Home Office

Criminality: Article 8 ECHR cases

Version 8.0

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About this guidance

This guidance explains how decision makers must consider claims that the deportation of a foreign criminal would breach Article 8 of the European Convention on Human Rights (the right to respect for private and family life).

Contacts

If you have any questions about the guidance and your line manager or senior caseworker cannot help you or you think that the guidance has factual errors then email the Migrant Criminality Policy team.

If you notice any formatting errors in this guidance (broken links, spelling mistakes and so on) or have any comments about the layout or navigability of the guidance then you can email the Guidance Rules and Forms team.

Publication

Below is information on when this version of the guidance was published:

- version **8.0**
- published for Home Office staff on **13 May 2019**

Changes from last version of this guidance

Additional sections to reflect the Supreme Court judgment in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53.

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Purpose

This section tells decision makers about use of this guidance in considering whether the deportation of a foreign criminal would breach Article 8.

Use of this guidance

This guidance must be used for all decisions made on or after 31 January 2019, by decision makers considering whether the deportation of a foreign criminal would breach Article 8 of the European Convention on Human Rights (ECHR).

Where Article 8 is raised in relation to the deportation of a foreign criminal under paragraphs A362 to 400 of the Immigration Rules, leave to remain will be granted if the requirements of paragraph 399 or 399B are met.

If deportation is considered in respect of an EEA national or their family member under the Immigration (European Economic Area) Regulations 2016 (EEA Regulations 2016) or deportation is being pursued solely on the grounds of an overseas conviction, leave outside the Immigration Rules will be granted if the requirements of paragraph 399 or 399B are met.

Guidance on the deportation of non-EEA nationals can be found at:

- Deporting non-EEA nationals

Guidance on the deportation under the EEA Regulations 2016 can be found at:

- EEA decisions taken on grounds of public policy

Court recommended deportations

Where a person is recommended by a court for deportation and it has been decided that their deportation would be conducive to the public good, they will usually be considered to have been convicted of an offence that has caused serious harm or to be a persistent offender. Where it is considered that deportation would not be conducive to the public good, then deportation will not be pursued, despite the court recommendation, and there is no need to consider Article 8.

The best interests of a child

The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of a child in the UK, together with Article 3 of the UN Convention on the Rights of the Child, means that consideration of the child's best interests must be a primary consideration in immigration decisions affecting them. This guidance and the Immigration Rules it covers form part of the arrangements for ensuring that we give practical effect to these obligations.

You must carefully consider all of the information and evidence provided concerning the best interests of a relevant child (that is a person who is under the age of 18 years and it is evident from the information provided by the foreign criminal will be affected by the decision), when assessing the private and family life exceptions to deportation and whether there are any very compelling circumstances.

The decision letter must demonstrate that all the information and evidence provided in the application concerning the best interests of a relevant child has been considered. You must carefully assess the quality of any evidence provided. Documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions about a child's best interests.

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Introduction

This section explains how decision makers must consider claims that the deportation of a foreign criminal would breach Article 8 of the European Convention on Human Rights (ECHR) - the right to respect for private and family life.

The Article 8 Framework

Sections 117A to 117D in Part 5A of the Nationality, Immigration and Asylum Act 2002 set out the correct approach to considering ECHR Article 8 claims. Part 5A was inserted by section 19 of the Immigration Act 2014 which came into force on 28 July 2014. In Part 5A:

- section 117A sets out how the Article 8 provisions are to be applied
- section 117B sets out Parliament's view of the public interest in Article 8 claims made by any foreign nationals, including foreign criminals
- section 117C sets out Parliament's view of the public interest in Article 8 claims made by foreign criminals liable to deportation
- section 117D sets out the interpretation of sections 117A to 117C

The Immigration Rules were amended on 28 July 2014. Paragraph A362 sets out that any Article 8 claim considered on or after this date, regardless of when it was made, must be considered under the amended rules.

Paragraph 398 of the Immigration Rules sets out the criminality thresholds. An Article 8 claim from a foreign criminal who has not been sentenced to at least 4 years' imprisonment will succeed if the requirements of an exception to deportation are met. The exceptions to deportation on the basis of family life are set out at paragraph 399 of the Immigration Rules, and the exception on the basis of private life is at paragraph 399A.

An Article 8 claim from a foreign criminal who has been sentenced to at least 4 years' imprisonment will only succeed where there are very compelling circumstances over and above the circumstances described in the exceptions to deportation at paragraphs 399 and 399A.

