
Deportation and the Law

If you have internet access a lot of information about immigration law and deportation issues can be found on www.gov.uk. For those who do not have internet access below is a summary of issues most relevant to a person facing deportation.

What is deportation?

It is common to talk about someone being 'deported' when we mean that they are being removed. However, deportation and removal are two different processes. Deportation is usually used when a person has committed a criminal offence, and a deportation order invalidates any leave to enter or remain they may have had, gives the power to remove someone from the UK, and prohibits their return whilst the deportation order is in force. There is no automatic expiry date for a deportation order. It remains in force unless it is revoked which only happens in very exceptional circumstances. It is a criminal offence to return to the UK in breach of a deportation order.

Removal is an administrative function to remove from the UK someone who is unlawfully in the UK (for example having entered illegally, overstayed the period of leave given, or breached a condition of leave given) or, in the case of EEA nationals and their family members, non-compliance with the 2006 Immigration (EEA) Regulations.

A person who is removed may be banned from re-entry for a period.

Extradition

Extradition is also sometimes confused with deportation but this is an entirely separate process. Any person, including a British citizen, can be extradited to any country with which the UK has an extradition agreement if they are facing criminal charges in that country. Consideration of extradition is outside the scope of this toolkit.

Who can be deported?

Most foreign nationals can potentially be deported.

Consideration for deportation is usually triggered when a foreign national is convicted of an offence and given a custodial sentence. Most cases for deportation are looked at by Home Office Immigration Enforcement Criminal Casework (HOIE CC). Consideration for deportation is usually triggered when a foreign national is convicted of an offence and given a custodial sentence. However, a foreign national who is in the UK unlawfully can be removed, whether or not they have committed a criminal offence, which can include immigration offences.

1. A judge can recommend deportation in addition to a sentence of imprisonment. This power comes from the Immigration Act 1971 which gives a judge a power to recommend deportation on the basis that it is “not conducive to the public good” for a particular person to remain in the UK. The exercise of this power is becoming increasingly rare due to the increased scope of statutory deportation.
2. For a non EEA national, meeting the criteria for automatic deportation outlined in the UK Borders Act 2007 which is: a single sentence of 12mths where no exceptions are met
3. For a non EEA national receiving a single sentence of less than 12 months but having received 2-3 sentences which add up to 12 months or more in the last 5 years; or they have been convicted of any serious drug, gun or knife offence with a sentence of less than 12 months.
4. For an EEA national, under the EEA Immigration Regulations 2006, receiving a sentence of 24mths OR crime involving sex, drugs or violence. On occasions the HOIE CC may be instructed to look at a case that falls below the 24 month threshold.

Automatic Deportation under the UK Borders Act 2007

If a non-EEA Foreign National Offender meets the criteria of the UK Borders Act 2007 they are liable for ‘automatic deportation’ unless they can show that they fall into one of the categories outlined below.

The following categories of person are NOT considered for automatic deportation under the UK Borders Act 2007 but may be considered for deportation or removal under the Immigration Act 1971 or the Immigration (EEA) Regulations 2006:

- Any person for whom deportation would breach their rights contrary to either the Refugee Convention or the European Convention of Human Rights (ECHR)
- Any person who was under 18 years old at the time of conviction
- Any person for whom deportation would breach their rights under European law
- Any person who is facing extradition
- Any person who has been ordered to serve a sentence or time in a psychiatric institution under certain provisions of the Mental Health Act 1983

- Where the Secretary of State thinks that the application of the automatic deportation provisions would contravene the UK's obligations in relation to recognised victims of trafficking

Any person who has been served with a decision that they are liable for automatic deportation and believes that they fall into any of the above categories should tell HOIE CC within the deadline given in the notice of decision to deport. A person may potentially fall under more than one of the categories so it is important to consider all the categories and give all the relevant information. Below is more information about some of those categories.

Deportation under the Immigration Act 1971

Where a non-EEA Foreign National Offender is not being deported pursuant to the UK Borders Act 2007 – either because he/she has not been sentenced to a single period of imprisonment of at least 12 months, which can be made up of aggregate or consecutive sentences, or because one or more of the exceptions to automatic deportation is met – HOIE can potentially consider deportation pursuant to the Immigration Act 1971 on the grounds that the FNO's deportation would be conducive to the public good.

