

Justice that protects



Placing public safety at the heart of criminal
justice and the prisons system

Richard Walton

Foreword by Lord Carlile of Berriew CBE QC



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Contents

About the Author	2
Foreword	5
Executive Summary	7
Recommendations	10
The role of the MOJ and HMPPS in protecting the public from harm	11
Case Study: Usman Khan	13
Case study: Anjem Choudary	17
Case study: John Worboys	18
Legal and institutional weaknesses exposed in the criminal justice system	19
Conclusions	23

Foreword

Lord Carlile of Berriew CBE QC, former Independent Reviewer of Terrorism Legislation (2001 – 2011)

Prisons exist to keep the public safe by depriving the most serious offenders of their liberty, and to enable them to become law-abiding citizens. In recent years, those priorities increasingly have been neglected by the Ministry of Justice and Her Majesty's Prisons and Probation Service. The collective rights of the vast majority of the public have been overlooked, without noticeable benefit to those who have been sentenced to prison.

The case of Usman Khan, who launched an Islamist terror attack in central London in November, despite being released on supposedly strict licence conditions, illustrates the inherent risks of an approach that appears to set poorly researched offender rehabilitation programmes above the safety of ordinary citizens. This is especially true in the context of extremist offenders, who are ideologically motivated and more difficult, sometimes impossible, to rehabilitate. Khan, previously convicted for involvement in a plot to bomb the London Stock Exchange, hoodwinked his supervisors, who allowed him to travel to the heart of the capital, with fatal consequences for two young people and their families. This should not have happened: the process that led to it has to be re-examined. It is clear that a reordering of priorities for ministers, officials, police and probation officers is urgently required. The alleged terrorist attack at HMP Whitemoor, which is said to have featured replica suicide vests, is further evidence that the most dangerous offenders are not being monitored effectively and in the public interest – even within a Category A prison.

This report sets out some of the organisational changes that would help to achieve the necessary change. The recommendation for the Home Office to reabsorb Her Majesty's Prisons and Probation Service (HMPPS) is persuasive. The Ministry of Justice, formed in 2007, has proven to be institutionally flawed and a cultural timidity still persists among officials around the management of terrorist offenders. The 13-year experiment, which removed prisons from the purview of the Home Office, has failed and should be brought to a close. It would make far more sense – in operational and strategic terms – for the Home Secretary, who has ministerial responsibility for domestic security, policing and public safety, to be once again accountable for the management of all prisoners, with the assistance of an able and knowledgeable Prisons Minister. A Home Office structured along traditional lines would also be in a stronger position to

direct information-sharing and more carefully assess the risks to public safety posed by prisoners – notably terrorist offenders – on their release.

A revamped Home Office must review how prisoner behaviour is evaluated, as well as the schemes designed to deradicalise terrorist offenders and rehabilitate other dangerous offenders. As the report explains, there has been little empirical study into the effectiveness of schemes designed to challenge extremist world views. Specialist training is vital here, and the use of the best psychological and neurological techniques to assess risk and danger. This is not work for the generalist: as Usman Khan's case shows, those who are ideologically motivated of Islamist extremism are capable of hiding their true intent for long periods in order to carry out devastating acts of violence.

Finally, legislating to prevent seriously dangerous convicted terrorists and possibly some other dangerous offenders from being released early into the community on licence is an idea that deserves serious consideration (and properly informed debate in both Houses of Parliament). It is likely to gain public support but judges must be persuaded of its legal integrity too. As the Government explores these legislative changes and structural changes in the round, it must ensure that public safety is paramount.

Executive Summary

The government has pledged to appoint a Royal Commission to ‘review and improve the efficiency and effectiveness of the criminal justice process. New sentencing laws will ensure the most serious violent offenders, including terrorists, serve longer in custody’.¹ Additionally, the Queen’s Speech stated: ‘My Government is committed to a fair justice system that keeps people safe’.²

The Royal Commission would be the first since the Runciman Commission in 1991³ and comes at a time of increasing crime rates and low public confidence in the criminal justice system, sentencing mandates and the management of convicted terrorists and other dangerous prisoners both while in prison and upon release. As necessary as it is, there is also a need to move ahead urgently with reforms to the Ministry of Justice and improve the management of dangerous offenders who pose a risk to public safety.

Two recent events are of serious and relevant concern. The first was the terrorist attack committed by Usman Khan, a convicted terrorist released on licence from prison. He attacked and killed Jack Merritt and Saskia Jones on 29th November 2019 during a conference on the rehabilitation of offenders at Fishmongers’ Hall on London Bridge, to which he had been invited as an exemplar of prison de-radicalisation programmes.⁴ The second was the apparent terrorist attack against prison officers that took place inside HMP Whitemoor on 9th January 2020. A convicted terrorist, Brusthom Ziamani⁵ (convicted in 2015 of preparations to kill a British soldier), is alleged to have attacked a prison officer with another ‘Muslim convert’ who was serving a sentence for a violent offence. The two are alleged to have been ‘wielding bladed weapons and wearing fake suicide vests’ during the attack. Several prison officers were injured, one seriously⁶ and an investigation by the Counter Terrorism Command (SO15) of the Metropolitan Police has been started.

