

02 November 2020

Rights and Security International's Briefing on the Overseas Operations Bill Report Stage

Background on Rights and Security International

1. Rights and Security International (RSI) is a legal charity which works to promote just and accountable security policy, drawing on over 25 years' experience working in the field of human rights and national security policy in the United Kingdom. RSI has been closely involved in monitoring the Government's involvement in joint overseas military operations as well as measures taken under the ambit of its national security and counter-terrorism strategies, seeking to ensure that these measures are compliant with human rights standards and international law.

Introduction

2. This briefing addresses two claims raised by the Government during the Committee stage of the Overseas Operations (Service Personnel and Veterans) Bill¹ and builds upon Rights and Security International's (RSI) previous briefings at both the [Second Reading](#) and [Committee](#) stages. The focus of this report is Part 2 of that Bill, which seeks to amend the limitation period for civil claims concerning human rights violations, personal injury or wrongful death arising out of overseas armed forces operations.
3. This briefing addresses arguments put forward by the Government during the debate at Committee Stage in relation to two issues: the disapplication of the six year longstop, and the 'date of knowledge' which instigates the limitation period. The flaws in the Bill's current approach mandate appropriate amendments, which have been tabled at both Committee and Report stages.
4. **RSI strongly supports proposed amendments 41-63,² which go some way to remedying these major deficiencies.**

Disapplication of the Longstop

5. The Bill proposes the imposition of a strict longstop³ that would create an absolute six-year time limit for tortious and HRA claims. The Government in Committee debates relied on its legal analysis to support its approach, which reflects the human rights guidance authored by the Ministry of Defence.⁴ RSI wishes to raise two concerns that it has with the Government's legal analysis, namely a) the implication that

¹ Held from the 6th to the 22nd of October 2020

² Previously amendments 73-87 at Committee Stage.

³ Clause 11; Schedule 2, Part 1; Schedule 3, Part 1; Schedule 4, Part 1.

⁴ Ministry of Defence, 'Overseas Operations (Service Personnel and Veterans) Bill: European Convention on Human Rights Memorandum by the Ministry of Defence', available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873596/ECHR_Memo_-_OO_SPV_Bill_-_FINAL.pdf ('MOD Briefing'), § 1.



limitation periods only engage the Article 6 right to a fair trial;⁵ and, b) the reliance upon the *Stubbings v. UK*⁶ judgment to justify a six-year limitation period.

6. The MOD's legal analysis argues that absolute time limits are not prohibited by the ECHR under Article 6. This analysis is premised on the fact that the initial limitation periods for HRA and personal injury claims remain unchanged by the Bill, and that the Bill merely imposes upper limits for the judge's discretion.⁷ However, the right to access a court must be both "practical and effective"; for this to occur, there must be "a clear, practical opportunity to challenge an act that is an interference with... rights".⁸ This requires any "special features" of the case be considered,⁹ as an overly formalistic and strict limitation on access could cause proceedings to be unfair.¹⁰ Thus, the Bill proposes an arbitrary limit that does not allow the consideration of the special features leading to the victims' claims.
7. Further, when considering whether the limitation period preserves the essence¹¹ of the right, alongside questions of legitimacy and proportionality,¹² the impact on the substance of the right must also be considered.¹³ Civil claims are likely to engage Arts. 2-3 of the ECHR: the right to life and the prohibition of torture and inhuman and degrading treatment or punishment. In these instances, access to judicial processes are essential aspects to aid in vindicating the right to redress; civil cases recognise a degree of fault on the part of the perpetrator,¹⁴ which is essential when criminal proceedings would be otherwise unavailable, or would fail to uncover systemic flaws.¹⁵ Due to the nature of these civil claims, the proposed limitation period may infringe Art. 6. Regardless of the legitimacy of the aim of limiting 'vexatious' claims, the absolute limitation period, operating on a merit-blind basis and without the possibility of extension where justified, cannot be deemed proportionate.¹⁶
8. In the *Stubbings* case, relied upon to support the argument that absolute time limits are not prohibited,¹⁷ the European Court was actually considering time limits for personal injury cases in circumstances where there was an underlying criminal action available.¹⁸ The right was therefore not effectively infringed, as there were other avenues of obtaining redress; this is not available in situations covered by the Bill. It is important to note that the Ministry of Defence's guidance relies upon the availability of tortious claims,¹⁹ as in *Stubbings*, but neglects to note that the Bill also applies to personal injury cases.

