



Prison Overcrowding, Transfers Abroad and the Rule of Law: Reflections on the Criminal Justice Bill 2023-24 (Abandoned)

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Introduction

Today's [King's Speech](#) has seen the new Labour Government announce an extensive programme of legislation. This follows welcome commitments which the [Prime Minister](#), [Lord Chancellor and Secretary of State for Justice](#), and the Law Officers ([Attorney General](#) and [Solicitor General](#)) have already made to the Rule of Law.

The Bingham Centre will be engaging with this legislative programme through our [Rule of Law Monitoring of Legislation Project](#). The project involves close analysis of Bills to consider their implications for the Rule of Law and to suggest improvements from a Rule of Law perspective. We plan to resume publishing these reports in the autumn after the summer recess.

In this short comment piece, we reflect on proposals for transferring prisoners abroad, which were contained in a Bill that was abandoned at the end of the last session of Parliament in May, when it was overtaken by the announcement of a general election. Our focus is on significant Rule of Law issues raised by the foreign prisons provisions in the Bill, including concerns about delegated powers and about scrutiny of the underlying international agreements with foreign countries for the transfer of prisoners. We do not consider the full human rights implications of the provisions, which include for example greater challenges for family visits than usually posed for prisoners in domestic prisons.

The Criminal Justice Bill 2023-24 and its proposals for transferring prisoners abroad

The [Criminal Justice Bill 2023-24](#) was included in the [King's Speech 2023](#) before it was introduced in the House of Commons on 14 November 2023. The Bill was sprawling in the range of issues it sought to address. One of the Bill's stated [aims](#) was to "build a better justice system by... establishing powers to transfer prisoners in and out of England and Wales to serve their sentence abroad".

The Bill had gone through Second Reading, Committee Stage, and [one day of Report Stage](#) in the Commons shortly before the then Prime Minister, Rishi Sunak, called a general election on 22 May 2024. The Bill did not make the [wash-up](#) (the truncated process by which some pieces of legislation were progressed and passed before Parliament was [prorogued](#) on 24 May 2024). Given the complexity of the Bill and some of its provisions, it is right that it was not rushed onto the statute book by this method (see e.g., comment [here](#) on use of the wash-up process).

However, the overcrowded prisons crisis remains a [live issue](#). Indeed, in its [manifesto](#), the Labour Party committed to "us[ing] all

relevant powers to build the prisons so badly needed". Then, a week after the new Labour Government was formed, it was [reported](#) that some prisoners will be released early to ease prison overcrowding. This blog does not consider the new policy announcement. Instead, it takes a look back and highlights some of the Rule of Law issues raised by the foreign prisons provisions in the Criminal Justice Bill 2023-24 in the event that similar proposals are made in future when prison overcrowding is debated.

An [effective criminal justice system](#) is a core component of the Rule of Law and a key factor used to evaluate such systems is whether the basic rights of prisoners are respected. It is important to recall the fundamental concept in the [UN Basic Principles for the Treatment of Prisoners](#) that "[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights" and in other agreements to which the state concerned is a party.

Why did the Government propose these powers?

In October 2023, the then Justice Secretary, Alex Chalk, [announced](#) the Conservative Government's plan to rent prison spaces abroad. He cited as precedent similar arrangements taken by Belgium and Norway in recent years. At [Second Reading](#) in November 2023, the then Secretary of State for the Home Department, James Cleverly, said that in order "temporarily to increase prison capacity" the Bill would "introduce domestic powers to transfer prisoners to rented prison spaces overseas subject to future agreements with other countries".

A [briefing paper](#) from the Parliamentary Office of Science and Technology published in January 2024 reported that "[t]he prison estate is operating at 99% of its usable operational capacity and over 60% of prisons are overcrowded".

There were [reports](#) in October 2023 that judges had received private guidance advising that they delay sentencing of convicted criminals given the state of prison overcrowding. In May 2024, it was [reported](#) that the National Police Chiefs Council had requested police forces to consider "pausing non-priority arrests... to ease the pressure within the criminal justice system". It was also reported that [Operation Early Dawn](#) would be put in place as a short-term measure due to prison overcrowding.

It is against this backdrop that the Criminal Justice Bill was introduced in the last parliamentary session to establish powers to transfer prisoners to serve their sentence abroad.

Clauses 32 to 36 of the [Criminal Justice Bill \(as amended in Public Bill Committee\)](#) concerned the transfer of prisoners to foreign prisons. The [Explanatory Notes](#) to the Bill explain:

"There is currently no legislation that covers the transfer of prisoners in foreign jurisdictions for the purposes of being detained in rented prison spaces on behalf of England and Wales. This legislation enables the transfer of any prisoner detained in English and Welsh prisons to a foreign jurisdiction, whilst retaining responsibility for the enforcement of the sentence. Separately, an international agreement will need to be negotiated to rent prison space from foreign jurisdictions. The provisions in this Bill provide for a secondary legislation power to amend domestic legislation to facilitate any implementation of such future agreement" (para 90).

