

Parliamentary Joint Committee on Intelligence and Security

Attorney-General's Department

Hearing date: 20 May 2024

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Andrew Wallace asked the following question:

Mr WALLACE: Can I pick up where I left off in my last question to the acting commissioner. In furtherance to Mr Wilson's concerns about the defences that may be available to an accused person under this regime: is the defence of 'honest but reasonable mistake of fact' available at least in the first instance to an accused person? This is not an offence of strict liability. There are defences and excuses available.

Mr Muffett: My colleague is just checking that now for us. Can I just draw attention to the key elements of the offence. In the previous panel we talked about it needing to be proven beyond reasonable doubt that a person intentionally entered or remained; that is intention. The second element is around the area being a declared area. We've talked about, and there's been evidence about, people accidentally being there and not being aware. The fault element that applies here is recklessness. The person has to be aware of a substantial risk, and it has to be unjustifiable to take the risk. It is not a matter of 'they have no idea'; it has to be proven beyond reasonable doubt that they were reckless as to whether the area was declared.

Mr WALLACE: You're looking at the issue of the honest but reasonable mistake of fact while we're talking, are you?

Mr Muffett: I will try to get you an answer on that shortly.

....

Mr WALLACE: Alright. Have you had a chance to consider my earlier question?

Mr Muffett: My apologies, but I might take that one on notice. I want to make sure that I'm going to give you the most accurate advice there.

The response to the question is as follows:

Section 9.1 of the *Criminal Code Act 1995* (Criminal Code) provides that a person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if the person is under a mistaken belief about, or is ignorant of, facts; and the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.

Sections 119.2(1)(a) and (b) of the Criminal Code sets out the elements of the offence that a person enters, or remains in, an area in a foreign country and that area has been declared by the Foreign Affairs Minister. The fault elements attached to these physical elements are intention and recklessness respectively. The application of section 9.1 of the Criminal Code to the offence would mean that a person who had a mistaken belief that, for example, they were entering a different area or the area had not been declared, may be able to rely on the defence of mistake or ignorance of fact. This will ultimately turn on the court's consideration of the circumstances and evidence adduced in a particular case.

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Josh Wilson asked the following question:

Mr JOSH WILSON: I hear what you're saying about the inclination to not have a reasonable excuse offence explicitly and statutorily in almost all of the criminal law. This is unusual. Where you have strict liability and the only mens rea and the only element of intent is that a person can be shown to have been reckless as to whether or not a place was a declared area, there's probably an argument for having something statutorily that allows the court to consider something else. But I hear what you're saying. Can you take on notice, when the UK put its regime in place and chose to include a reasonable excuse defence, is there anything the department can direct us to in terms of any explicit reasoning that led to the adoption or the inclusion of that defence. I think it would be useful for the committee to see that. It hasn't been drawn to our attention by the Law Council or the Human Rights Commission. Maybe it doesn't exist. But they obviously saw fit to put it there and it would be interesting for us understand why, as against the arguments you've made for keeping it out.

The response to the question is as follows:

The Committee may be assisted by a letter, of 6 September 2018, from the then United Kingdom Minister of State for Security and Economic Crime to Mr Nick Thomas-Symonds MP, outlining the reasoning for the proposed introduction of the 'entering or remaining in a designated area' provisions as part of the United Kingdom's Counter-Terrorism and Border Security Bill, including the associated reasonable excuse defence:

<https://assets.publishing.service.gov.uk/media/5b964ae0ed915d4d56171f0d/Letter-from-the-Security-Minister-to-Nick-Thomas-Symonds-MP.pdf>.



Rt Hon Ben Wallace MP
Minister of State for Security and
Economic Crime

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Nick Thomas-Symonds MP
House of Commons
London
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6 September 2018

Dear Nick,

**COUNTER-TERRORISM AND BORDER SECURITY BILL: FURTHER
GOVERNMENT AMENDMENTS FOR COMMONS REPORT STAGE**

I am writing to let you have details of the further Government amendments I tabled yesterday for Report stage.

*“Designated area” offence (new clause “*Entering or remaining in a designated area*” and amendments to clauses 8, 9, 10 and 23 and Schedule 4)*

At Second Reading, John Woodcock and other MPs pointed to the need to strengthen the legislation to tackle foreign terrorist fighters, and Assistant Commissioner Neil Basu argued for an Australian-style “designated area” offence in his oral evidence to the Public Bill Committee (Official Report, 26 June 2018, column 9). Gregor McGill, the Director of Legal Services at the Crown Prosecution Service, also indicated in his evidence that such an offence could help address some of the issues with foreign fighters in the future. The Government agrees with this assessment and new clause “*Entering or remaining in a designated area*” provides for such an offence.

The key features of this new measure are as follows:

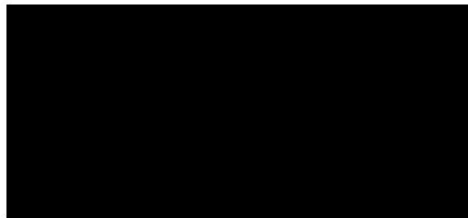
- It would be an offence for a UK national or UK resident to enter or remain in a designated area outside of the UK.
- The offence would not apply to a person who is in the service of, or acting on behalf of, the Crown (for example, as a member of the armed forces). For other persons, there would be a reasonable excuse defence. This would cover persons entering or remaining in the designated area, for example, for the purpose of providing humanitarian aid; to carry out work for a foreign government (including service in their armed forces) or the UN; to work as a journalist; or to attend a funeral of a close relative. It would be for the

defendant to demonstrate that the defence applied. Once a defendant has raised the defence the burden of proof (to the criminal standard) to disprove the defence would rest with the prosecution (see section 118 of the 2000 Act).

- Prosecution for the offence in England and Wales and Northern Ireland would require the consent of the Director of Public Prosecutions given with the permission of the Attorney General/Advocate General (see section 117 of the 2000 Act).
- The offence would be triable on indictment and subject to a maximum penalty of 10 years' imprisonment, a fine, or both. The offence would be added to the list of terrorism offences for which an extended sentence may be imposed.
- An area outside the UK would be designated by the Secretary of State by regulations (subject to the made affirmative procedure). The test for designation would be that the Secretary of State is satisfied that it is necessary to designate an area in order to protect the public from a risk of terrorism. The Secretary of State would be required to keep any designation under review.

I attach supplementary delegated powers and ECHR memoranda.

I am copying this letter to Diane Abbott, members of the Public Bill Committee, Yvette Cooper (Chair, Home Affairs Select Committee), Harriet Harman (Chair, Joint Committee on Human Rights), Dominic Grieve (Chair, Intelligence and Security Committee), Sir Edward Davey, John Woodcock, Lord Rosser and Lord Paddick; I am also placing a copy in the library of the House.



Rt Hon Ben Wallace MP

Minister of State for Security and Economic Crime