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Rights and Security International's Briefing to the House of Lords Overseas Operations (Service Personnel and Veterans) Bill 2019-2021

Summary

- Clauses 8-11 of the Bill introduce a six-year absolute longstop on civil claims arising from overseas armed forces operations after which time the courts will no longer have any discretion to allow the claim to proceed, regardless of the legitimacy of the delay. In addition, Clauses 8-11 amend the balance in factors that a court must take into account when determining whether to allow a claim to proceed out of time within the six-year period. The balance is amended to the detriment of potential claimants.
- These provisions bar access to justice for victims of human rights abuses and personal injury or wrongful death and risk promoting a culture of impunity within the MOD. As a result, the Bill risks placing the UK in breach of its obligations under international human rights law.

Introduction

[Rights and Security International](#) (RSI) is concerned about many aspects of the Overseas Operations (Service Personnel and Veterans) Bill 2019-2021 ('the Bill'): the restrictions it places on criminal prosecutions for serious international crimes, the limitations it places upon legitimate victims seeking redress for personal injury, wrongful death or human rights abuses, and the 'duty to consider derogation' from the European Convention on Human Rights ('the ECHR'). This briefing will focus solely on the second of those concerns: the limitations placed upon civil claimants, introduced in Part 2 of the Bill.¹

RSI is concerned that the Bill undermines the availability of civil redress, essential for securing access to justice for individuals and wider accountability of the Ministry of Defence ('MOD') in cases arising from overseas armed forces operations. This is particularly stark as it has been widely reported that, in spite of numerous findings of wrongfulness in official inquiries² and civil judgments,³ the UK has only prosecuted one member of the armed forces since 2001 for war crimes.⁴ Thus, the availability of civil redress as an alternative to criminal prosecution is essential.

This briefing will explain how the Bill's proposed amendments to the limitation periods currently applicable to civil claims would hinder access to justice and in so doing risk putting the UK in breach of its international human rights obligations, primarily those under the ECHR. This briefing focuses on the issues with two of

¹ Clause 8 applies to tortious claims for personal injury or wrongful death in the English and Welsh courts, with equivalent provisions in clauses 9 and 10 for Scottish and Northern Irish courts respectively; clause 11 deals with claims under the Human Rights Act 1998.

² The [Baha Mousa Public Inquiry](#) and corresponding report gave rise to 73 recommendations, including on institutional aspects of training with respect to prisoners.

³ Over 1,230 claimants advanced ECHR claims, whilst 1,000 brought personal injury claims in the *Al-Saadoon* litigation, arising out of the UK's involvement in Iraq, with many of the claims concluding in favour of the claimants. The case later reached the Court of Appeal, but for a factual summary, see the judgment of Leggatt J in the High Court: [Al-Saadoon & Ors v. Secretary of State for Defence \[2015\] EWHC 715 \(Admin\)](#).

⁴ Ceasefire Centre for Civilian Rights, '[Official figures reveal only one prosecution of UK armed forces personnel for war crimes overseas since 2001](#)' (December 2020).

the Bill's proposals: (i) the imposition of a six-year absolute longstop after which civil claims may not proceed, and (ii) the introduction of an imbalance in the factors that a court must consider when deciding whether to disapply the standard limitation period, which will make it harder for claims to proceed.

Imposition of an absolute six-year longstop on HRA and tortious claims

1. The Bill's Clause 8(1)(a) and Part 1 of Schedule 1⁵ seek to amend Section 33 of the Limitation Act 1980 by removing the power of the court to disapply the standard limitation period for personal injury and wrongful death claims arising out of overseas military operations once six years has passed from the 'relevant date'. As the law currently stands, courts have a power to disapply the standard limitation period and allow a claim to proceed out of time where they consider it equitable to do so having regard to all the circumstances of the case.⁶ However, the Bill would have the effect of creating an absolute longstop of six years, after which no claim will be able to proceed, regardless of the legitimacy of the delay. Clause 11 of the Bill has a similar effect for claims brought under the HRA; inserting a new s7A(4) into the HRA with the effect that claims will be automatically barred six years after the act occurred, or twelve months after the 'date of knowledge', regardless of the legitimacy of the delay. Thus, both provisions introduce a merit-blind longstop constraining judicial discretion.
2. An absolute six-year limitation period unjustifiably limits the ability of legitimate claimants to access the courts. The imposition of such an arbitrary longstop is inappropriate given the nuances and practicalities of conflict-related wrongs which, as explored below, often lead to explicable and justifiable delays in bringing proceedings. Multiple high-profile examples illustrate this.⁷
3. The *Alseran* case⁸ involved a number of victims of serious human rights abuses perpetrated by members of the British armed forces in Iraq: unlawful killings, unlawful imprisonments, and forms of ill-treatment. For present purposes, a prime example is the case of Kamil Alseran, whom the Court concluded was subject to unlawful detention and ill-treatment. For practical reasons, Mr Alseran was unable to launch his claim until ten years after his unlawful detention: as an Iraqi citizen he was unaware of his rights to access the English courts, and was practically unable to approach English lawyers, partially due to the security situation on the ground. However, in this case, the court was able to utilise its discretion and allow Mr Alseran's tortious claim to proceed despite the delay.⁹ Had the Bill as currently drafted been in force, Mr Alseran's claim would have been barred and he would never have been able to access justice. Instead, the discretion afforded by the HRA, which this Bill would seriously curtail, allowed the court to consider all the circumstances of the case, including administrative difficulties in bringing the case and the merits of the claim, alongside the prejudice to the defendant caused by the delay, to determine whether to allow the claim to proceed.¹⁰ Thus, while the present state of the law enables courts to take a balanced approach to the disapplication of the standard limitation period, proposed Clauses 8-11 of the Bill would impose a blanket prohibition on civil claims proceeding after six years.
4. Justifiable delays can also be caused by the late onset of injuries. Several of the claimants in *Multiple Claimants v. Ministry of Defence*,¹¹ service personnel that had been injured during the course of their deployment, were unable to launch their claims until more than twenty years after the event. The context and circumstances of deployment put service personnel at particular risk of illnesses like post-traumatic stress disorder and hearing loss, which often fail to be diagnosed or remain latent until many years later.