Questions are now being asked about the monitoring of convicted terrorists inside prison and the extent to which the public is being protected from further serious harm by terrorist offenders released early on licence. There are concerns surrounding terrorist offenders whose release is subject to a Parole Board decision, as well as those who are not subject to the same decision process. Furthermore, the Ministry of Justice (MOJ) is itself in the spotlight: is it sufficiently focused on keeping the public safe and reducing the threat and risk posed by offenders, or is it distracted by other issues, including the sheer numbers of prisoners being held within the estate?

1. <https://www.gov.uk/government/speeches/queens-speech-december-2019>
2. <https://www.gov.uk/government/speeches/queens-speech-december-2019>
3. <https://discovery.nationalarchives.gov.uk/details/r/C3042>
4. <https://www.bbc.co.uk/news/uk-50611788>
5. <https://www.mi5.gov.uk/cy/news/ziamani-sentenced-for-preparing-terrorist-acts>
6. <https://www.bbc.co.uk/news/uk-england-cambridgeshire-51049853>

The Royal Commission must seize the opportunity to address the widely held public perception – shared by the police and other services – that sentences for terrorism are overly lenient, with prison release on licence now seen as a ‘right not a privilege’, a poorly scrutinised policy and one that is often allowed too early.

The first step is to recognise that terrorist offenders who have previously plotted attacks are – and will continue to be – dangerous (by definition) both inside and outside of prison, because they are driven by ideology rather than other less enduring motives. They should, therefore, be subject to particularly stringent prison conditions that take account of their motives and the enduring threat they pose. The apparent terrorist attack in HMP Whitemoor – a Category A, High Security prison – is the first ever to have taken place inside a British prison. A full review of the monitoring and detention of all terrorist prisoners should now be undertaken, independently of both the Ministry of Justice and Her Majesty’s Prisons and Probations Service, to establish, for example, how a convicted terrorist was apparently able to acquire weapons and replica suicide vests and launch an attack against prison officers while in prison custody.

A second step is for convicted terrorists not to be released prematurely on licence but made to serve their full sentence. This would require judges to end the current practice of passing a notional maximum sentence and lead to the passing of real sentences to be served.

A third step is to acknowledge the particular operational difficulty and extremely high cost of monitoring terrorist offenders in the community and better determine whether they pose a threat to the public. Terrorist offenders should have to demonstrate their rehabilitation and successful de-radicalisation prior to release. Active engagement with the police and intelligence agencies must also be considered.

A case is also made in this paper for Her Majesty’s Prisons and Probation Service (HMPPS) being reabsorbed into the Home Office, bringing prisons under the direct control of the Home Secretary, whose department deals with threat, harm and risk to public safety. This would allow for the creation of a reformed Lord Chancellor’s department to work with the independent judiciary and the courts in the running of the criminal justice system.

The management of terrorists and other seriously dangerous offenders before and after prison should be more closely aligned with the agencies and government departments who deal with and understand the threat and risk they pose – namely the police, intelligence agencies and the Home Office. These agencies should take the lead when deliberations are being made about releasing a terrorist or seriously dangerous offender back into the community and the possible implications for public safety.

If responsibility for prisons were removed from the Ministry of Justice and returned to the Home Office, sentencing policy would be led by the Home Secretary, who in practice would be more inclined to follow the established principle that the law exists first and foremost to protect the public. In recent times, the Home Office and Ministry of Justice have given the appearance of operating in parallel spaces, yet both deal with the

same cohort of offenders at different stages as they progress through the criminal justice system.

Finally, uncoupling the institutions of state that deliver justice and an efficient criminal justice system (i.e. the courts and judiciary) from those that imprison and manage offenders (HMPPS) would re-establish the important sacrosanct principle of judicial independence, preventing a conflation by Ministers of the work of bodies which should be kept separate.

Recommendations

The Government, notwithstanding the Royal Commission into criminal justice, should move to bring about the following reforms:

- Absorb Her Majesty's Prisons and Probation Service (HMPPS) into the Home Office to re-balance justice towards protecting the public from further harm as a first order priority, to improve information sharing between agencies dealing with offenders and to re-establish the independence of the judiciary, reducing conflicts of interest.
- Establish a Lord Chancellor's Department to oversee the modernisation of the courts and judiciary, enshrining judicial independence and replacing the current Ministry of Justice as established in 2007.
- Commission a review of the monitoring and detention of extremist and convicted terrorists inside prison. The review – fully independent from the Ministry of Justice and Her Majesty's Prison and Probation Service – should report on the extent to which the recommendations made in a previous review in 2016⁷ have been implemented and how much of what has been implemented has been successful (including high security 'separation units').
- Review sentencing policy for terrorism offences that is widely viewed as 'inefficient, lacking transparency',⁸ and overly lenient.
- Legislate to prevent convicted terrorists and other seriously dangerous offenders being released early into the community on licence.
- Legislate to mandate that the Parole Board should oversee (with the police and intelligence agencies playing a significant role) a comprehensive threat and risk assessment of all terrorist offenders being released into the community, once they have served their full sentence.
- Review Parole Board procedures (as part of the 'Tailored Review of the Parole Board') to ensure that it is routinely in receipt of all intelligence from all relevant agencies, including classified intelligence from the police and MI5.