Paragraphs 399B and 399C set out the provisions for granting leave to remain where an Article 8 claim succeeds (see the section on granting leave). There is no provision to grant leave on the basis of Article 8 to a foreign criminal outside the Immigration Rules unless the foreign criminal is an EEA national or deportation is pursued solely on the basis of an overseas conviction (see sections on EEA nationals and deportation on the basis of convictions abroad).

EEA nationals

The Immigration Rules and part 5A of the 2002 act do not apply directly to EEA nationals or their family members. However, Article 8 applies equally to everyone,

regardless of nationality, and to consider Article 8 claims from EEA nationals and their family members differently, either more or less generously than claims from non-EEA nationals, would breach the common law principle of fairness. Therefore, decisions in relation to EEA nationals and their family members must be taken consistently with Parliament's view of the public interest as set out in primary legislation.

There may be rare cases where an Article 8 claim from an EEA national succeeds (where their claim to remain under the Immigration (European Economic Area) Regulations 2016 (EEA Regulations 2016) has failed) and they fall to be granted leave to remain. If they are not exercising Treaty rights, but their removal would breach Article 8, then they will be subject to immigration control and limited leave will be granted outside the Immigration Rules for a period not exceeding 30 months, subject to such conditions as the Secretary of State deems appropriate. The period of leave to be granted and any conditions to be attached to that leave, must be determined on a case-by-case basis.

Where EEA nationals are granted leave outside the rules, they must be informed that they are required to inform the Home Office at the earliest opportunity of any change in circumstances, because if they exercise Treaty rights in future, then their residence will be governed by the EEA Regulations 2016 and they will no longer be subject to immigration control.

Deportation on the basis of convictions abroad

Where deportation is pursued solely on the basis of one or more overseas convictions, the person liable to deportation will not meet the definition of a foreign criminal set out at section 117D(1) of the 2002 act and will not fall within any of the criminality thresholds at paragraph 398 of the Immigration Rules. This means the claim will be considered outside the Immigration Rules, but the rules must be used as a guide, because they reflect Parliament's view of the balance to be struck between an individual's right to private and family life and the public interest.

Where a subsequent Article 8 claim is successful, because an exception to deportation is met or because there are very compelling circumstances, limited leave will be granted outside the Immigration Rules for a period not exceeding 30 months, subject to such conditions as the Secretary of State deems appropriate. The period of leave to be granted, and any conditions to be attached to that leave, must be determined on a case-by-case basis.

Definitions

Foreign criminal

The definition of a foreign criminal is set out at section 117D(2) of the Nationality, Immigration and Asylum Act 2002 (the 2002 act) and means a person who is not a British citizen, who has been convicted in the UK of an offence, and who has been

sentenced to a period of imprisonment of at least 12 months, or has been convicted of an offence that has caused serious harm, or is a persistent offender.

Serious harm

It is at the discretion of the Secretary of State whether he considers an offence to have caused serious harm.

An offence that has caused ‘serious harm’ means an offence that has caused serious physical or psychological harm to a victim or victims, or that has contributed to a widespread problem that causes serious harm to a community or to society in general.

The foreign criminal does not have to have been convicted in relation to any serious harm which followed from their offence. For example, they may fit within this provision if they are convicted of a lesser offence because it cannot be proved beyond reasonable doubt that they were guilty of a separate offence in relation to the serious harm which resulted from their actions.

Where a person has been convicted of one or more violent, drugs or sex offences, they will usually be considered to have been convicted of an offence that has caused serious harm.

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.

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General principles when considering an Article 8 claim

This section tells you about the general principles you must follow when considering an Article 8 claim in a deportation context.

The exceptions to deportation

Paragraphs 398 to 399A of the Immigration Rules set out when a foreign criminal's private and/or family life will outweigh the public interest in deporting them.

In the case of a foreign criminal who has been sentenced to less than 4 years, deportation will not be appropriate where any of the following apply:

- the person has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child and the effect of deportation on the partner or child would be unduly harsh
- the person has been lawfully resident in the UK for most of their life, they are socially and culturally integrated in the UK, and there would be very significant obstacles to their integration in the country of return

Once a foreign criminal has been sentenced to a period of at least 4 years' imprisonment, they will never be eligible to be considered under the exceptions. Instead, Paragraph 398 of the Immigration Rules sets out that in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least 4 years, or in the case of a foreign criminal who otherwise does not meet the exceptions to deportation, the public interest requires deportation unless there are very compelling circumstances over and above the circumstances described in paragraphs 399 and 399A.