EEA Nationals

EEA nationals and their family members who commit crimes in the UK will be considered for deportation under the 2006 Immigration (EEA) Regulations. This is covered in the section below on - Any person for whom deportation would breach their rights under European Law.

Any person for whom deportation would breach their rights contrary to either the Refugee Convention or the European Convention of Human Rights (ECHR)

The Refugee Convention

The UK is a signatory to the 1951 Convention Relating to the Status of Refugees ('The Refugee Convention').

A person who is recognised as a refugee in the UK has been granted protection by the government because they are unable to return to their own country due to a well-founded fear of persecution. Signatories to the Refugee Convention are prohibited from returning someone to their country of origin if they face persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion under Article 33(1) of the Refugee Convention.

“No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (Refugee Convention Article 33(1). However, this is subject to Article 33(2), which states that the benefit of Article 33(1) may not be

claimed by a refugee if there are reasonable grounds for regarding them as a danger to the security of the UK or they have been convicted by a final judgment of a particularly serious crime, which means they constitute a danger to the community of the UK.

Therefore, someone can be refused protection under the Refugee Convention if they have committed serious crimes or otherwise represent a danger to security. However, the UK's obligations under the European Convention on Human Rights (ECHR) may prevent deportation if this would breach their human rights. If a person with refugee status can show that they would still be at risk of persecution if they were returned to their country of origin then they should not be deported.

However, if the circumstances which led to the grant of refugee status have changed (e.g. a change of government in their country of origin), which means they are no longer at risk of persecution, then refugee status may be withdrawn and the person will then face deportation unless they are covered by a different exemption category.

An 'asylum seeker' is a person who has applied to be recognised as a refugee and whose case is still under consideration by the Home Office. A person should not be removed from the UK while their asylum claim is still under consideration by the Home Office. In some cases the Home Office may decide to remove an asylum seeker to a safe third country that is responsible for considering the asylum claim: this is usually, but not always, the first State that an applicant entered, or, the first in which his or her asylum claim was lodged.

Any person who believes that they may have a claim to be recognised as a refugee should seek legal advice. Asylum claimants may be entitled to legal aid to make their case.

The European Convention on Human Rights

The UK is a signatory to the European Convention on Human Rights (ECHR). This has been incorporated into UK law via the Human Rights Act 1998 (HRA), which means a person can rely on the ECHR in the UK courts rather than having to take a case to the European Court of Human Rights.

In terms of contesting deportation Article 3 and Article 8 of the ECHR are most relevant.

Article 3 - Protection from torture and mistreatment

Article 3 of the HRA states:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

This means that no public authority in the UK can torture anyone or subject them

to inhuman or degrading treatment or punishment, nor can they send any person back to any country if there is a real risk that they will face torture or inhuman or degrading treatment or punishment.

The meaning of ‘torture’ and ‘inhuman or degrading treatment or punishment’ has been defined by a number of cases in the courts.

Article 3 is an absolute right, which means that it cannot be limited or restricted in any way, regardless of a person’s conduct (for example if they have committed a criminal offence).

If you think that you should not be deported because of risk of torture or inhuman or degrading treatment or punishment in the country to which you would be removed you should seek legal advice as soon as possible. An Article 3 application is treated in the same way as an asylum claim and applicants are entitled to legal aid to make their claim.

Article 8 - Right to respect for family and private life

Article 8 of the HRA states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In relation to deportation, the right to respect for family and private life usually involves the right to stay in the UK to be with family or to continue with the life that a person has established here.

Article 8(2) allows that in certain circumstances a public authority can interfere with this right. That indicates that Article 8 is NOT an absolute right and the government can take into account a number of considerations when considering the right to respect for family and private life.

Since 9 July 2012, the Immigration Rules have set out the requirements to be met by FNOs seeking to avoid deportation on the basis of family or private life they have established in the UK. If an FNO has been served with a decision to deport and believes he/she qualifies to remain in the UK on the basis of family or private life in the UK, they must provide evidence to show why they meet the requirements of the Immigration Rules within the time limit given in the decision to deport. The duty to provide information on family and private life in UK falls on the FNO and it is important to give Criminal Casework as much information as possible to about a person’s family and life within the UK so that it can be ascertained if there are any

circumstances which might give rise to Article 8 arguments against deportation.

When Criminal Casework consider Article 8 rights they are not only looking at the right of the FNP to lead their life in the UK but the rights of their family members, particularly any children, present in the UK, to have the FNP present as part of their life. It is therefore important to also give information on the impact of deportation on any children or other family members who might be affected. While the majority of Article 8 cases involve children it is not exclusive to such cases and other circumstances may fall within the remit of Article 8.