7. <https://www.gov.uk/government/publications/islamist-extremism-in-prisons-probation-and-youth-justice/summary-of-the-main-findings-of-the-review-of-islamist-extremism-in-prisons-probation-and-youth-justice>

8. <https://www.lawcom.gov.uk/project/sentencing-code/>

The role of the MOJ and HMPPS in protecting the public from harm

It ought to be a presumption that the MOJ is focused on reducing threat and risk inside and outside of prisons alongside its management of offenders. Yet, it lists its four priorities as:⁹

- A prison and probation service that reforms offenders
- A modern courts and justice system
- A Global Britain that promotes the rule of law
- A transformed department that is simpler, smarter and more unified

Her Majesty's Prison and Probation Service (HMPPS) is vague in its reference to dealing with threat and risk within prisons and outside, stating that it:

'is here to prevent victims by changing lives... and reduce offending by rehabilitating the people in our care through education and employment'.¹⁰

Laudable though these objectives are, they appear to relegate the protection of the public from harm to a second order priority, placing the offender and the offender's future life as a first order priority, ahead of protecting the public from further serious harm.

The one agency that does declare itself to be engaged in the assessment of threat and risk is the Parole Board. It describes itself as an 'independent body that carries out risk assessments on prisoners to determine whether they can be safely released into the community'.¹¹ It states: 'Our job is to determine if someone is safe to release. We do that with great care, and public safety is our number one priority'. However, the Parole Board depends on the Ministry of Justice and other government departments for the sharing of information about offenders in order to make sound judgements based on accurate risk assessments. This was not successfully achieved, for example, in the case of John Worboys.

The number of convicted terrorists is extremely small compared to the size of the prison population. As at 30 September 2019, there were 224 persons in custody for terrorism-related offences¹², just 0.26% of the wider 83,430 prison population in England and Wales.¹³ Of those in custody, 'the clear majority (77%) hold Islamist-extremist views. A further 17% are categorised as holding far right-wing ideologies with the remaining prisoners (6%) holding beliefs related to other ideologies'.

The threat to the UK from terrorism is currently assessed by MI5 as

9. <https://www.gov.uk/government/organisations/ministry-of-justice/about>

10. <https://www.gov.uk/government/organisations/her-majestys-prison-and-probation-service/about>

11. <https://www.gov.uk/government/organisations/parole-board/about>

12. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/850457/police-powers-terrorism-sep2019-hosb3019.pdf

13. <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04334>

‘Substantial’ which means an attack remains ‘likely’.¹⁴ The threat that terrorist prisoners pose is extremely high, both inside and upon release from prison. It is not uncommon for terrorist plots to germinate inside prison nor for other dangerous offenders to be subject to radicalisation by terrorist offenders, leading to a dangerous terrorist / organised crime nexus inside and subsequently outside prison¹⁵. The recent terrorist attack in HMP Whitemoor – a Category A high security prison – by a convicted terrorist and another Muslim convert is, however, the first of its kind in the UK (although two similar terrorist attacks inside French prisons occurred in 2018 and 2019)¹⁶¹⁷¹⁸. The alleged perpetrator Brusthom Ziamani was also recently named by a former inmate from HMP Woodhill, who described ‘sharia courts’ and ‘punishment beatings’ as taking place in that prison by a group of extremist prisoners who had sworn allegiance to Islamic State¹⁹.

Plainly there are strong arguments, therefore, for treating this small but extremely dangerous cohort of offenders, who have already proved that they are a threat to public safety, very differently from the wider prison population (particularly when deradicalisation programmes have no established track record) and for making structural changes to the Departments of State that currently deal with the threat and risk that these offenders pose, inside and outside of prison.

14. <https://www.mi5.gov.uk/threat-levels>

15. <https://ctc.usma.edu/crime-as-jihad-developments-in-the-crime-terror-nexus-in-europe/>

16. <https://www.euronews.com/2019/03/05/inmate-wounds-two-french-prison-guards-in-terrorist-attack>

17. <https://www.bbc.co.uk/news/world-europe-47467821>

18. <https://www.thelocal.fr/20180112/three-french-prison-guards-hurt-in-scissor-attack-by-german-al-qaeda-inmate>

19. <https://www.thetimes.co.uk/article/islamist-extremists-hold-sharia-trials-and-groom-young-muslims-in-british-prisons-2pq7ptjtp>

Case Study: Usman Khan

In January 2012 Usman Khan was convicted of his role in a plot to bomb the London Stock Exchange – ‘engaging in conduct in preparation for acts of terrorism’, having attended Ellahi mosque in Tunstall, Stoke-on-Trent. The Fazal Ellahi Charitable Trust which operated this mosque was subsequently investigated by the Charity Commission in 2018 after the mosque’s imam, Kamran Hussain, was convicted of six charges of encouraging terrorism and two of encouraging support for a proscribed organisation.²⁰ In May 2019, the charity and mosque were shut down following the findings of the Charity Commission investigation.²¹

Following his conviction, Khan was initially given an indeterminate sentence by Mr. Justice Wilkie who stated that Khan and his co-conspirators were “about the long term business of establishing and operating a terrorist military training facility in Pakistan on land owned by Khan, to which British recruits... would go to receive training”.²² Despite the strength of comments by Mr. Justice Wilkie about the extent of Khan’s “dangerousness”, his sentence was subsequently changed by the Court of Appeal in April 2013 to an Extended Sentence for Public Protection²³ of 21 years with a custodial term of 16 years and an extended licence of five years. After eight years in prison, on 20th December 2018, Khan was automatically released on licence into the community without being assessed by the Parole Board.²⁴ Subsequently he carried out the terrorist attack on 29th November 2019, stabbing to death two young people.

