



Home Office

Immigration Directorate Instructions

Deporting non-EEA foreign nationals

Version 3.1

April 2015

Contents

Section 1

- 1.1 Introduction
- 1.2 Process

Section 2: UK Borders Act 2007

- 2.1 Criteria
- 2.2 Definition of Imprisonment in the UK Borders Act 2007
- 2.3 Foreign Criminals who do not meet the criteria for automatic deportation
- 2.4 Exceptions to automatic deportation
- 2.5 Additional exemptions
- 2.6 Exceptions apply
- 2.7 Making a decision to deport under the UK Borders Act 2007
- 2.8 Detention

Section 3: Immigration Act 1971

- 3.1 Introduction
- 3.2 How to consider if deportation is appropriate
- 3.3 Court recommended – section 3(6)
- 3.4 Deporting family members of foreign nationals – section 3(5)(b)
- 3.5 Exemption criteria – section 7 of the 1971 Immigration Act
- 3.6 British citizens

Section 4: Decision to make a deportation order

- 4.1 Making a decision to make a deportation order
- 4.2 Outstanding applications for limited/indefinite leave to enter/remain under the Immigration Rules
- 4.3 Detention

Section 5: Representations and obtaining the deportation order

- 5.1 Consideration of representations and right of appeal
- 5.2 Certification of asylum and/or human rights claims
- 5.3 Post deportation order representations

Section 6: Deportation is not possible

- 6.1 Revocation of ILR

Section 1

1. Introduction

This guidance tells you how to decide if a non- EEA foreign national should be considered for deportation under the:

- UK Borders Act 2007
- 1971 Immigration Act

1.1.2 Any queries about this guidance should be sent to the Criminality Policy Guidance Queries inbox.

1.1.3 Guidance for deporting EEA nationals can be found in the [European Economic Area \(EEA\) foreign national offender cases guidance](#) on Horizon.

1.1.4 Guidance on how to administratively remove foreign nationals who are liable to removal under section 10 of the [Immigration & Asylum Act 1999](#) or section 47 of the [Immigration, Asylum and Nationality Act 2006](#) can be found in the EIGs. See [51 Administrative removal](#).

1.2 Process

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Section 2

2. UK Borders Act 2007

2.1 Criteria

[Section 32\(5\)](#) of the UK Borders Act 2007 sets out that the Secretary of State must make a deportation order in respect of a foreign criminal where:

- the criminal was convicted in the United Kingdom and sentenced to a period of imprisonment, and
- the period of imprisonment is 12 months or more, and
- the sentence is a single sentence for a single conviction, it must not be an aggregate sentence or consecutive sentences, and
- the criminal was serving that sentence on or after 1 August 2008, and
- the criminal had not been served with a notice of decision to deport before 1 August 2008, and
- none of the exceptions set out in [section 33](#) of the 2007 Act apply.

2.1.2 Foreign criminals who have been convicted and/or sentenced before 1 August 2008 may still be subject to automatic deportation as long as they meet the criteria above.

2.2 Definition of imprisonment in the UK Borders Act 2007

Section 32(2) of the UK Borders Act 2007 sets out that the automatic deportation provisions apply to those sentenced to a period of imprisonment of at least 12 months and section 38 defines what is meant by “imprisonment”. See [section 32\(2\)](#) and [section 38](#).

2.2.2 Sentences given in days or weeks

Sometimes sentences are given in days or weeks instead of the more familiar months or years. The following will help you determine whether the sentence is at least 12 months.

The interpretation for 12 months in section 32 is a period of 12 calendar months. A month for the purposes of this legislation is a calendar month as defined by the [Interpretation Act 1978](#).

A period of imprisonment of 12 months consists of 365 days (unless it is a leap year, in which case it is 366) and ends on the corresponding date in the 12th month. A period of imprisonment of 52 weeks does not amount to 12 months, because a week consists of seven consecutive days, as per its ordinary meaning, and so amounts only to 364 days.

2.2.3 Indeterminate sentences

Imprisonment for at least 12 months includes where a person is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period (provided that it may last for at least 12 months).

2.2.4 Suspended sentences

Imprisonment for at least 12 months does not include suspended sentences unless a court subsequently orders that the sentence or any part of the sentence, regardless of length, is to take effect. In these circumstances, if the original suspended sentence was for at least 12 months, then the case should be considered under the UK Borders Act 2007.

2.2.5 Other types of imprisonment

Imprisonment due to the default of payment of compensation or a fine does not amount to a sentence of imprisonment for the purposes of the UK Borders Act 2007.