Any person who thinks that they may have a right to stay in the UK under Article 8 may wish to seek legal advice. However, there is no legal aid for assistance with an Article 8 case, so FNOs may have to pay for any legal assistance.

Any person for whom deportation would breach their rights under European Law

The UK is a member of the European Union (EU) and the European Economic Area (EEA). Citizens of EU and EEA countries have the right of freedom of movement within other member states and to exercise various other rights known as 'treaty rights'. These rights are so called because they come from the treaty agreements between the EU and EEA countries. Switzerland is not a member of the EU or the EEA but has an agreement which means that its citizens have equivalent rights in EU and EEA countries. All members of the EU are automatically members of the EEA, but EEA countries are not automatically members of the EU.

Below is a table showing the member countries of the EU and EEA. The date on which a country joined the EU is important as other member states may be allowed to restrict the rights of citizens of new member states (e.g. rights to access benefits or to take up employment) for up to seven years after the date of joining. So, for example, States may have restrictions on the rights of Croatian citizens up to 1st July 2020.

EU members prior to 1 May 2004	Countries joining EU on 1 May 2004 - restrictions ended on 1 May 2011	Countries joining EU after 2004	Countries which are NOT members of EU but are members of EEA	The other one
<ul style="list-style-type: none"> • Austria • Belgium • Denmark • Finland • France • Germany • Greece • Ireland • Italy • Luxembourg • The Netherlands • Portugal • Spain • Sweden • United Kingdom 	<ul style="list-style-type: none"> • Cyprus (Greek Cyprus only) • Malta • Czech Republic • Estonia • Hungary • Latvia • Lithuania • Poland • Slovakia • Slovenia 	<p>Joined 1 Jan 2007 (restrictions till Jan 2014)</p> <ul style="list-style-type: none"> • Bulgaria • Romania <p>Joined 1 Jul 2013 (potential restrictions till Jul 2020)</p> <ul style="list-style-type: none"> • Croatia 	<ul style="list-style-type: none"> • Iceland • Lichtenstein • Norway 	<ul style="list-style-type: none"> • Switzerland

Since all EU countries are members of the EEA, from this point on we will refer to the EEA meaning ‘all EU and EEA countries and Switzerland’.

When we talk about ‘a person for whom deportation would breach their rights under European law’ we are referring to citizens of European countries who are or have been exercising treaty rights (for example the right to work or study) in another European country and the family members of such people, even if the family members are from outside the EEA.

Because the EEA want to encourage citizens to move for employment and study, European law gives greater protection to those people and their families than to people from outside of the EEA. European law also gives some rights to the parents/carers of European children, particularly those who are sole parents or carers.

In practical terms, this means that the threshold for deportation for an EEA national or the family member of an EEA national is usually higher than that for an equivalent person from outside of the EEA (24 month custodial sentence rather than a 12 month custodial sentence unless the offence is an offence involving sex, violence or drugs).

An EEA national who meets the criteria above will trigger consideration for deportation but the Criminal Casework team will also consider information about how long the person has been resident in the UK and what they and their spouse or dependant family members have been doing while in the UK (e.g. history of employment or studying) and will need to seek an opinion from the National Probation Service about whether the person would be considered a risk to the community upon release.

People who are not themselves EEA nationals but are the spouses, partners, dependant relatives of EEA nationals (not including UK nationals) who are present in the UK will also be considered under this higher level of protection from deportation under European law. Sole parents of children who are EEA or UK nationals who are present in the UK may also benefit from the protection of European law.

Irish citizens are not generally considered for deportation unless a court has recommended deportation in sentencing or where, due to the exceptional circumstances of the case, the public interest requires deportation. This may include someone convicted of a terrorist offence, murder or serious sexual or violent offence and serving a very long sentence.

Any person who believes that they may have their rights under European law breached by deportation must provide Criminal Casework with information about this as soon as possible. This should include information on such issues as length of residence in the UK, what they and any relevant family members have been doing during their time in the UK (e.g. work or study including children in school) or other issues. It is advisable to seek further legal advice. However, there is no legal aid available for such cases so FNOs should be aware that they may have to pay for any advice.