The event he was attending in Fishmongers’ Hall on London Bridge marked the five-year anniversary of the Cambridge University criminal justice programme called ‘Learning Together’, a programme run by Cambridge University’s Institute of Criminology that sought to rehabilitate prisoners with workshops on storytelling. Khan had joined ‘Learning Together’ after his release from prison. Believing that he had reformed and been de-radicalised, it is understood that Cambridge University was considering offering Khan a place as an undergraduate. Harry Fletcher, a former head of the probation officers’ union, Napo, said that Khan was being seen by the probation service twice a week and had shown no sign of posing a risk.²⁵ During the ‘Learning Together’ conference on the day of the attack, Khan apparently sat quietly through the morning session, taking part in both storytelling and writing workshops. According to Gareth Evans, another ex-prisoner at the event, “He was unremarkable. I know that in one of the workshops he responded to one of the questions on the feedback.”²⁶

Learning Together, a Cambridge University programme, worked with Usman Khan in prison and after his release and used him as a case study to

20. <https://www.stokesentinel.co.uk/news/stoke-on-trent-news/charity-running-stoke-trent-mosque-2049388>

21. <https://www.gov.uk/government/news/trustees-failed-to-protect-charity-from-abuse-for-terrorist-purposes-regulator-finds>

22. <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/mr-j-wilkie-sentencing-remarks-r-v-chowdhury.pdf>

23. <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-usman-khan-others.pdf#page=22>

24. <https://www.gov.uk/government/news/parole-board-statement-on-london-bridge-attack-on-friday-29-november-2019>

25. <https://www.thetimes.co.uk/article/london-bridge-attack-poster-boy-for-rehabilitation-and-killer-wx9blb6n6>

26. <https://www.thetimes.co.uk/article/london-bridge-attack-the-killer-sat-feet-away-from-me-now-i-fear-for-the-scheme-that-helped-me-go-straight-3pxnmtgvc>

show how they have helped prisoners. Khan apparently penned a poem and a thank-you note to organisers after they provided him with a computer he could use without breaching his licence conditions, which restricted him from going online. Just months later he used his connection to the rehabilitation programme to get permission to travel to London and kill two of the organisers who were working for the programme.

It is unclear at what point during his sentence Khan moved from HMP Belmarsh to HMP Whitemoor, but it is here that he became involved with academics from Cambridge like Mr Jack Merritt, who began working at the prison in 2016. Both HMP Whitemoor and Khan were considered by those engaged in prison de-radicalisation as a success story. In a case study of Khan²⁷, it was said that he had been ‘involved with *Learning Together* a great deal’ since his release, that he had given a speech via a video link at the Institute of Continuing Education in Cambridge and had attended a ‘discussion’ at his former prison. The rehabilitation programme provided him with a computer both whilst he was in custody and after his release ‘so that he can continue his studies and writing’. The case study shows how *Learning Together* provided 15 Whitemoor inmates with references in the last year which were used for higher education applications and parole board hearings.

Learning Together said it was “proud” to be able to fund-raise to provide Khan with a “secure non-networked Chromebook that he can use to study and develop his writing while complying with his licence terms”. His thank-you note stated that the project had a “special place in my heart”. “*Learning Together* is about opening minds, unlocking doors, and giving voice to those who are shut down, hidden from the rest of us,” he wrote. “It helps to include those who are generally excluded. I cannot send enough thanks to the entire *Learning Together* team and all those who continue to support this wonderful community.”

It is not known whether he was plotting his attack whilst praising the work, but it was not the first time that Khan gave the impression of having been successfully de-radicalised. Writing from his cell seven years ago, he asked for the chance to “prove” he no longer harboured extreme Islamist views or posed a threat to the public. He was considered a model prisoner.²⁸

The difficulties of relying upon the UK’s main prison terrorist de-radicalisation programme Healthy Identity Intervention (HII) were recently laid bare by the forensic psychologist behind the scheme, Christopher Dean, who stated in a radio 4 interview that “sometimes they may come into contact with individuals or they may go through a spell in life where they may begin to re-engage with groups or causes or ideologies associated with their offending behaviour... I think we have to be very careful about ever saying that somebody no longer presents a risk of committing an offence. I don’t think you can ever be sure. We have to be very careful about saying someone has totally changed or has been cured”. He went on to state “I think we need to be very careful about suggesting that interventions in themselves are the solution”. He also acknowledged that to date, no empirical study had been undertaken by the MOJ to test whether the HII scheme or the follow-on programme *Learning Together* had been successful at preventing re-offending or extremist behaviour.²⁹

The government introduced Extended Indeterminate Sentences in December 2012,³⁰ which mean that offenders like Khan can currently only

27. <https://www.telegraph.co.uk/news/2019/12/01/london-bridge-attacker-poster-boy-rehab-scheme-targeted/>

28. <https://www.telegraph.co.uk/news/2019/12/01/london-bridge-attacker-poster-boy-rehab-scheme-targeted/>

29. <https://www.bbc.co.uk/news/uk-50967100>

30. <https://www.gov.uk/government/news/new-sentences-and-criminal-offences-come-into-effect>

be released when they have served two thirds of their sentence with up to a further eight years on licence. However, if the sentence for the terrorist offence was less than 10 years in prison and began before 13 April 2015, then release can still be automatic. If it was for more than 10 years or the offender was sentenced after that date, then it is the Parole Board that decides whether prisoners are released, and they are only ‘automatically’ released at the end of their custodial sentence.