2.2.6 Imprisonment other than in a prison

Imprisonment for at least 12 months includes where a person is sentenced to detention, or ordered or directed to be detained in an institution other than a prison, including a hospital or an institution for young offenders. It does not include periods detained in the Military Correctional Training Centre (MCTC) although these cases can be considered for deportation under the Immigration Act 1971.

2.3 Foreign criminals who do not meet the criteria for automatic deportation

If a foreign criminal does not meet the automatic deportation threshold, consideration must be given to whether deportation should be pursued under the Immigration Act 1971 because it would be conducive to the public good.

2.4 Exceptions to automatic deportation

[Section 33](#) of the UK Borders Act 2007 sets out exceptions to automatic deportation. Whilst an exception applies then automatic deportation cannot continue, but this does not necessarily preclude deportation action under the Immigration Act 1971.

2.4.2 Asylum and human rights

If deportation would breach the person's rights under the European Convention on Human Rights (ECHR) or the UK's obligations under the Refugee Convention then the exception at section 33(2) applies.

Where deportation is pursuant to section 32 of the UK Borders Act 2007, asylum and human rights claims must be considered in full before a deportation order can be signed.

If there is found to be a breach of the UK's obligations under the Refugee Convention or of ECHR then deportation under either the UK Borders Act 2007 or the Immigration Act 1971 will not be possible.

2.4.2.2 Protection Claim

Protection (asylum, Article 2 and 3) claims must be considered by a case owner who has had the appropriate training.

Guidance for considering an asylum claim can be found through the [Asylum policy and process index](#).

2.4.2.3 Article 8

Article 8 claims from foreign criminals are considered under paragraphs 398 to 399A of the Immigration Rules which are underpinned by sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002 (as amended by section 19 of the Immigration Act 2014). For further information see [Criminality guidance for Article 8 ECHR cases](#).

2.4.3 Age

Section 33(3) provides that a foreign criminal who was under the age of 18 on the date of conviction is exempt from automatic deportation.

In most cases, Case Owners should be able to use the age accepted by the criminal court. However, this is not a guarantee of age and case owners may need to consider other evidence.

In age-disputed cases the strongest evidence that can be used to determine a foreign criminal is over 18 is:

- Original, credible documentary evidence from independent sources that they are 18 years of age or over or
- A Merton compliant age assessment by social services stating they are 18 years of age or over
- Assessments completed by social services emergency duty teams are not acceptable evidence of age.

If you accept the foreign criminal meets the exception at section 33(3) because of their age, this means that the Secretary of State does not have a statutory duty to deport him/her, but consideration must still be given to whether deportation is conducive to the public good and should be pursued pursuant to the Immigration Act 1971.

For more information, see [Managing foreign national offenders under 18 years old](#).

2.4.4 European Economic Area (EEA) nationals

This exception applies to a foreign criminal who is an EEA national or who is a close relative or a dependant of an EEA national. In order to meet this exception to automatic deportation the foreign criminal must demonstrate that deportation would breach their rights under Community treaties. EEA nationals are not covered by this guidance and if a foreign criminal provides credible documentary evidence of his status as an EEA national or the family member of an EEA national then you must consider the case under the deportation process set out in [European Economic Area \(EEA\) foreign national offender cases guidance](#).

If the foreign criminal does not provide satisfactory evidence that they meet the exception at section 33(4), then he/she remains liable to automatic deportation pursuant to section 32.

2.4.5 Extradition

If a foreign criminal is subject to current extradition proceedings they will be exempt from automatic deportation.

In an extradition case:

- The judicial cooperation unit (JCU) or Metropolitan Police extradition unit will contact the criminal casework case owner once an extradition request has been received.
- Any request for extradition from outside the UK takes precedence. Deportation must be put on hold while extradition is taken forward by the JCU.

If extradition fails:

- JCU will tell the case owner, who will proceed with deportation action.

2.4.6 Mentally disordered offenders

Foreign criminals held under one of the specified provisions of the Mental Health Act 1983 or associated legislation are not subject to automatic deportation.

The Offender Management and Public Protection Group (OMPPG) in NOMS advises the mentally disordered offenders (MDO) team when a foreign criminal is subject to restriction orders, restriction directions or hospital directions under the Mental Health Act 1983.

Mentally disordered offender cases are dealt with by a specialist team in Criminal Casework.

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2.4.7 Victims of human trafficking

If automatic deportation would breach the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings ratified by the UK on the 17 December 2008 and implemented from 1 April 2009 then the foreign criminal is exempt from automatic deportation.

The UK would be in breach of its obligations under the trafficking convention if the Home Office were to remove or deport a potential victim of trafficking during the 45 day reflection and recovery period.

