[276]

The concluding observations of the ECtHR in *Da Silva* are not met:

> The decision to prosecute the OCPM as an employer of police officers did not have the consequence, either in law or in practice, of excluding the prosecution of individual police officers as well. Neither was the decision not to prosecute any individual officer due to any failings in the investigation or the State's tolerance of or collusion in unlawful acts; rather, it was due to the fact that, following a thorough investigation, a prosecutor considered all the facts of the case and concluded that there was insufficient evidence against any individual officer to meet the threshold evidential test in respect of any criminal offence. Nevertheless, institutional and operational failings were identified and detailed recommendations were made to ensure that the mistakes leading to the death of Mr de Menezes were not repeated.[284]

What the Bill proposes is the State's 'tolerance of or collusion in' unlawful acts. Combined with the imposition of a new limitation period for the HRA, there is no guarantee that an Article 2 compliant investigation would ever take place after six years.

Art 14 – discrimination

The potential for a violation of Article 14 is recognised in the ECHR Memorandum prepared by the Ministry of Defence. However, the Article 14 analysis is only taken from the perspective of perpetrators - service personnel who commit crimes overseas as compared to service personnel who commit the same crimes within the UK territorial jurisdiction. Even more disturbing is the different treatment of victims. Article 14 is a difficult area of Convention jurisprudence and therefore not fully utilised, or understood, in national human rights law. What follows is a simplification of how it might apply here.

With respect to victims, there are two categories. First, those who are the victim of a criminal act perpetrated by UK armed forces abroad. Here the two groups could be UK service personnel (overseas) and civilians (overseas) as set out in the hypothetical examples above. Second, there are those who are the victim of a criminal act perpetrated by UK armed forces. Here the two groups could be civilians (UK based) and civilians (overseas).

Article 14 does not confer a free-standing right of non-discrimination but precludes discrimination in the enjoyment of Convention rights. For it to be applicable, the facts must fall within the ambit of another Convention right. If a crime has been committed, the facts are very likely to fall within the ambit of another Convention right. As noted above, if someone has died, or been seriously injured, the most likely would be Articles 2 and 3. The difference in treatment between the two groups in each scenario is clear. After five years has elapsed, prosecutorial discretion remains as normal in relation to the first group, but becomes exceptional, and subject to the consent of the Attorney General in relation to the second.

To be unlawful, discrimination under Article 14 need not fit into a ground already recognised in national anti-discrimination law. Article 14 also applies to discrimination on the ground of 'other status'. Returning to the two examples, in the first, the ground for discrimination would be status as UK service personnel/non-UK service personnel. In the second, the

ground for discrimination would be residence – UK based or overseas. There is not such an obvious difference between the groups that their situations cannot be regarded as analogous.

Article 14 is not an absolute right and differences in treatment can be justified if these pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. As set out in the Explanatory Memorandum, the objective here is to 'provide greater certainty for Service personnel and veterans in relation to vexatious claims and prosecution of historical events that occurred in the uniquely complex environment of armed conflict overseas.' Later it is stated that the government also wishes to address the problem of 'Lawfare' (the judicialization of armed conflict). And that it does not wish to stop 'those guilty of committing serious criminal acts from being prosecuted'. It is not clear why it is thought guilt is established prior to a criminal trial, or who will determine what is a 'serious criminal act'.

Later in the Explanatory Memorandum in relation to section 3 it is stated that overseas military operations can have an 'adverse effect' on Service personnel 'including on their ability to make sound decisions and their mental health'. This is also a subject of the ECHR Memorandum and it appears that this is the primary justification offered for the difference in treatment:

> . . the difference in treatment is justified because when Service Personnel deploy on operations overseas, they do so in very different circumstances than those they experience when deployed in support of civil authorities in the UK. On overseas operations, Service Personnel act in the heat of the moment under unique pressures and they face a high degree of hostility and threat of violence. These uniquely challenging circumstances justify the introduction of legal protections . .

The Bill would fail at the very first hurdle. None of these objectives are sufficiently important to justify limiting a fundamental right. Achieving certainty for some perpetrators of criminal acts and addressing the 'problem' of lawfare are political, rather than legitimate, objectives.

The 'unique pressures' justification is the only one that would have any chance of withstanding scrutiny. But no evidence is provided for this claim and, in the case of murder, or manslaughter, it is difficult to imagine how the circumstances, and pressures, would differ if the perpetrator was in the UK or abroad. A preferable approach would be to provide appropriate training to reduce the risk of criminal acts being committed in the 'heat of the moment'.

Moving to the next stage of the test, the link between the measures and the objective, given the Bill does not actually prevent prosecutions, but makes these exceptional after five years, it is doubtful how much certainty it actually provides.

