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The new scheme for foreign national prisoners: vigilance is key

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The new scheme for foreign national prisoners: vigilance is key

TERS will reduce the caseload of the Parole Board and the cost of handling such cases, but it is in its early stages and practitioners should be prepared to start judicial review proceedings where they feel the secretary of state has acted unlawfully, says Patrick Hassan-Morlai

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The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 received Royal Assent on Tuesday 1 May 2012 and section 119 came into force on that day. This section and section 77 (alcohol abstinence and monitoring requirements pilot scheme) are the only two substantive sections that came into force on 1 May.

The provision governing the Tariff Expired Removal Scheme (TERS) is contained in section 32A of the Crime (Sentences) Act 1997 as inserted by section 119 of the LASPO Act. In broad terms, TERS applies only to foreign national prisoners whom the secretary of state can remove from the UK if the foreign national prisoner is serving a life sentence that includes an IPP sentence, has served their minimum term, i.e. tariff, and is liable to removal from the UK. Section 119 adopts the definition of liability to removal from the UK in section 259 of the Criminal Justice Act 2003.

Although the power to remove a foreign national prisoner could be exercised on or after tariff expiry and whether or not the Parole Board has directed their release, it is almost certain that the secretary of state will no longer refer the cases of such prisoners to the board. Letters sent to prisoners deemed suitable for TERS by the public protection casework section at the Ministry of Justice stated that “the secretary of state will be able to authorise removal on or after tariff expiry date (TED) without reference to the Parole Board”.

There are financial and practical benefits to exclude this category of foreign nationals from Parole Board consideration. It will reduce the overall caseload of Parole Board as well as the costs of handling such cases. Richard Ford’s article in The Times of 31 December 2011 entitled ‘Parole delays cost £6m as more prisoners seek compensation’ sums up the financial risk on the Parole Board when it failed to review cases on time. Noting that delay in considering lifer/IPP cases has proved expensive for the Parole Board, the board itself will be pleased to have these cases removed from its caseload.

Areas of concern

Foreign national prisoners removed from the UK under the TERS provision will be subject to deportation order. Such an order will prevent their re-entry into the UK as long as the order remains in place. These prisoners are able to challenge deportation orders. Once removed from the UK, a foreign national prisoner must not return there; if they do, they will be lawfully and indefinitely detained until the Parole Board directs their release or they are removed again from the UK by the secretary of state under the TERS provision. The Parole Board will

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almost certainly not direct such prisoners’ rerelease as the secretary of state may not refer such prisoners’ cases to the parole board. This is one area where practitioners should be concerned about their clients’ rights. If a prisoner who had been removed under TERS returns to the UK, has not been removed again and has spent a considerable time in prison without a parole review, there is an argument that article 5(4) of the European Convention on Human Rights could be engaged.

A number of serving prisoners will be affected by TERS, not least those who have served their tariff before or on 1 May 2012, but also those who will finish serving their tariff after this date.

Initial enquiries made with the Legal Services Commission revealed that the commission “is of the opinion that this removal scheme may be funded under prison law if there is a legal issue arising out of the same. This is akin to specification 12.101(K)(ii)(iii)(iv) of the Standard Crime Contract 2010.”

However, the commission’s view has since changed with its senior legal advisers subsequently issuing the following clarification on the funding for TERS: “A decision by the secretary of state to remove a foreign national prisoner from the UK is not within the scope of the prison law specification of the Standard Crime Contract 2010. It is not an issue arising out of his/her sentence, and it is not a treatment issue. Nor is it a decision of the Parole Board (or a disciplinary case, for that matter). To conclude, the only type of funding which may be available would be for a public law challenge under a civil contract of the decision to remove.”

Taking action
As a new category of work, it is understandable that the commission has had to change or clarify its view on the funding for TERS work. Nevertheless, it is clear that among the three main criteria of TERS is the type of sentence imposed on a prisoner (i.e. life sentence) and whether the prisoner has served their tariff. Therefore, the decision to place a foreign national prisoner on TERS must be an issue arising out of their sentence as a lifer or an IPP prisoner and whether or not they have served their tariff. Prisoners who believe the secretary of state has wrongly or unlawfully placed them on TERS or are about to be removed from the UK should consider commencing judicial review proceedings. As such matters are to be handled expeditiously, funding could be obtained either through the exercise of devolved powers or by submitting an emergency application on form CLSAPP6 to the Legal Services Commission.

The definition of foreign national prisoners also includes EEA (European economic area) nationals (see Prison Service Instrument 52/2011, paragraph 2.8). EEA nationals cannot be deported but can be expelled from the UK (see Criminal Proceedings v Calfa [1999] ECR 1-11 and the Immigration EEA (European Economic Area) Regulations 2006). This category of foreign national prisoners may benefit significantly from assistance to challenge a decision to place them on TERS or challenge removal if their index offence is not of sufficient gravity to justify expulsion.

As a new scheme, TERS is bound to create headaches for all those who will be affected by it or involved in handling TERS cases. Prisoners and practitioners should, however, be prepared to mount public law challenges to the application of the scheme. Indeed, judicial review proceedings will be the most appropriate means to ensure that the secretary of state acts within their statutory powers in section 119 and exercises such powers reasonably and proportionately. Public law practitioners should therefore welcome LASPO for introducing another category of work for them.

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