The provisions were skeletal in form. During the [Ninth Sitting of the Committee Stage](#) in January 2024, Laura Farris, the then Parliamentary Under-Secretary of State for the Home Department, explained that the purpose of the provisions was to "set the framework for future agreements, so of necessity they are deliberately quite widely drafted and do not seek to tie our hands".

What were the Rule of Law implications of these provisions on foreign prisons?

Clause 32 of the Bill provided that "Sections 33 to 36 make provision about any arrangement made between the United Kingdom and a foreign country which provides for prisoners (or any description of prisoners) to be detained, in the foreign country, for part or all of a period for which they are liable to be detained".

"Prisoner" was defined in broad terms in Clause 32 of the Bill as meaning "a person detained (or liable to be detained) in a prison

in England and Wales in pursuance of a sentence passed, or order made, by a court or tribunal anywhere, other than a person detained under section 42 of the International Criminal Court Act 2001". Therefore, it was not clear on the face of the Bill whether, for example, prisoners living with disabilities or prisoners who were survivors of modern slavery would be at risk of being sent abroad under these provisions. The [Prison Reform Trust](#) expressed similar concerns that "vulnerable prisoners, including individuals who are pregnant, disabled or have mental health needs or learning difficulties could be subject to transfer" and cautioned that there were "no explicit safeguards or guarantees to protect against this in the bill". The [Hansard Society](#) also warned that although it had been "reported that no prisoner would be transferred under the scheme if they were 'deemed unsuitable' due to being a 'safety risk' or a 'threat to national security' or because they suffer from health problems... such conditions do not appear in the Bill" and instead "these details would be established via the international agreement(s) and any implementing secondary legislation, both of which will be subject to limited, if any, parliamentary scrutiny".

"Foreign country" was also broadly defined in Clause 32 of the Bill as "a country or territory outside the United Kingdom".

In this regard, the [European Convention on Human Rights \(ECHR\) Memorandum](#) accompanying the Bill stated that "[t]he clauses in the Bill facilitate the transfer of prisoners in England and Wales to the overseas jurisdiction and make provision to ensure oversight of any agreement with the foreign country under which the UK prisoners will be held" (para 120). It continued, "[t]he clauses do not set the terms of such agreements which will be international agreements subject to parliamentary process under the Constitutional Reform and Governance Act 2010" (para 121). It also emphasised that "[a]ny agreement and operation of that agreement would need to ensure preservation of all ECHR rights of prisoners and would be looking to provide a regime comparable to that of prisons in England and Wales" (para 121). During the [Ninth Sitting of the Committee Stage](#), Laura Farris indicated that "[t]o the extent that the exploratory conversations have begun, we are only having them with other European countries" and "[t]hat means that they are bound by the same obligations under the European convention on human rights". During [Report Stage](#) she stated that the Government would "conclude a deal only with a country that can demonstrate that its prison conditions and capabilities meet the applicable human rights standards". She added that "[t]he Secretary of State retains responsibility for each prisoner, which ensures that any transferred prisoner retains all their rights under the European convention on human rights, irrespective of where they may be transferred".

As noted above, a particular human rights issue raised in this context concerns the right to respect for private and family life contained in [Article 8 ECHR](#). Commenting on the Bill, the [Prison Reform Trust](#) cited the Farmer Review's emphasis on the importance of family relationships to help reduce reoffending. The Prison Reform Trust also raised concerns about the financial cost and logistical challenges involved in visits abroad. The ECHR Memorandum accompanying the Bill acknowledged that "[a]ny international agreement and the implementation of the agreement will engage Articles 2, 3, 5, 6, and 8 of the ECHR" (para 122). It also noted that "[w]hile the provisions for transfer in the Bill do not directly engage Article 8, it is recognised that they need to operate in accordance with Article 8 and a prisoner's individual circumstances will be required to be considered in advance of transferring any prisoner to a prison overseas" (para 122).

Additionally, the UK has [ratified the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\)](#) which aims to establish a system of regular visits by independent international and national bodies to monitor places of detention. The UK's [National Preventative Mechanism \(NPM\)](#) under the OPCAT was established in 2009. In October 2023, in evidence to the Justice Committee's [inquiry into the future prison population and estate capacity](#), former Head of the UK NPM Secretariat [Louise Finer](#) highlighted the risks and challenges posed by plans to rent prison space abroad. In particular, Finer warned that the "long-standing resistance by successive UK governments to the extra-territorial application of its international human rights treaty obligations is also relevant". She stressed that "[t]here is a risk that the UK government will create its own legal vacuum unless it ensures its international treaty obligations as they relate to this scheme are

upheld".