⁵ Of the European Convention on Human Rights and Fundamental Freedoms (ECHR) 1950; Committee Debates, p. 270.
⁶ *Stubbings v. United Kingdom* (1996) 23 EHRR 213 ('*Stubbings*'); Committee Debates, pp. 270-272.
⁷ MOD Briefing, §§ 33-34.
⁸ Council of Europe, 'Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)', available at: https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf updated 31 August 2019 ('Council of Europe Art. 6 Guidance') § 91; App. No. 23805/94, *Bellet v. France*, Judgment, 4 December 1995, §§ 36-38.
⁹ Council of Europe Art. 6 Guidance, § 92; App. No. 22677/10, *Kurşun v. Turkey*, Judgment, 30 October 2018, §§ 103-104.
¹⁰ Council of Europe Art. 6 Guidance, § 92; *Tunç and Tunç v. Turkey*, §§ 32-33.
¹¹ Council of Europe Art. 6 Guidance, § 87; App. No. 12964/87, *Geoffre de la Pradelle v. France*, Judgment, 16 December 1992, § 28; App. Nos. 12750/87, 13780/88, 14003/88, *Philis v. Greece*, Judgment, 27 August 1991, § 59.
¹² Council of Europe Art. 6 Guidance, § 87; App. No. 76943/11, *Lupeni Greek Catholic Parish and Others v. Romania [GC]*, Judgment, 29 November 2016, § 89; App. No. 51357/07, *Nait-Liman v. Switzerland [GC]*, Judgment, 15 March 2018, § 115.
¹³ Council of Europe Art. 6 Guidance, § 108; App. No. 8225/78, *Ashingdane v. United Kingdom*, Judgment, 28 May 1985, § 57.
¹⁴ Dinah Shelton, *Remedies in International Human Rights Law* (OUP: Oxford, 2nd edn, 2006), p. 10.
¹⁵ International Covenant on Civil and Political Rights, Art. 2(3); Human Rights Committee, 'General Comment No. 31', CCPR/C/21/Rev.1/Add. 13 (26 May 2004), §§ 16-18.
¹⁶ In a different context, the European Court of Human Rights in App. Nos. 52067/10 and 41072/11, *Moor and Others v. Switzerland*, Judgment, 11 March 2014, at §§ 74-79, concluded that absolute limitations on asbestos-related civil claims was disproportionate in achieving the aim of legal certainty, as the diseases developed a significant period after the event and rendered the limitation almost absolutely exclusionary. This decision is clearly applicable to this context, as demonstrated by the aforementioned examples. The judgment is not available in English, but a summary can be found here <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22002-9395%22%5D%7D>.
¹⁷ MOD Briefing, § 33.
¹⁸ '*Stubbings*', § 52.
¹⁹ MOD Briefing, § 41.



9. In order to ensure an approach that complies fully with the UK's international human rights obligations, it is therefore essential that judges retain a degree of discretion to extend the absolute longstop in circumstances like in *Alseran*,²⁰ *'Mau Mau'*,²¹ and *Multiple Claimants*;²² thus, **while RSI would favour removing the longstop entirely, it is at least necessary to for the Bill to retain discretion for judges to extend the longstop.**

10. Amendments 41-45 sought to do this by ensuring that cases with unjustifiable delays would remain unable to proceed, but also that those whose cases are subject to explicable and legitimate delays outside of their control are able to access justice. As repeatedly referenced in the Committee debates,²³ the Limitation Act 1980 and the Human Rights Act 1998 already contain stringent limitation periods that may render an absolute longstop unnecessary, in that unmeritorious cases or claims with unjustifiable delays are already excluded.²⁴ In any case, the proposed amendments would have created a discretion that would have avoided the arbitrary restriction of legitimate claims.