Once this period is over and a conclusive decision finding they have not been trafficked has been served, the exception to automatic deportation no longer applies on human trafficking grounds (although it is possible other exceptions may still apply, for example human rights).

The case owner must serve an individual with an automatic deportation decision in the normal way if:

- they have previously been considered as a potential victim of trafficking, and
- they have been given a 45 day reflection and recovery period, but
- it is ultimately considered not to be exempt from automatic deportation under any of the exceptions listed under section 33.

For the definition of a victim of human trafficking, see related links:

- [Victims of human trafficking - guidance for frontline staff](#), and

- [Victims of trafficking – competent authority guidance.](#)

2.5 Additional exemptions

An individual is also exempt from automatic deportation under [section 33\(1\)\(b\)](#) of the UK Borders Act 2007 if they fall within sections [7](#) or [8](#) of the Immigration Act 1971 and they are exempt from deportation.

2.6 Exceptions apply

Foreign criminals excluded from automatic deportation under the UK Borders Act 2007 under section 33 must be considered for deportation under the [Immigration Act 1971](#). This is unless they are excluded from automatic deportation on the grounds that their deportation would breach the UK's obligations under the Refugee Convention or the ECHR. Deportation would not be successful under the Immigration Act 1971.

2.7 Making a decision to deport under the UK Borders Act 2007

If it is decided that none of the exceptions applies and that deportation under section 32 of the UK Borders Act 2007 is required, a decision to deport must be served setting out why the foreign criminal's presence is not conducive to the public good. For further information see section 4.1 [Making A Decision To Deport](#) below.

2.7.2 If the foreign criminal has made a protection and/or human rights claim which falls for refusal then consideration must be given to whether certification under section 94, section 94B or section 96 is appropriate. See 5.2 [Certification of asylum and/or human rights claim](#) below.

2.8 Detention

The notice of intention to deport provides the power to detain under immigration legislation. Further information on considering whether detention is appropriate prior to this decision being made for the purposes of section 36 of the UK Borders Act 2007 can be found [here](#).

Section 3

1971 Immigration Act

3.1 Introduction

Section 3(5) of the Immigration Act 1971 allows the Secretary of State to deport individuals where their presence in the UK is not conducive to the public good. This gives the Secretary of State discretion to act in a way that reflects the public interest. Evidence of serious or persistent criminality must be proved to the immigration (balance of probabilities) rather than criminal (beyond reasonable doubt) standard.

3.1.2 The full facts for why an individual is considered to be non-conducive should be weighed against the relevant factors for why deportation may be disproportionate (length of residence, ties to the UK, the UK's obligations under the human rights and refugee conventions). Initially this will be done on the basis of the information held on the individual by the department. Any subsequent grounds raised within the 20 day deadline must also be considered. For human rights claims made outside that deadline, the presumption should be that the claim will be certified, unless there are strong grounds for why the issues could not be raised earlier. See [Certification of asylum and/or human rights claims](#) below.

3.2 How to consider if deportation is appropriate

A non-EEA foreign national will normally be considered for deportation pursuant to the Immigration Act 1971 if they do not meet the criteria for deportation under the UK Borders Act 2007 (see [Section 2](#) above) but they have been involved in criminal activity **in the UK or overseas** and meet one of the criteria below:

- **the non EEA foreign national is recommended for deportation by a court empowered to do so.** See: [Court recommended](#) below;
- **the non EEA foreign national has received a custodial sentence of any length for a serious drug offence or gun crime.** See: [Drug offences \(Bournemouth commitment\) guidance](#);
- **the non EEA foreign national has committed a crime and received a custodial sentence of 12 months or more. This can be made up of aggregate or consecutive sentences;**
- **the non EEA foreign national is a persistent offender. “Persistent offender” means a repeat offender who shows a pattern of offending over a period of time. This can mean a series of offences committed in a fairly short timeframe, or which escalate in seriousness over time, or a long history of minor offences;**
- **the non EEA foreign national has been sentenced to less than 12 months’ imprisonment, but the Secretary of State considers that the offending has caused serious harm either in the UK or in another country;**

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3.2.2 Case owners should also take into account:

- **Cautions:** Police cautions can also be taken into account when considering whether deportation is conducive to the public good. See: [GGfR- Page 54 - Non-custodial sentences: cautions, warnings and reprimands](#) and related links for an explanation of cautions;
- **Previous Convictions:** All previous convictions can be taken into consideration when making a deportation decision on or after 13 December 2012. See: [Rehabilitation of Offenders Act guidance](#)
- **Serious Harm offences:** The Secretary of State has discretion to consider whether an offence has caused serious harm. Such an offence may result in a sentence of less than 12 months but may still be grounds on which to pursue deportation. A full definition of serious harm can be found in [Criminality guidance for Article 8 ECHR cases](#).