Clauses 33 and 34 of the Bill related to warrants for the transfer of a prisoner to or from a foreign prison. Among other things, Clause 33 provided that the Secretary of State "may issue a warrant for the transfer of the prisoner to the foreign country, for the purpose of being detained in a prison in the foreign country" and also "may issue a warrant for the return of the prisoner to the United Kingdom under the arrangement". Clause 33 was stated to apply where the UK and a foreign country "have made an arrangement of a kind mentioned in section 32(1)" and "the Secretary of State and the appropriate authority of the foreign country agree to the transfer of a person ("the prisoner") under the arrangement". Clauses 33 and 34 did not contain any further test or balancing exercise the Secretary of State would be required to undertake before issuing a warrant, and so it was not clear from these provisions how the power would be exercised.

Clause 35 related to the oversight of foreign prisons. Among other things, where a relevant arrangement was made, it required the Secretary of State to appoint a controller in relation to that arrangement who must "(a) keep under review, and report to the Secretary of State on, the running of any prison where persons are detained under the arrangement" and "(b) ensure that persons who have been transferred to a foreign country under the arrangement are returned to England and Wales before the end of the period for which they are liable to be detained". Clause 35 also provided for an amendment to the [Prison Act 1952](#) to provide that HM Chief Inspector of Prisons "may - (a) inspect or arrange for the inspection of any prisons where persons are detained under an arrangement of a kind mentioned in section 32(1) of the Criminal Justice Act 2024 (service of custodial sentences abroad), and (b) report to the Secretary of State on them". No further detail was given in Clause 35 as to how these functions would be exercised in practice in relation to foreign prisons, nor what minimum standards the foreign prisons would be required to meet. In her evidence to the Justice Committee, cited above, Louise Finer highlighted a range of questions that would need to be addressed if HM Inspectorate of Prisons were to be given a role in such cases.

Finally, **Clause 36** of the Bill provided that the Secretary of State "may by regulations make further provision in connection with an arrangement of a kind mentioned in Section 32(1)". This is a [Henry VIII clause](#). The [Delegated Powers Memorandum](#) accompanying the Bill stated that "the Government is taking a power ... to amend primary and secondary legislation, as required, for the sole purposes of implementing and ensuring compliance with any international agreement made for the purpose of holding prisoners in another State" (para 51). It explained that "this power is necessary because, until those negotiations conclude, the Government cannot know what further legislative amendments may be required, and the timeframes in which the amendments will need to be made" (para 52).

During the [Ninth Sitting of the Committee Stage](#), Laura Farris similarly stated that the Government were "seeking a delegated power that will allow us to amend legislation for the sole purpose of complying with the terms of any future prison rental agreement that we sign". She stated that "[w]ithout this delegated power, further primary legislation would need to be taken through Parliament at the conclusion of individual negotiations to implement the international agreements" which would "impact the Government's ability to act swiftly". In her words, the delegated power formed "an essential part of the future-proofing framework" designed to accommodate future negotiations and arrangements.

The risks to the Rule of Law from an increasing reliance on delegated legislation have been widely reported (see e.g., [here](#) and [here](#)). As the [Hansard Society](#) stated in relation to the foreign prisons provisions in the Criminal Justice Bill 2023-24:

"The acceptability to Parliament of any deal to transfer prisoners to another country will depend on the details of the deal(s): for example, to which country will the prisoners be sent, under what conditions, how will prisoners for transfer be selected, how will human rights provisions be respected and how will the prisoners be returned to the UK on completion of their sentence. The Bill as currently drafted invites parliamentarians to grant powers to Ministers to negotiate agreements to transfer prisoners abroad without knowing how the powers will be used in respect of any such matters."

A related question here is whether Parliament would be able to sufficiently scrutinise the underlying international agreements. During [Report Stage](#), Laura Farris stated that "[t]he Lord Chancellor has already confirmed that the use of these powers requires a valid international agreement, and any such agreement would be put before Parliament as a treaty, subject to ratification procedures contained in the Constitutional Reform and Governance Act 2010". However, as the [Hansard Society](#) commented, "the Bill does not explicitly require that any and all international agreements struck in relation to [these clauses] must be made in the form of a Treaty" and "[a]n international agreement made in the form of a Memorandum of Understanding (MoU), for example, may not be subject to active parliamentary scrutiny and approval". Indeed, in its [report](#) on the original Memorandum of Understanding between the UK and Rwanda for an asylum partnership, the House of Lords International Agreements Committee was emphatic in asserting that, "[a]greements that raise fundamental questions about individual rights should not be entered into through an MoU, but through a formal treaty".

Conclusion

The issue of prison overcrowding will not go away anytime soon: prison population numbers are [projected](#) to increase to between 94,600 and 114,800 people by March 2028.

If plans are made to resuscitate the Criminal Justice Bill's provisions relating to foreign prisons in idea or substance in order to address prison overcrowding, the new Labour Government should consider the Rule of Law concerns highlighted above. In particular, it should ensure that there is opportunity for full and effective Parliamentary scrutiny, not only of the domestic legislation but of any and all underlying international agreements.

URL: <https://binghamcentre.biicL.org/comments/132/prison-overcrowding-transfers-abroad-and-the-rule-of-law-reflections-on-the-criminal-justice-bill-2023-24-abandoned>