It is not known how many terrorist offenders in prison are currently on Extended Sentences that will allow them to be released without referral to the Parole Board but, by way of example, 31 persons were convicted of terrorism-related offences in the year ending 31 December 2014, eight of whom were sentenced to more than four years but under 10 years, and 16 of whom were sentenced to more than one year but under four years. Of this cohort of 31, therefore, 24 qualified for automatic release.³¹ Research by *The Guardian* revealed that ‘of the 90 sentences handed down for the preparation of terrorist acts – effectively attack planning – in the decade to 2016, almost a third will have been spent by the end of this [2016] year. A further 23 will be spent in 2019.’³²

Analysis by the Sentencing Council confirmed that more than 40% of the sentences for terrorism offences handed down over a 10-year period prior to the end of 2018 would have been served with ‘more than 80 of the 193 terms issued for terrorism offences between 2007 and 2016’ running out by the end of 2018, with the number of individuals released being much higher owing to the release of prisoners on licence.³³

The UK based ‘rule of law’ model for countering terrorism threats includes covert evidence gathering by the domestic Security Service, MI5, working with the Counter Terrorism Police Network. The usual aim is for early pre-emptive interception to prevent attacks from occurring and convictions for offences that are essentially preparatory offences. Whilst not always the case, terrorists can be given lower sentences in relation to these preparatory offences than if they had actually carried out an attack because the harm they would have caused had they been successful is sometimes difficult accurately to assess. This is less likely for complex attack plots involving several co-conspirators such as *Op. Overt* (2006)³⁴, an Al-Qaeda plot to blow up several airliners simultaneously over the Atlantic, when lengthy sentences were passed even though the plot was intercepted before it came to fruition.

The most common offence for which persons have been convicted for terrorism-related offences since 11 September 2001 is ‘preparation for terrorist acts’ (section 5 of Terrorism Act 2006), which has accounted for 15% of all terrorism-related convictions.³⁵ This important offence enables effective law-based intervention at an early stage without having to try to prove a conspiracy, as was previously the case prior to this legislation coming into effect. Whilst the maximum sentence for this offence can be life in prison, sentences are often much shorter.

Following the terrorist attack committed by Khan, the Lord Chancellor and Secretary of State for Justice, the Rt. Hon Robert Buckland QC, publicly stated that the MOJ, police and MI5 were urgently working together to

31. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/437826/police-powers-terror-q4-2014.pdf

32. <https://www.theguardian.com/uk-news/2018/jun/03/surge-in-terrorists-eligible-for-parole-poses-threat-to-uk-security>

33. <https://www.theguardian.com/uk-news/2018/jun/03/surge-in-terrorists-eligible-for-parole-poses-threat-to-uk-security>

34. <https://edition.cnn.com/2009/WORLD/europe/09/14/uk.airline.bomb.sentencing/index.html>

35. <https://www.cps.gov.uk/terrorism>

review the “70 or so cases of terrorist offenders who were currently in the community on licence from prison”. He also said that he would be reviewing “not only those cases but also people who are about to be released, and also a wider group who were not convicted of terrorism offences, but who present an extremist risk in the prison system”.³⁶ This wider group constitutes a potentially significant number of offenders, identifiable as a result of counter terrorism police having engaged more recently in prosecuting known extremists for a range of criminal offences, adopting a tactic of being lawfully audacious in order to reduce the terrorist threat through all lawful means.³⁷ The comments by Buckland raise questions about the flagging within prisons of this wider group of prisoners and whether extremist motivations are sufficiently obvious so that they can be managed effectively, and their terrorism risk understood.

Immediately following the comments by the Lord Chancellor, police arrested a close associate of Khan, Nazam Hussain, who was subsequently recalled to prison for breach of his licence; and in a separate case in a different part of the country, Yayha Rashid, who was found in breach of his licence, was also recalled – and later convicted of a further terrorist offence.

These cases demonstrate i) the real possibility that sentence guidelines for terrorism offences are too weak, in that they fail to recognise the higher quantum needed for deterrence to operate credibly; (ii) insufficient information available to sentencing courts as to the threat represented by those whom they sentence (possibly sophisticated psychological profiling should be mandatory before sentence); (iii) insufficient management and assessment of terrorist offenders whilst serving their sentences, as the HMP Whitemoor case seems to illustrate; (iv) insufficient use of the Parole Board before release of any terrorist offender; (v) poor management of terrorist offenders on licence; and (vi) inadequate understanding of the operational and financial cost of managing dangerous terrorist offenders in the community.

36. <https://www.civilserviceworld.com/articles/news/moj-reviews-licence-conditions-terrorists-released-prison-after-london-bridge-attack>

37. <https://ctc.usma.edu/protecting-euro-2016-and-the-rio-olympics-lessons-learned-from-london-2012/>

Case study: Anjem Choudary

Anjem Choudary, the notorious founder of the proscribed terrorist organisation Al-Muhajiroun (ALM), was convicted in August 2016 of the terrorist offence of ‘inviting support for Islamic State’ (a proscribed organisation) contrary to section 12 of the Terrorism Act 2000. Choudary was an associate of Usman Khan and many other convicted terrorists. On 6 September 2016, Choudary was sentenced to five years and six months in prison but was subsequently released automatically on licence in October 2018, just over two years after his conviction.