⁵ Equivalent provisions are introduced with Scotland (clause 9 and Part 1 of Schedule 3) and Northern Ireland (clause 10 and Part 1 of Schedule 4).

⁶ See Section 33 Limitation Act 1980 and Section 7 (5) Human Rights Act 1998.

⁷ See also the 'Mau Mau' litigation: [Kimanthi & Ors v. Foreign and Commonwealth Office \[2015\] EWHC 3684](#), which concerned claims brought for actions that had occurred over fifty years prior, during the 'Kenya Emergency'.

⁸ [Alseran & Ors v. Ministry of Defence \[2017\] EWHC 3289 QB](#).

⁹ *Alseran* (n 8), paras. 762-765, 771-777. Although this assessment was based on Iraqi Law, Leggatt J nonetheless notes the 'more or less identical' nature of the two jurisdictions' approach, whilst explaining that, in fact, the Iraqi exceptions were narrower than the broad discretionary powers available under s33 [at 831].

¹⁰ *Alseran* (n 8), paras. 852-870.

¹¹ [Multiple Claimants v. Ministry of Defence \[2003\] EWHC 1134 \(QB\)](#).



5. Given the discussion above, the Bill risks placing the UK in violation of its international obligations under the ECHR. In the course of the Bill's debate in the House of Commons, the MOD¹² and ministers¹³ repeatedly argued that the six-year absolute longstop is compatible with the ECHR on the basis that the existing limitation periods for HRA and personal injury claims are unchanged by the Bill, and that the imposition of an upper time limit on the court's discretion to disapply the limitation period does not engage the ECHR. However, whilst true that the length of the limitation periods are unchanged by the Bill, the nature of these same limitation periods is fundamentally changed by the Bill: instead of being flexible restrictions on the ability to bring claims, they are rendered absolute after six years. This is a significant shift from an ECHR perspective. The jurisprudence demonstrates that in order to satisfy the requirements imposed by the ECHR, the right to access a court must be 'practical and effective', with 'a clear, practical opportunity to challenge an act that is an interference with... rights'.¹⁴ In addition, the 'special features' of the case must also be considered when assessing the validity of the limitation,¹⁵ in order to avoid unnecessarily and unjustifiably strict and formalistic interpretations.¹⁶ As demonstrated by reference to *Alseran*, *Kimanthi* and *Multiple Claimants* above, the special circumstances of overseas military operations needs to be considered, both from the perspective of the delayed onset of the likely injuries that would occur in this context, but also from the practicalities that a claimant may face in instigating claims in this jurisdiction. In imposing an arbitrary longstop for both personal injury and HRA claims, without any opportunity for discretionary extension, the Bill fails to consider such special features, and therefore risks putting the UK in breach of its international human rights obligations.
6. Moreover, though States are afforded a margin of appreciation when assessing the lawfulness of limitation periods, it is essential to ensure that the 'essence' of the substantive right is upheld,¹⁷ alongside an assessment of whether limitations on the rights are legitimate, necessary and proportionate.¹⁸ The legitimacy of the MOD's stated aim of preventing 'vexatious claims' is subject to much challenge. High profile inquiries as well as the vast number of civil claims in which the courts have found civil liability for human rights violations, personal injury and wrongful death, suggest that the majority of civil claims arising out of overseas operations are meritorious and not 'vexatious'.¹⁹ Moreover, the inflated nature of the 'vexatious claims' narrative can be demonstrated by the MOD's practice in settling claims. Though the MOD's current policy is to defend any claim it believes it is not liable for,²⁰ it has settled hundreds, suggesting that it did not find these to be 'vexatious'.
7. Even assuming that the goal of stemming 'vexatious claims' were legitimate, the absolute longstop proposed by the Bill is unnecessary. This is because existing limitation periods for personal injury and wrongful death claims, as well as such periods under the HRA, are sufficient to exclude 'vexatious claims'. As the law currently stands, courts already have the power to strike out civil claims that disclose 'no reasonable grounds' for bringing the case, including those which are vexatious or 'obviously ill-founded'.²¹ Unlike the Bill's proposals, these existing powers are ECHR-compliant. They require a much more balanced investigation by the court, allowing it to consider both factors justifying disapplication, but