Assuming these hurdles can be overcome, and a proportionality test is applied, it is clearly a disproportionate interference and does not strike a fair balance between the rights of the individual and the interests of the community. At its worst, it would permit impunity, and tarnish the reputation of the UK armed forces. At its best, it does not even achieve certainty for UK service personnel. What makes the family of a civilian killed by UK armed forces in an overseas operation any less deserving of justice than the family of a UK defence contractor?

The discriminatory potential of Part 1 is palpable. It is not only in violation of Article 14 ECHR but requires prosecutorial discretion to be exercised in a racist manner. Overt, legislated for discrimination of this nature is abhorrent and makes a mockery of the words of General Sir Nick Carter, chief of the defence staff who wrote to soldiers, sailors and air force personnel on 10 June 2020 calling on all personnel to see the potential in every recruit and to refuse to allow intolerance.

Article 13 – effective remedies

Whilst it is not a Convention right given further effect by the HRA, it is important to also note that Article 13, the right to an effective remedy, binds the UK in international law. Limiting prosecutorial discretion in this way, and thereby preventing vindication of Article 2 and 3 rights, would clearly also be a violation of the right to an effective remedy.

Part 2 – limitation periods and human rights

Overview

Part 2 reduces potential liability in tort and under the HRA. To fulfil the purpose of the Bill, this makes sense as although a criminal penalty after five years may not be possible to pursue, a claim in tort or under the HRA would cover much of the same ground.

Sections 8-10 limit the court's discretion to disapply time limits for actions in respect of personal injury or death which relate to overseas operations of the armed forces. The detail is contained in Schedule 2. To summarise, this provides that in respect of personal injury and death, the limitation period must not exceed 6 years. As with Part 1, there are various differences in treatment between groups. First, service personnel who have sustained death or personal injury in the UK; and service personnel who have sustained death or injury during operations outside the British Islands. Second, non-service personnel.

Section 11 relates specifically to the HRA. Section 7 of the HRA already provides for a one-year limitation period. However, if a death has occurred more than one year ago, Article 2 may require that there be an Article 2 compliant investigation into the death. In this respect the one-year limitation period does not apply. The Bill provides for an amendment to section 7 to address this. Again, the drafting is complex, but the following are the essential points.

- The new section 7A only applies to overseas armed forces proceedings.

- These must be brought before the later of: (a) the end of the period of 6 years beginning with the date on which the act complained of took place; (b) the end of the period of 12 months beginning with the date of knowledge. This 'date of knowledge' means the date on which the person bringing the proceedings first knew, or first ought to have known both: (a) of the act complained of, and; (b) that it was an act of the Ministry of Defence or the Secretary of State for Defence.

With respect to the 12-month period, this is an attempt to reflect the present Art 2 position. However, 6 years is not in keeping with ECHR or HRA jurisprudence. There is a difference in treatment between groups. This could be service personnel who have suffered a breach of their Convention rights in the UK; and service personnel who have suffered a breach of their

Convention rights during operations outside the British Islands. Or it may be non-service personnel such as victims of torture contrary to Art 3, detention contrary to Art 5, and death or near-death contrary to Art 2. Furthermore, this is a clear breach of HRA and ECtHR jurisprudence. Its implementation would result in a declaration of incompatibility and non-resolution would result in an adverse judgment of the ECtHR.

HRA claims generally

Section 7(1)(5) of the HRA provides that proceedings must be brought within one year from the date on which the act complained of took place. This can be extended if the court considers it equitable to do so having regard to all the circumstances but in practice, this has been rare. To put the outer limit at six years would be unlikely to cause major disadvantage although, as already noted, convincing evidence emerging of a violation of Convention rights at a later date would likely constitute a reason to extend the limitation period. As discussed below, this introduces a problem of discrimination between groups – those subject to a HRA violation attributable to the MOD in connection with overseas operations and those subject to a HRA violation attributable to the MOD not in connection with overseas operations. The first group's potential HRA claims are subject to a limit that the second group's are not.

Article 2 – special rules

In addition to the problem of discrimination, discussed below, in some instances a six-year limit may be incompatible with the Article 2 duty to investigate deaths. In its 2016 judgment in *Al-Saadoon*, the High Court explained the position. Once a duty to investigate has been triggered, the duty does not persist indefinitely until it has been performed. Rather, it 'continues throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of the death, and establish responsibility for it.' It has been held that where there is a duty on the state which is continuing, and of which the state is in continuing breach, the 'time limit for bringing proceedings to complain of a breach cannot expire for as long as the duty lasts. If this duty has ceased, a fresh duty may arise if new evidence or information comes to light.