When sentencing Choudary, the judge acknowledged how dangerous Choudary was but stated:

*“I have no doubt that each of your offences is so serious that nothing other than imprisonment would suffice to punish you. Although I have expressed my view as to the likelihood of your continuing to spread your message, and as to your dangerousness, the offence under section 12 is not one to which the provisions of Chapter 5 of the Criminal Justice Act 2003 apply, and the court therefore has no power to impose an extended sentence. The sentences must therefore be determinate sentences of imprisonment, and the real issue in each of your cases is how long those sentences must be”*³⁸

Despite having refused to take part in any de-radicalisation courses or exercises whilst in prison, Choudary was subsequently released from prison automatically on 19th October 2018, midway through his sentence, without any referral to the Parole Board. The then Prisons Minister Rory Stewart stated just prior to his release that Choudary remained “genuinely dangerous”, adding that the police and intelligence agencies would have to watch Choudary “like a hawk”.³⁹ Choudary remains on licence in the community and under monitoring by the police and MI5.

This case study demonstrates: i) a lenient sentence for a terrorist offence; ii) weak law/policy that resulted in the release of a known dangerous terrorist offender into the community without any referral or risk assessment by the Parole Board; iii) an on-going operational and financial cost (surveillance by police and MI5 of terrorist offenders is extremely resource intensive) of monitoring such an unreformed dangerous offender back in the community.⁴⁰

38. <https://www.judiciary.uk/wp-content/uploads/2016/09/r-v-choudary-sentencing.pdf>

39. <https://www.npr.org/2018/09/12/647039195/dangerous-islamist-preacher-set-to-be-released-early-from-u-k-prison>

40. <https://www.thetimes.co.uk/article/qatada-costs-pound100000-a-week-f62fx87xld2>

Case study: John Worboys

John Worboys was a serial rapist and former London black cab driver who was convicted of 19 offences, including one count of rape, five sexual assaults, one attempted assault and 12 drugging charges (though investigating officers believed that he may have carried out over 100 similar offences between 2002 and 2008). Worboys was given an Indeterminate Sentence for Public Protection (IPP) meaning he could be kept in prison for as long as he was deemed to remain a danger to the public.

A subsequent controversial decision by the Parole Board to release Worboys was overturned when several of his former victims successfully challenged the decision in the High Court.⁴¹ The then Chair of the Parole Board, Prof. Nick Hardwick, resigned over the case, criticising the MOJ for not providing sufficiently comprehensive case papers upon which the Parole Board could make a decision on the risk Worboys posed. Worboys was subsequently convicted of a further four similar offences and sentenced to two life sentences with a minimum term of six years.⁴²

This case demonstrates: i) weaknesses in a criminal justice system that resulted in a relatively short sentence for one of the most dangerous serial rapists of modern times; ii) poor sharing of intelligence from the MOJ to the Parole Board resulting in a highly dangerous offender being risk assessed as safe to be released; iii) poor decision making by the Parole Board on the threat Worboys posed if released; iv) impotence by the MOJ in its ability to intervene and challenge a decision by the Parole Board, leaving it to victims to undertake a judicial review of the Parole Board's decision.

41. <https://www.bbc.co.uk/news/uk-43568533>

42. <https://www.theguardian.com/uk-news/2019/dec/17/john-worboys-jailed-for-life-over-attacks-on-four-more-victims>

Legal and institutional weaknesses exposed in the criminal justice system

It is difficult to judge whether these three case studies are symptomatic of legal and institutional failures that need to be addressed by the government and the forthcoming Royal Commission, or whether they are exceptional cases in an otherwise complex and satisfactory process of managing the threat and risk posed by terrorists and other seriously dangerous offenders. They are, however, all recent cases and at the most serious end of the terrorist and violence threat spectrum.

The Ministry of Justice was created in 2007 (replacing the Department for Constitutional Affairs), and the Home Office's responsibilities for probation, prisons and the prevention of re-offending were transferred to the new Ministry, which also has responsibility for the judiciary and the court system in England and Wales and for some UK-wide judicial matters. This division of responsibilities has been problematic since the inception of the MOJ. Fusing responsibility for courts and prisons into the same department has risked compromising the sacrosanct principle of judicial independence, with Ministers at the MOJ reluctant to provide clear political support for judicial independence when the judiciary have faced severe criticism from the media. It has also distorted the reasoning and action of responsible ministers and civil servants, discouraging the focus on public protection and security, which is central to the Home Office's core historic purpose.

There is a strong case that the management of terrorists both during their sentences and after release should be more closely aligned with the agencies who obtain, develop and analyse the relevant intelligence, namely the police, intelligence agencies and the Home Office. This does not appear to be the case at present, and it is not clear that all relevant parties are able to receive sensitive intelligence.

If responsibility for prisons were removed from the MOJ and returned to the Home Office, sentencing policy would be led by the Home Secretary and one would expect this to lead to the prioritisation of the primary principle that the law exists first and foremost to protect the public.

Under current arrangements, the Ministry of Justice has to maintain an ongoing relationship with the judiciary, with the Lord Chancellor often being understood to have a responsibility to speak up for the judiciary

within government. This is not in itself a conflict. The Lord Chancellor is certainly not the judiciary's spokesman. However, the overlapping responsibilities risk complicating the formation of robust sentencing policy and control over prisons in ways that undermine protection of the public.