¹² Notably the group most likely to benefit from the limitation periods imposed, to the detriment of legitimate claimants, both military and civilian, as discussed below. See Ministry of Defence, '[Overseas Operations \(Service Personnel and Veterans\) Bill: European Convention on Human Rights Memorandum by the Ministry of Defence](#)' (2020).

¹³ For example, see [PBC \(Bill 117\) 2019-2021](#) ('House of Commons Committee Debates'), cols 270-273.

¹⁴ Council of Europe, '[Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial \(civil limb\)](#)' (updated August 2020) ('Council of Europe Art. 6 Guidance'), § 91; App. No. 23805/94, *Bellet v. France*, Judgment, 4 December 1995, §§ 36-38.

¹⁵ Council of Europe Art. 6 Guidance, §§ 92, 112; App. No. 8225/78, *Ashingdane v. United Kingdom*, Judgment, 28 May 1985, § 57; App. No. 22677/10, *Kursun v. Turkey*, Judgment, 30 October 2018, §§ 103-104.

¹⁶ Council of Europe Art. 6 Guidance, § 92; App. No. 24014/05, *Tunc and Tunc v. Turkey*, Judgment, 14 April 2015, §§ 32-33.

¹⁷ Council of Europe Art. 6 Guidance, § 87; App. No. 12964/87, *Geouffre 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.

¹⁸ 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.

¹⁹ See the *Baha Mousa Inquiry* (n 2) and *Alseran* (n 8) and *Al-Saadoon* (n 3).

²⁰ MoD common law compensation claim statistics, 13 December 2019, available at:

<https://www.gov.uk/government/collections/mod-compensation-claims-statistics>.

²¹ See the [Civil Procedure Rules](#), Rule 3.4, as supplemented by [Practice Direction 3A](#).



also those that would indicate a detriment to the defendant caused by the delay. As discussed, given that overseas military operations often engage multiple factors that limit the ability of claimants – military or civilian – to instigate claims before the UK courts, a short and absolute limitation that could exclude a large number of legitimate claims is simply too restrictive to be consistent with justice. On the basis of ECHR jurisprudence, it is clear that the Bill risks putting the UK in breach of its international human rights obligations.

8. In addition, the six-year absolute longstop is not proportionate to the alleged aim of barring ‘vexatious claims’. In excluding all claims from proceeding beyond six years regardless of the merits of the claim or the legitimacy of the delay, it is overinclusive. The European Court of Human Rights, in *Moor and others v. Switzerland*,²² concluded that absolute limitations on asbestos-related civil claims were a disproportionate means of achieving the aim of legal certainty, as the diseases developed a significant period after the event and rendered the limitation almost absolutely exclusionary. Both the policy aim of legal certainty and the restriction imposed in pursuit of this aim correspond directly to the shortcomings of this Bill, indicating that the Bill risks placing the UK in breach of its obligations under the ECHR.
9. Further, civil claims will frequently engage Arts. 2-3 of the ECHR, providing for the right to life and the prohibition of torture and inhuman or degrading treatment or punishment respectively. As noted above, access to civil court processes, either by virtue of a tortious claim or under the HRA, is essential in circumstances in which criminal responsibility is lacking in practice. Regardless of the efficacy of criminal proceedings, civil proceedings are essential in uncovering systemic decision-making flaws that may otherwise not be subject to scrutiny, or in other instances in which criminal processes are unavailable,²³ by establishing a degree of fault for the perpetrator and thus providing justice for the victim.²⁴ In instances in which criminal prosecutions are not sought or not successful,²⁵ despite strong evidence that serious crimes have been committed,²⁶ it is even more important to facilitate access to civil claims procedures, in order to prevent a culture of impunity from developing.²⁷

Creation of imbalance in factors extending standard limitation periods

10. The Bill’s Clause 8(1)(b) and paragraph 1(4) of Schedule 1,²⁸ and its proposed introduction in Clause 11 (2) of Section 7A(2) into the HRA, seek to amend the balance in factors that a court must take into account when determining whether to allow a claim to proceed beyond the standard limitation period (after three

²² App. Nos. 52067/10 and 41072/11, *Moor and Others v. Switzerland*, Judgment, 11 March 2014, at §§ 74-79 ([see English summary](#)).