A foreign national offender who has been ordered to serve a sentence or time in a psychiatric institution under certain provisions of the Mental Health Act 1983

A foreign national offender where s37, s45A, s47, s57A or s58 of the Mental Health Act 1983 or s136 of the Mental Health (Care and Treatment)(Scotland)Act 2003 has effect comes under the exemptions for automatic deportation as long as he or she continues under that treatment.

A person who has previously been treated under one of the above sections but has now been discharged and is facing deportation may wish to seek further legal advice on their situation

A recognised victim of trafficking

Trafficking can be most simply explained as the movement of a person for the purposes of exploitation.

People often think of trafficking mainly in terms of sex trafficking, that is forced prostitution or other forms of sexual exploitation, but the definition of what constitutes trafficking is much wider. It does include sexual exploitation and prostitution but also includes (but is not restricted to) forced labour, slavery or removal of organs. Recent legislation states that trafficking may cover forced marriage, forced begging, pick-pocketing, shop lifting, drug trafficking or illegal adoption but there is at present little UK case law which would give guidance on how this legislation is to be applied.

Trafficking does not necessarily mean having been moved across an international border by the trafficker(s), but can also include movement within a country. So, for example, a person could come of their own free will to the UK, and then fall into the hands of people who move them from one area in the UK to another area also in the UK in order to exploit them. This movement could constitute trafficking.

The UK has signed a number of international treaties designed to prevent trafficking and to protect the victims of trafficking.

Identifying whether a person has been trafficked can be difficult. To begin with, it might be very difficult to talk about experiences of having been trafficked. The trafficking victim might feel ashamed, embarrassed or scared of what will happen if they tell what happened. They or their loved ones may have been threatened with harm if they tell, or they may believe that what has happened is their own fault; this feeling of blame can be exacerbated by receiving a criminal conviction. The victim may mistrust authorities. Time, a relationship of trust and a secure and confidential environment may help people to open up about their experiences but these can often be hard to come by in a prison environment.

Any person who thinks that they may have been trafficked should seek expert advice.

Professionals who believe that an FNO they are working with may be a victim of trafficking should seek further guidance from the section 'Trafficking'.

FNOs who do not meet the exceptions to automatic deportation

The criteria for all of the exception categories above are very rigorous and many of those who fulfil the conditions for automatic deportation will not fall within an exception category. In addition, the exceptions apply only to automatic deportation under the UK Borders Act 2007 and unless deportation would breach the Refugee Convention or the European Convention on Human Rights do not necessarily prevent

the Home Office from pursuing deportation under the Immigration Act 1971 or in the case of EEA nationals or their family members under the Immigration (EEA) Regulations 2006. For those FNOs it is important that they are realistic in their expectations of what will happen to them at the end of sentence and they should be encouraged to think about the options open to them. A decision to continue to pursue action against deportation can have consequences in terms of eligibility for some schemes (such as the Facilitated Returns Scheme) and on the length of time that an FNO spends in prison or detention and any FNO must be sure that he or she has the right information to make an informed choice about his or her own situation.

Prison Service Instruction 4/2013 sets out the operational framework for removal and repatriation of FNOs. The deportation process itself is explained more fully in the section 'Deportation Process'.

Appeal Rights

There is a right of appeal against some decisions, such as refusal of an asylum/ protection or human rights claim. The decision notice will say whether there is a right of appeal. In some cases the appeal can only be made once the person has left the UK.

The decisions that can be appealed are:

- Refusal of a protection claim. A protection claim is a claim that removal would breach the United Kingdom's obligation under the Refugee Convention, or would breach the United Kingdom's obligations in relations to persons eligible for a grant of humanitarian protection.
- Refusal of a human rights claim
- A decision to revoke protection status. (A decision under the Immigration (European Economic Area) Regulations 2006 against an EEA decision).

Removal

It has been noted above that deportation is different from removal. Deportation is a sanction which can be used to remove and prevent a person returning to the UK where their behaviour is considered to be 'non-conducive to the public good'. Removal is an administrative process which can be taken against any person who has breached the immigration rules either by being in the UK without permission or by breaching or no longer fulfilling the conditions of their entry. Sometimes the HOIE may administratively remove a foreign national who has committed a criminal offence though.

Any foreign national who is not within the scope of deportation proceedings could still be considered for administrative removal at the end of their sentence. Other teams within HOIE Criminal Casework will refer all cases of those who do not meet the threshold for their deportation criteria, to other 'non-criteria casework teams who will consider removal action in those cases.