The problems with the status quo have become increasingly clear in recent years. The previous Lord Chancellor (Rt. Hon David Gauke MP) had no powers to block the release of either Choudary or, in the case of Worboys, even to compel the Parole Board to reconsider their decision (the parole rules have now been changed to enable reconsideration at least⁴³). Gauke publicly entertained the idea of applying for judicial review of the Parole Board's decision but decided not to do so on the grounds that the application would be unlikely to succeed.⁴⁴ It was left to the victims of Worboys supported by the Mayor of London to bring a successful legal action⁴⁵. What is striking in both cases is that, unlike Home Secretaries in the past, the then Lord Chancellor had no capacity to protect the public and to block release of these offenders who were still extremely dangerous; in the case of Worboys, his only option was to bring legal action against the Board for which he had responsibility, and this option was not pursued, presumably amongst other reasons, because of the risk of political embarrassment if defeated.

The London Bridge attack by Usman Khan brought to public attention the problem of automatic release for many of those serving lengthy terms of imprisonment for terrorist offences. If sentencing policy were returned to the Home Office, it would be much easier and more likely that decisions about who should be responsible for releasing dangerous offenders, and the conditions on which they might be released, would be made with a view to public protection because of the closer alignment of the agencies that routinely deal with this issue. The Home Office has joined up responsibility for all security matters, oversees both policing and MI5 and its institutional orientation is very different to the Ministry of Justice. Relatedly, it is perhaps telling that despite the MOJ setting up a scheme for imprisonment of convicted jihadis in separate units within prisons – to minimise radicalisation of other prisoners – very few convicted terrorists have been separated in this way (although Anjem Choudary was one of the first), reportedly because of fear of anticipated human rights litigation. There are reasons to hope that if the Home Office were responsible for prisons, this pre-emptive capitulation, before litigation has even been initiated, would be avoided.

Finally, the three case studies above all illustrate the inherent difficulties of two different Departments of State (and their respective Ministers), managing the threat of terrorists and other seriously dangerous offenders in the public domain, through to prison and back out into the community. It should not be surprising therefore that intelligence on offenders is lost as the baton is passed between ministries whose role it is to manage them. The sharing of intelligence between police and MI5, both under the Home Office, has evolved over many years but continues to be challenging as

43. <https://www.gov.uk/government/news/new-improvements-to-parole-board-transparency-and-victim-support>

44. <https://www.lawgazette.co.uk/law/worboys-judicial-review-inappropriate-lord-chancellor-says/5064452.article>

45. <https://www.london.gov.uk/press-releases/mayoral/sadiq-khan-challenging-decision-to-release-worboys>

evidenced by the recent comments of the coroner from the inquest into the first London Bridge terrorist attack in 2017 when he stated that: ‘the evidence in this case revealed a need to improve communications and co-working between MI5 and CTP officers working on the same investigation’.⁴⁶

The MOJ Extremism Unit (ExU) is part of a wider MOJ Security Group that is responsible for ‘developing the strategic and policy responses to the risks presented by terrorists, extremists and radicalisers’. It receives intelligence on extremism from all prisons in England and Wales and uses this information to produce strategic analysis to assist operational colleagues. It also works with Regional Counter Terrorism Coordinators (RCTCs) who are ‘based across the regions to develop intelligence and manage terrorist or extremist prisoners in custody’⁴⁷. RCTCs work with all key partners such as police, probation, security services, and Probation counter terrorism leads.

From my own experience, however, I know that information sharing between the National Counter Terrorism Police Network/MI5 and HMPPS and the MOJ has been routinely problematic over the past ten years with an absence of formal mechanisms for sharing such intelligence and a culture within the MOJ of not fully embracing the sharing of intelligence with the police and MI5. Whilst counter terrorism police are usually involved in multi-agency ‘Pathfinder’ meetings that discuss the management of offenders prior to release (and lead a separate Multi Agency Screening Meeting (MAEM), there remains a high degree of frustration by senior detectives at the lack of response by the prison service to intelligence coming from sources other than their own, and indeed an inability to effectively receive and manage highly sensitive intelligence. There appears to be a cultural defensiveness that is entrenched and highly resistant to structural change in this important field.

This is not the case with the Parole Board, which should remain independent whilst receiving full disclosure of information from other agencies involved in the assessment of threat, harm and risk, including highly classified intelligence from the police and intelligence agencies. Following the allegation that the MOJ did not provide the Parole Board will sufficient information relating to the history of ‘Worboys’ wider offending, both the HMPPS and the Parole Board have subsequently taken steps to address the issue of full disclosure with ‘new guidance and instructions issued to HMPPS staff compiling dossiers for the Board to make sure that all relevant evidence is always provided – including evidence relation to unconvicted offences and the judges sentencing remarks’.⁴⁸

Decisions made by the Parole Board are, however, currently made in private but following the MOJ review into the Worboys case, there is now a ‘presumption that victims who want one should be provided with a summary of the reasons for the Parole Board decisions’.⁴⁹ These ‘decision summaries’ (in effect since 22 May 2018) make Parole Board decisions ‘more open’. The decision to release a prisoner is clearly judicial in nature: the basis of such a decision could, however, be even more open to scrutiny and visible to victims and equally the wider public, whose safety could be at risk from the release of an offender.