²³ 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.

²⁴ Dinah Shelton, *Remedies in International Human Rights Law* (OUP: Oxford, 2nd edn, 2006), p. 10.

²⁵ The *Stubbings v. United Kingdom* (1996) 23 EHRR 213 judgment, frequently cited as authority for the view that absolute time limits on civil claims are not prohibited, actually concerned a case in which there was an underlying criminal action available [at 52]. The right therefore was not effectively infringed, as there was still some form of redress available to victims. In this instance, the Bill seeks to thwart both civil (tortious and under the HRA) and criminal liability arising out of overseas operations, clearly rendering the *Stubbings* judgment distinguishable.

²⁶ The International Criminal Court’s Prosecutor’s recent report into the UK’s involvement in Iraq was stark in this regard, in concluding that: “The information available provides a reasonable basis to believe that... members of UK armed forces in Iraq committed the war crime of wilful killing/murder... at a minimum, against seven persons in their custody. The information available provides a reasonable basis to believe that... members of UK armed forces committed the war crime of torture and inhuman/cruel treatment... and the war crime of outrages upon personal dignity... against at least 54 persons in their custody. The information available further provides a reasonable basis to believe that members of UK armed forces committed the war crime of other forms of sexual violence, at a minimum, against the seven victims as well as the war crime of rape against one of those seven victims while they were detained at Camp Breadbasket in May 2003.” International Criminal Court Office of the Prosecutor, ‘[Situation in Iraq/UK: Final Report](#)’ (09 December 2020), §§ 2, 113.

²⁷ The effective barring of civil claims after six years may also violate the UK’s obligations under other international human rights law treaties, such as the Convention Against Torture.

²⁸ Equivalent provisions are introduced with Scotland (clause 9 and Part 1 of Schedule 3) and Northern Ireland (clause 10 and Part 1 of Schedule 4).



years for tortious claims for personal injury and wrongful death,²⁹ and after one year for HRA claims).³⁰ The Bill requires that the court pay ‘particular regard’ to the impact of the operational context on the ability of HM Forces members to ‘fully or accurately’ recall events and the degree of ‘dependence on the memories of such individuals’ on the cogency of the evidence, as well as the impact on the mental health caused by the proceedings on HM Forces witnesses. The Bill therefore places a clear focus on factors that would preclude a claim from proceeding, illegitimately tipping the balance of considerations in favour of the MOD.³¹ This both undermines access to justice and is unnecessary.

11. The re-balancing undermines access to justice by making it harder for meritorious claims to succeed when delayed for justifiable reasons. As explained above, the circumstances in which claims will arise in the operational context makes it extremely difficult for claimants to instigate their claim within a three- or one-year period. This will further exacerbate the risk that the UK is placed in breach of its human rights obligations, as outlined above, and consistent with the aforementioned jurisprudence.
12. The re-balancing is unnecessary because the courts already consider factors which would support a claim not proceeding beyond the standard limitation period. Section 7(5)(b) of the HRA already directs the court to consider ‘all the circumstances’ of the case, which presumably includes the cogency of the evidence. In addition, the ‘Mau Mau’ litigation,³² occurring over fifty years after the event, is a prime example of how courts can effectively balance the reliability of conflict-related evidence many years after the event. As a result, all the re-balancing does is tend against allowing a claim to proceed, risking putting the UK in violation of its international human rights obligations in implementing unjustifiably restrictive limitation periods that unduly prevent legitimate claims from proceeding, and jeopardising the core value of justice for victims.

RSI kindly requests that the above concerns are brought to the attention of the House of Lords during the Bill’s Second Reading on Wednesday 20 January 2021.

For more information or to discuss these issues further, please contact Emily Ramsden, Legal and Policy Officer at Rights and Security International on eramsden@rightsandsecurity.org

Rights and Security International is a legal charity which works to promote just and accountable security policy, drawing on over 25 years of 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.

²⁹ Limitation Act 1980, s11(4).

³⁰ HRA, Section 7(5)(a).

³¹ In relation to claims under the HRA, Thomas LJ in [Dunn v. Parole Board \[2008\] EWCA Civ 374](#) exclaimed that: “It is for the court to examine in the circumstances of each case all the relevant factors and then decide whether it is equitable to provide for a longer period. It may be necessary in the circumstances of a particular case to look at objective and subjective factors; proportionality will generally be taken into account. It is not in my view appropriate to say that one particular factor has as a matter of general approach a greater weight than others. The court should look at the matter broadly and attach such weight as is appropriate in each given case.” [at 32].

³² *Kimanthi* (n 7).