This applies even if deportation was not pursued at the time of the 4 year sentence because there were very compelling circumstances such that deportation would have been disproportionate, and the foreign criminal goes on to reoffend and is sentenced to a period of imprisonment of less than 4 years. This is because their deportation will continue to be conducive to the public good and in the public interest for the 4 year sentence as well as any subsequent sentences.

Consideration of the public interest test

Parliament has set out its view of the public interest in Article 8 claims from foreign criminals in sections 117B and 117C of the 2002 Act. A foreign criminal's claimed private and/or family life must be carefully assessed and balanced against Parliament's view of the public interest to determine whether deportation would breach Article 8.

Consideration must be given to the public interest in deportation to determine whether it is outweighed by a foreign criminal's private or family life when assessing whether:

- the effect of deportation on a qualifying partner or a qualifying child would be unduly harsh
- a foreign criminal is socially and culturally integrated in the UK
- there are very compelling circumstances over and above the circumstances described in the exceptions to deportation

When considering the public interest in deporting a foreign criminal who is liable to deportation (other than by virtue of the provisions of the EEA regulations 2016) you must consider **all** of the following:

- the more serious the offence committed by a foreign criminal, the greater the public interest in deportation
- the more criminal convictions a foreign criminal has, the greater the public interest in deportation
- it is in the public interest to deport a foreign criminal even where there is evidence of remorse or rehabilitation or that they present a low risk of reoffending
- the need to deter other non-British nationals from committing crimes – by leading them to understand that, whatever the other circumstances, one consequence may well be deportation – is a very important facet of the public interest in deporting a foreign criminal
- the role of deportation as an expression of society's revulsion at serious crimes, and in building public confidence in the treatment of non-British nationals who have committed serious crimes is a very important facet of the public interest in deporting a foreign criminal
- where a foreign criminal has also been convicted of an offence outside the UK, the overseas conviction will usually add to the public interest in deportation - an example of an exception to this general rule might be where there is evidence that prosecution was pursued solely for political reasons
- there are factors which are capable of adding weight to the public interest in deportation, including where a foreign criminal:
  - is considered to have a high risk of reoffending
  - does not accept responsibility for their offending or express remorse
  - has an adverse immigration history or precarious immigration status
  - has a history of immigration-related non-compliance (for example, failing to co-operate fully and in good faith with the travel document process) or frustrating the removal process in other ways
  - has previously obtained or attempted to obtain limited or indefinite leave to enter or remain by means of deception
  - has used deception in any other circumstances (for example to secure employment, benefits or free NHS healthcare to which they were not entitled)
  - has entered the UK in breach of a deportation order

Section 117B(1) of the 2002 act states that the maintenance of effective immigration controls is in the public interest. The exceptions to deportation at paragraph 399(b) (family life with a partner) and paragraph 399A (private life) of the Immigration Rules contain requirements to be met in relation to immigration status. A person's immigration history must also be taken into account when considering whether there are very compelling circumstances.

Sections 117B(2) and 117B(3) of the 2002 act state that it is in the public interest that those seeking to remain in the UK are able to speak English and are financially independent. In criminal cases, this will be relevant to the consideration of whether:

- the effect of deportation will be unduly harsh on a qualifying partner or a qualifying child
- a foreign criminal is socially and culturally integrated in the UK
- there are very compelling circumstances over and above the circumstances described in the exceptions to deportation such that the public interest is outweighed

As a general principle, where a foreign criminal cannot demonstrate that they speak English and/or that they are financially independent, they will find it more difficult to show that the effect of deportation will be unduly harsh, that they are socially and culturally integrated or that there are very compelling circumstances.

Section 117B(4) of the 2002 act sets out that little weight should be given to a private life or a relationship with a qualifying partner established when the person is in the UK unlawfully. Section 117B(5) sets out that little weight should be given to a private life established at a time when the person's immigration status is precarious. A person is in the UK unlawfully if they require leave to enter or remain in the UK but do not have it.