46. <https://londonbridgeinquests.independent.gov.uk/wp-content/uploads/2019/11/Final-Report-on-Action-to-Prevent-Future-Deaths-Report.pdf>

47. <http://www.justice.gov.uk/downloads/offenders/probation-instructions/pi-10-2014-managing-terrorist-extremist-offenders.doc>

48. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775844/review-of-the-pb-rules-and-rm.pdf; page 8

49. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775844/review-of-the-pb-rules-and-rm.pdf

In a statement made by the former Secretary State for Justice Rt. Hon David Gauke MP, the MOJ announced the creation of a new ‘Reconsideration Mechanism for Parole Board decisions’ and a further ‘Tailored Review of the Parole Board’ to ‘consider whether there is a case for further, more fundamental reforms that would require primary legislation – including whether to change the powers and responsibilities conferred on the Parole Board or whether it should be reconstituted to deliver its functions in a different way’.⁵⁰

One area this review should consider is whether release on licence for convicted terrorists has in effect come to be seen as a right rather than a privilege, with insufficient emphasis placed on the protection of the public. Furthermore, whether this ‘second sentencing judgement’ too often appears to be at odds with the original comments by a judge upon conviction, weakening confidence by the public in the effectiveness of the entire criminal justice system.

Taking account of the uniquely inherent dangerousness of all terrorist offenders - owing to the distinctly ideological and often theological motives that drive them, it is recommended that release on licence of terrorist offenders is ended. Convicted terrorists should serve their full sentence and all be subject to a Parole Board hearing prior to release, with the police and intelligence agencies having a statutory role in assisting the Parole Board assess the threat and risk they pose.

There is also a need to address the overlap of responsibilities for managing the threat and risk that terrorists pose once released. Three agencies (Probation Service, police and MI5) currently manage the risk of a released terrorist offender, but it is not entirely clear who leads the process day to day and how information is shared across agencies. The police remain responsible for public safety, MI5 have the lead for intelligence gathering relating to those engaged in terrorism, but the Probation Service have the statutory responsibility for the supervision of licence conditions of offenders released from prison and are the lead agency under the Multi Agency Public Protection Arrangements (MAPPPA) for offenders on licence. Yet most convicted terrorists will also be subject upon release to a Terrorism Notification Order (TNO), issued by the judge upon sentence and requiring them, amongst other things, to register at a police station. The police (not Probation Service) are responsible for the management and oversight of a released offender’s compliance of a TNO.

From the little information currently available in the public domain, it appears that Khan’s licence conditions were amended days before he was allowed to travel to the rehabilitation conference on London Bridge, but it is not clear if all agencies were aware of this. The management of terrorism offenders between agencies is now part of the review being undertaken by MI5 into the Khan case and the forthcoming Inquest will undoubtedly focus on this issue as a potential fault line in the system of risk management of a known terrorist offender.

50. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775844/review-of-the-pb-rules-and-rm.pdf

Conclusions

The new government should re-focus prison and wider criminal justice policy towards protecting the public from further harm as a first order priority (rather than prisoner rehabilitation), especially for the small cohort of seriously dangerous convicted terrorists.

In the wake of the apparent terrorist attack committed by a convicted terrorist prisoner inside HMP Whitemoor on 9th January 2020, the first inside a British prison, the government should urgently commission an independent review of the monitoring and detention of all extremist and convicted terrorist prisoners to understand how a convicted terrorist and another violent offender were able to acquire bladed weapons and replica suicide vests inside prison and commit the attack. The review should report on the extent to which the recommendations made in a previous review in 2016⁵¹ have been implemented.

The Law Commission has concluded that the sentencing policy for terrorism offences is ‘inefficient, lacking transparency’,⁵² and according to polling undertaken during the General Election, a majority of the public consider sentences for terrorists to be overly lenient. A review of sentencing for terrorist offences is, therefore, a pressing priority⁵³.

Owing to the fact that terrorists are uniquely motivated by ideology and, in the case of jihadist Islamist terrorists, a particular theology, there is a need to ensure that terrorist offenders are monitored in a particularly stringent manner and not released early on licence but serve their full prison sentence term. If legislated for, this would simplify the monitoring of these offenders’ post release, negating the need for the Probation Service to monitor their licence conditions alongside police, leaving the police solely responsible with MI5 for monitoring and managing their release back into the community.

Following the review of the mistakes made during the assessment of the serial sex offender John Worboys, a more thorough ‘Tailored Review of the Parole Board’ has already been commissioned. Amongst other issues, this should review the current sharing of intelligence from all relevant agencies with the Parole Board and recommend that the police and intelligence agencies play a more significant role in undertaking comprehensive threat and risk assessments of all terrorist offenders being released into the community, once they have served their full sentence.

Finally, this paper has made a strong argument for merging Her Majesty’s Prisons and Probation Service (HMPPS) back into the Home Office to re-balance justice towards protecting the public from further harm as a first order priority, to improve information sharing between agencies dealing

51. <https://www.gov.uk/government/publications/islamist-extremism-in-prisons-probation-and-youth-justice/summary-of-the-main-findings-of-the-review-of-islamist-extremism-in-prisons-probation-and-youth-justice>

52. <https://www.lawcom.gov.uk/project/sentencing-code/>

53. <https://www.thetimes.co.uk/article/boris-johnsons-hard-line-on-terrorist-sentencing-after-london-bridge-attack-has-voter-appeal-t0mr65ml6>

with offenders and to re-establish the independence of the judiciary reducing conflicts of interest. Alongside this, it will be important to re-create a Lord Chancellor's department to oversee the modernisation of the courts and judiciary, enshrining and protecting judicial independence.



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