Even if the allegation is first made to state authorities a long time after a death or alleged ill-treatment, and the authorities were not previously aware, if the duty is triggered, the claim will be within the section 7(5) time limit. Recently the Supreme Court found a violation of Article 2 in relation to failure to investigate a death which had occurred in 1989.

The High Court did recognise that it is possible for the period of delay to be too long for HRA proceedings to be brought. And this is recognised in the Bill which imposes the 12 month limit where knowledge is demonstrated. However, the High Court did not hold that a 6 year limit is appropriate where there is no knowledge. It is entirely possible for new evidence or information to come to light after six years – perhaps as the result of a different investigation, a confession or the leaking of classified information. As with Part 1, the danger with a 6 year limit is that it incentivises cover ups and in this instance it is even more hazardous as the six year limit is not subject to extension whilst the limit on prosecutorial discretion is not a hard and fast rule.

Similar concerns apply to the duty to investigate arguable violations of Article 3 such as allegations of torture which may not come to light until many years after the act is perpetrated.

Article 14

Similarly to Part 1, Part 2 unlawfully discriminates between different groups dependent upon whether or not death, personal injury or violation of human rights occurs in the UK or in connection with overseas operations of the armed forces. Here the Article 14 claim would most likely be within the ambit of Article 6 given the restriction on access to a court. Again the Explanatory Memorandum downplays the situation of victims of human rights violations and claimants who have died or been injured by focussing predominantly on the difference in treatment between the MOD and other possible defendants such as private contractors and NGOs. Claimants are briefly mentioned and the justification offered is the 'unique position of the armed forces involved in operations overseas'. More information is provided to justify the different treatment of NGOs and private contractors which is adds to the 'unique position' justification:

> The circumstances of claims arising out of overseas military operations are limited and unusual. When deployed, the armed forces are in a unique situation and these unique circumstances can make it difficult to have certainty over events and to capture the level of detailed information that will be needed to help determine such a claim. Such claims are heavily reliant on the memories of current and former Service Personnel who frequently interact with hundreds of people during a single deployment and may deploy multiple times. Decisions in operational contexts must be taken extremely quickly and under great stress.

In addition to the discrimination between victims overseas and victims in the UK, the discriminatory impact would also fall negatively on members of the armed forces themselves. In some instances illnesses and injuries do not manifest until many years after the event. It is possible to imagine a personal injury claim concerning exposure to a toxin which does not emerge until much later; evidence eventually uncovered about defective equipment; information leaked many years later concerning a mistaken command operation decision; or syndrome associated with a particular method of training which is not properly diagnosed for ten years. This Part of the Bill is an incentive to coverup potential problems and resist inquiries indefinitely. It is not explained why it is thought current and future UK governments are immune from the desire to conceal dirty secrets.

Derogation

The final feature of the Bill is contained in section 12 is a much watered down version of what was previously planned. It provides that in relation to any overseas operations that the Secretary of State considers are or would be significant, 'the Secretary of State must keep under consideration whether it would be appropriate' for the UK to make a derogation under Article 15(1) of the ECHR. Given that 'keeping under consideration' is likely to occur in any event, and that derogations from Articles 2 and 3 are not possible within the confines of Article 15 ECHR, it is difficult to see what difference this section would make. Perhaps it is to remind the Secretary of State for Defence that derogation is possible, and that it might be useful to derogate from Article 5 prior to future conflicts, provided it is also possible to satisfy the other elements of Article 15.

Conclusion

As George Monbiot recently wrote, ‘lies and erasures are crucial to the myths on which Britain’s official self-image is founded’. This Bill would grant impunity for murder and torture, unjustifiably discriminate against victims of the crimes and human rights violations of the UK armed forces abroad, and place service personnel killed or injured during overseas service at a grave disadvantage. It is an encouragement to obfuscate and cover up crimes and violations of human rights, including torture and murder, until the random time limits set out in the Bill have passed. Under political pressure it is difficult to imagine an Attorney General would ever grant consent to such ‘exceptional’ prosecutions. Furthermore, the Bill does not even achieve what it sets out to do. Rather than providing greater certainty for service personnel and veterans it further complicates the position and dismisses their own deaths and injuries as a fantasy fabricated as a result of the stresses of being deployed overseas.

With the current pandemic, those living in the UK are getting minor taste of the chaos and distress caused by a major public emergency. Perhaps it is not as difficult to imagine, as it once was, the stress and horror caused by a military incursion from the armed forces of another country let alone a country which is seeking to grant its soldiers immunity from criminal prosecution and human rights claims.

10/09/2020