For the purposes of this guidance, a person's immigration status is precarious if they are in the UK with limited leave to enter or remain, or they have settled status which was obtained fraudulently, or they have committed a criminal offence which they should have been aware would make them liable to removal or deportation. These provisions are taken into account in the exceptions to deportation at paragraphs 399(b) and 399A of the Immigration Rules and must be taken into account when considering whether there are very compelling circumstances.

Where a foreign criminal is in the UK unlawfully, or no longer meets the conditions of the leave they were granted and one of the following applies, the claim to respect for private or family life will be weaker and so will be less capable of outweighing the public interest in deportation:

- they have formed a private life or a relationship with a qualifying partner while in the UK unlawfully
- they have formed a private life while their immigration status was precarious

Qualifying partners and children

A ‘qualifying child’ means a person who is under the age of 18 and who either:

- is a British citizen
- has lived in the UK for a continuous period of 7 years or more

A ‘qualifying partner’ means a partner who either:

- is a British citizen
- is settled in the UK (which means having indefinite leave to enter or remain in the UK, or permanent residence pursuant to the 2EEA Regulations 2016, and being ordinarily resident in the UK)

Where a foreign criminal claims to have a partner and/or a child in the UK who does not meet the definition of a qualifying partner or a qualifying child then the family life exceptions to deportation at paragraph 399 of the Immigration Rules cannot apply even if the foreign criminal has not been sentenced to a period of imprisonment of 4 years or more.

In such a case, paragraph 398 sets out that the Article 8 claim will only succeed where there are very compelling circumstances over and above those described in paragraphs 399 and 399A of the Immigration Rules. This is because a claim on the basis of family life with a non-qualifying partner or a non-qualifying child will usually be weaker, so something more, that must be very compelling, will be required in order to be capable of outweighing the public interest.

Unduly harsh

When considering the public interest statements, words must be given their ordinary meanings. The Oxford English Dictionary defines ‘unduly’ as ‘excessively’ and ‘harsh’ as ‘severe, cruel’.

The expression ‘unduly harsh’ introduces a higher threshold than that of “reasonableness” under section 117B(6), taking account of the public interest in the deportation of foreign criminals. The word ‘unduly’ implies an element of comparison. It assumes that there is a ‘due’ level of ‘harshness’, that is a level which may be acceptable or justifiable in the relevant context. ‘Unduly’ implies something going beyond that level.

Considering whether the deportation of a parent is unduly harsh must be considered in the relevant context set by section 117C(1) of the of the Nationality, Immigration and Asylum Act 2002 and that the deportation of a foreign criminal is in the public interest. For the deportation of a foreign criminal to be considered ‘unduly harsh’ therefore requires a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent.

You are not required to balance relative levels of severity of the parent’s offence, other than the length of sentence.

It will usually be more difficult for a foreign criminal to show that the effect of deportation on a partner will be unduly harsh if the relationship was formed while the foreign criminal was in the UK unlawfully or with precarious immigration status because their family life will be less capable of outweighing the public interest than if they were in the UK with lawful, settled immigration status.

Section 117B(2) of the 2002 act states that it is in the public interest that those who seek to remain in the UK are able to speak English. If a foreign criminal cannot demonstrate that they are able to speak English, it will be more difficult for them to show that the effect of deportation on their qualifying partner or qualifying child will be unduly harsh. There is no prescribed standard of English which must be met here and no prescribed evidence which must be submitted. You should consider all available information, though less weight will be given to claims unsubstantiated by original, independent and verifiable documentary evidence. Indications that a foreign criminal can speak English may include evidence:

- of citizenship (such as a passport) of a country where English is the (or a) main or official language
- of an academic qualification that was taught in English
- of passing an English language test
- that they have been interviewed (for example in connection with an asylum claim), or given evidence at an appeal hearing in English

Section 117B(3) of the 2002 act states that it is in the public interest that those who seek to remain in the UK are financially independent. If a foreign criminal cannot demonstrate that they are financially independent, it will be more difficult for them to show that the effect of deportation on their qualifying partner or qualifying child will be unduly harsh. Financial independence here means not being a burden on the taxpayer. It includes not accessing income-related benefits or tax credits, on the basis of the foreign criminal's income or savings or those of their partner, but not those of a third party. There is no prescribed financial threshold which must be met and no prescribed evidence which must be submitted. You must consider all available information, though less weight will be given to claims unsubstantiated by original, independent and verifiable documentary evidence, for example from an employer or regulated financial institution.