3.2.3 This is not an exhaustive list and deportation may be pursued in any case where the Secretary of State considers that the individual's presence in the UK is not conducive to the public good.

3.2.4 The Immigration Act 1971 contains exemption to deportation. For further guidance see [Exemption criteria - section 7 of the 1971 Immigration Act](#).

3.3 Court recommendations – section 3(6)

Section 3(6) of the Immigration Act 1971 allows for the deportation of foreign nationals who are aged 17 and over and have been convicted of criminal offences in the United Kingdom, where the sentencing court recommends deportation. The basis for court recommended deportations is that:

- They have been convicted of a crime where a term of imprisonment can be imposed;
- The relevant form (an IM3) has been served on the subject, by the police or prosecuting authority, at least seven days before sentence, giving the person the opportunity to state why they should be exempt from deportation.

3.3.2 The text of section 3(6) of the Immigration Act 1971 can be found [here](#).

3.3.3 Note: This is a recommendation only. If the individual would not otherwise fall to be considered for deportation, it would not generally be appropriate to pursue deportation.

3.4 Section 3(5)(b) – Deporting family members of foreign nationals

Section 3(5)(b) of the Immigration Act 1971 provides for the deportation of family members - "if another person to whose family he belongs is or has been ordered to be deported".

3.4.2 The spouse, civil partner or children under the age of 18 of a person who has either been deported or been ordered to be deported are themselves liable to deportation. However a deportation order under the 1971 Act cannot be made against a family member if more than eight weeks have elapsed since the foreign national was deported.

3.4.3 We cannot use this power where a family member has leave to remain in the UK in their own right.

3.4.4 A deportation order made against a person under section 3(5)(b) will cease to have effect if he or she ceases to belong to the family of the foreign national served with a deportation order or if the deportation order made against the foreign national ceases to have effect. Where the spouse or civil partner is liable to deportation in his/her own right e.g. they are also foreign criminals, action must be taken on that basis.

3.4.5 Where a child of a foreign national liable to deportation is aged 16 or over and liable to deportation in his/her own right, action must be taken on that basis.

3.4.6 For further guidance see: [Children and family cases guidance](#)

3.4.7 When considering whether section 3(5)(b) is appropriate, full account must be taken of paragraphs 365 to 366 of the [Immigration Rules](#). These considerations must be reflected in the comments on the reasons for deportation letter.

3.4.8 Where it is decided that it would be appropriate to deport a member of a family under section 3(5)(b), paragraph 368 of the [Immigration Rules](#) should be taken into account and it should be explained when the decision to deport is served, that the family member can leave the United Kingdom voluntarily without the need for a deportation order being signed.

3.5 Exemption from deportation under section 7 of the Immigration Act 1971

Section 7(1) of the Immigration Act 1971 states that it is not lawful to deport Commonwealth or Irish Citizens who were Commonwealth or Irish Citizens and were ordinarily resident in the UK for the commencement of the Act in January 1973 and ordinarily resident in the UK for at least five years before the decision to make a deportation order. Sections 7(3) and (4) set out how the period of five years should be counted and excludes any time spent serving custodial sentences of six months or more. For the text of the sections of the Act referred to in this section, see: [Immigration Act 1971](#).

3.5.2 The provisions of section 7(1) do not apply to nationals of Cyprus, Ireland and Malta as they are now EEA nationals and consideration is given to deportation on that basis. For further information see: [European Economic Area \(EEA\) foreign national offender cases guidance](#).

3.6 British citizens

British citizens are not subject to immigration control and therefore cannot be considered for deportation.

3.6.2 Guidance on how you can identify a British citizen can be found in the link: [identifying British citizens and others exempt from deportation guidance](#). Where an individual's nationality is not clear, they should be asked to provide original documentary evidence of their nationality. **Where there is any doubt, it is for an individual to provide evidence that they are a British citizen or is entitled to any exemption under the Immigration Act 1971– see section 3(8) of the [Immigration Act 1971](#).**

Section 4 – Decision to make a deportation order

4.1 Making a decision to make a deportation order

If it is decided that deportation is appropriate then a decision to make a deportation order must be served setting out why the foreign national's presence is non-conducive to the public good. The notice must contain consideration of all the information held by the Home Office on the foreign national's circumstances at the time of the decision. Any outstanding human rights claims should be assessed prior to making the decision to deport but unless they are found to be so compelling as to outweigh the public interest in deportation, full consideration of outstanding claims should be deferred until after the foreign national has had the opportunity to make further representations so that all matters can be considered together.