The 'Date of Knowledge'

11. RSI also has concerns regarding points made in the Minister's discussion relating to the 'date of knowledge'.²⁵ Amendments 47-59 aimed ensure that the 'date of knowledge' did not become an unjustifiable and unintended bar to the claims of both military and non-military victims.

12. The Government in its response to the amendments stated the following:

13. "We consider that the definition in clause 11 is comprehensive and fair to both claimants and the MOD. It does not replicate section 14 of the Limitation Act 1980, for example, because parts of that definition do not make sense in the context of Human Rights Act claims. Similarly, amendment 75 proposes new parts for the date of knowledge definition that do not work in the context of Human Rights Act claims."²⁶

14. Despite claims to the contrary,²⁷ analogies to previous cases which would not be caught by the scope of the Bill, such as those of the 'nuclear test veterans',²⁸ are essential to understanding the necessity of the proposed amendments. The *Alseran* judgment is a prime example of the difficulties non-military claimants face in achieving justice for the violations that they have suffered; likewise, in relation to claims brought by service personnel, the *Multiple Claimants* judgment indicates how the claims brought by service personnel could fall foul of the Bill in its present form. It is necessary to ensure that legitimate and explicable delays, caused through no fault of the claimant, are accounted for. The proposed amendments relating to the date of knowledge a judge must consider when extending the standard limitation period account for such delays, are needed to ensure justice.

²⁰ *Alseran & Ors v. Ministry of Defence* [2017] EWHC 3289 (QB).

²¹ *Kimanthi & Ors v. Foreign and Commonwealth Office* [2015] EWHC 3684.

²² *Multiple Claimants v. Ministry of Defence* [2003] EWHC 1134 (QB).

²³ For example, at pp. 235-252.

²⁴ See the Limitation Act 1980, s33; Civil Procedure Rules, rule 3.4, which give judges the power to strike out applications where allegations are unfounded or 'vexatious'.

²⁵ The 'date of knowledge' is only applicable to HRA claims in the Bill's draft form, by virtue of Clause 11. The below-discussed amendments apply this to tortious claims in Schedule 2, Part 1; Schedule 3, Part 1; and, Schedule 4, Part 1, whilst also modifying the date on which this is deemed to have occurred.

²⁶ Committee Debates, p. 288.

²⁷ Committee Debates, p. 289.

²⁸ As discussed in the Committee Debates at pp. 276-289



15. The Government argues that the date of knowledge is the date in which the claimant becomes aware of the injury, and that this does not negatively impact those with gradual or delayed-onset conditions. In our view, this is incorrect.

16. As presently drafted, only two factors are considered for the purposes of the date of knowledge: awareness of the act, and awareness that the MOD or the Secretary of State was responsible for the act.²⁹ At no point is awareness of the injuries reflected in the date of knowledge, nor is awareness of the ability to claim. In such circumstances, the military claimant who suffers from gradual hearing loss as a result of a negligent act of the MOD whilst operating overseas, or the civilian claimant who is unaware that they can bring a claim in this jurisdiction, or the veteran who has mistakenly been given the impression that they are unable to instigate proceedings against the MOD or Secretary of State, would all fall foul of the date of knowledge.

17. Proposed amendments 47-59 sought to remedy this situation to ensure that such legitimate claimants would still be able to obtain justice. The Government's position is that the amendment "would not work" and that Clause 11, as currently drafted, is "comprehensive and fair to both claimants and the MOD". There is no doubt that the unnecessary exclusion generated by the current date of knowledge is beneficial to the MOD, but it cannot be said to be fair for claimants. **If these elements are intended to be included within the date of knowledge, then they must be expressly included.**

18. As a result, RSI expresses its support for amendments 41-63.

²⁹ Clause 11, in inserting a proposed s7A(5) into the HRA.