4.1.2 The decision must inform the foreign national that they may, if they wish, make representations within 20 working days as to why they should not be deported.

4.1.3 This decision should issue a warning under section 120 of the Nationality, Immigration and Asylum Act 2002 which places a continuing obligation to raise with the Home Office any reasons why they should be permitted to remain in the UK including any time there is a change of circumstances, as soon as they occur.

4.1.4 The decision must also seek representations from the foreign national about whether there are any reasons why any appeal against a final refusal of any claim by the Home Office should not be certified under section 94B of the 2002 Act, the effect of which would be an out-of-country right of appeal. See [Section 94B certification guidance for Non European Economic Area deportation cases](#) for further guidance.

4.2 Outstanding applications for limited/indefinite leave to enter/remain under the Immigration Rules

A foreign national may have an application outstanding under the [Immigration Rules](#) e.g. a settlement application. If a decision is pending then the evidence produced must be considered when taking the deportation decision.

4.2.2 If it is decided that deportation action is appropriate then the claim under the Immigration Rules will fall to be refused and must be done as part of the deportation consideration in the reasons for deportation letter that accompanies the DO. See paragraphs 322(1C)/322(5)/322(5A) in the [Immigration Rules](#) for how to refuse foreign nationals who have applied for leave under the rules.

4.3 Detention

Guidance about the detention of foreign nationals under the Immigration Act 1971 can be found [here](#). A foreign national becomes liable to be detained when the decision to make a deportation order letter is served.

Section 5

Representations and obtaining the deportation order

5.1 Consideration of representations and right of appeal

If no representations are made after the 20 working day deadline for representations has passed, the case owner must make a decision on issuing a deportation order on the facts that are before them. As a human rights claim will not have been made by the individual, the deportation order will not be appealable and the individual can be removed.

5.1.2 If the foreign national takes the opportunity to raise issues which they consider means that they should not be deported, these must be considered fully. The burden of proof is on the individual to show why the impact of deportation would breach the Refugee Convention or their human rights, and so will have to provide evidence as to the impact of deportation. Less weight will be given to unsubstantiated claims.

5.1.3 The case owner must take a view on whether deportation remains appropriate in light of the new information. This must be done to the relevant test in light of those representations. If the claim is refused, there will only be a right of appeal if the decision is one of the three types set out in section 82 of the 2002 Act (as amended by the Immigration Act 2014):

- Refusal of a protection claim,
- Refusal of a human rights claim,
- Revocation of protection status.

5.1.4 For further guidance on appeal rights under section 82 see the [appeals guidance](#) Rights of Appeal on Horizon.

5.2 Certification of protection and/or human rights claims

If the representations raise protection or human rights grounds and it is decided to refuse the claim(s), the case owner must consider whether the claim(s) should be certified under existing powers (section 96 and section 94 of the 2002 Act, in that order) or, in the case of non-protection human rights claims, under section 94B of the 2002 Act (as inserted by the 2014 Act), which allows the certification of human rights claims made by those liable for deportation in certain circumstances. Guidance on when to certify a claim can be found in the following links:

- [Further submissions](#) – section 96
- [Certification of Protection and Human Rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002](#) – section 94
- [Section 94B certification guidance for non-European Economic Area deportation cases](#) - section 94B.

5.2.2 If it is not possible to certify a protection and/or human rights claim under sections 96, 94 or 94B, then the foreign national will have an in-country right of appeal.

5.2.3 If the post-decision representations do not raise protection or human rights grounds then there will be no right of appeal against the decision.

5.2.4 The case owner needs to draft the decision on the human rights claim setting out the reasons for refusing the representations and explaining any appeal rights or decision to certify the claim(s), and obtain a deportation order.

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5.3 Post-deportation order representations

Any representations received after the deportation order has been made must still be considered. However, the delay in submitting the representations will weigh against the foreign national unless they are able to provide a reasonable explanation. A reasonable explanation might be a very recent change in country circumstances which has rendered the foreign national a refugee sur place. It would not include a failure to organise themselves or others to meet the deadline.

5.3.2 If it is decided to refuse the post-deportation order representations then the letter must make clear any appeal right/certification that applies.

5.3.3 If it is decided on the basis of the post-deportation order representations that deportation should not be pursued, the deportation order must be revoked.

5.3.4

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Section 6

Deportation is not possible

6.1 Revocation of ILR

If it is decided not to pursue deportation action against a foreign national for whatever reason e.g. removal would breach human rights, consideration must be given to revoking any indefinite leave. For further guidance see [Revocation of Indefinite Leave](#).