Case law

You must not make decisions on the basis of case law established before commencement of section 19 of the Immigration Act 2014 (28 July 2014) or refer to such case law in decision letters. Decisions must be taken solely on the basis of the Immigration Rules, which part 5A of the 2002 act underpins.

Where a case is decided outside the Immigration Rules (for instance where the foreign criminal is an EEA national or deportation is pursued solely because of one or more overseas conviction), the decision must not refer to case law, and must explain that the Immigration Rules have guided the consideration because they reflect Parliament's view of the balance to be struck between an individual's right to private and family life and the public interest.

In cases where either of the following applies:

- the decision has been certified as clearly unfounded under section 94(1A) or section 94(2) of the 2002 act on the basis that the person is entitled to reside in a State listed at section 94(4) (designated states) or on a case by case basis
- it has been decided that further submissions do not amount to a fresh claim under paragraph 353 of the Immigration Rules

you do not, as of 28 July 2014, need to include a separate consideration of Article 8 case law in the decision letter.

HA(Iraq)

In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 the Supreme Court effectively approved the provisions in the Immigration Rules concerning the approach to be taken to the consideration of Article 8 in the context of the deportation of foreign criminals (paragraphs 396 – 399A). The court agreed that those rules are consistent with the requirements of Article 8.

The court concluded that the rules do not constitute a 'complete code' in deportation cases, insofar as they cannot be said to be binding on judges in tribunals. It is for the appellate judge to determine, on the facts of the case, whether deportation in a particular case would be disproportionate. However, the Supreme Court made clear that the rules must remain central to that assessment.

The Secretary of State for the Home Department has now given statutory effect to her assessment of the 'public interest question' in this context, by way of the provisions contained in sections 117B and C of the 2002 act (as amended by the Immigration Act 2014). These provisions were not considered in Hesham Ali.

When considering the public interest in deportation, Lord Wilson considered Lord Kerr's view (given in the latter's dissenting judgment) that if an individual is unlikely to commit a further crime or be involved in further disorder, then their expulsion cannot be said to be rationally connected to the legitimate aim of the prevention of disorder or crime. Lord Wilson found this analysis too narrow, concluding that the deterrent effect on foreign citizens of understanding that a serious offence is likely to lead to deportation may be a more powerful aid to the prevention of crime than the removal of one foreign criminal judged as likely to re-offend.

The court concluded that the weight to be attached to the public interest in the deportation of a foreign criminal is such that only an Article 8 claim that is: "**very strong indeed – very compelling**" will be capable of outweighing it (see, for example, paragraph 50 of the judgment).

KO (Nigeria) & others

In KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 the Supreme Court considered the interpretation of section 117C(5) of the

Nationality, Immigration and Asylum Act 2002 where the deportee has a genuine and subsisting relationship with a qualifying child, and when considering whether the effect of deportation on the child would be unduly harsh.

The Supreme Court held that consideration of unduly harsh needs to be made in the context that it has been established that deportation of the parent(s) is in the public interest. Having considered the nature of offending in establishing that deportation was in the public interest the seriousness and nature of the offending should not be taken into account in assessing whether deportation would be ‘unduly harsh’.

The Supreme Court also confirmed that the ‘unduly harsh’ test is a high one, going beyond what would necessarily be involved for any child faced with the deportation of a parent. If the consequence of the deportation of a parent would be to separate the child and the parent, or mean the child would leave the UK with the parent, that in itself does not make deportation ‘unduly harsh’.

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Family life with a child

This section tells decision makers how to consider family life with a child in the context of deportation.

The exception to deportation on the basis of family life with a child is set out at paragraph 399(a) of the Immigration Rules. It can only be considered in the case of a foreign criminal who has not been sentenced to a period of imprisonment of 4 years or more. Foreign criminals who have been sentenced to a period of imprisonment of 4 years or more must demonstrate there are very compelling circumstances over and above the circumstances described in paragraph 399A.

Where a foreign criminal has been sentenced to less than 4 years imprisonment in the UK, but at least 4 years imprisonment abroad, then the exception does not apply (see sections on public interest and deportation on the basis of convictions abroad for additional guidance on overseas convictions).

This is because the criminality threshold at paragraph 398(a) of the Immigration Rules looks at whether: “the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years” and because paragraph 6 of the Immigration Rules provides that “conviction” means conviction for a criminal offence in the UK or any other country.

The exception will be met where:

- the foreign criminal has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and one of the following applies:
  - the child is a British citizen and it would be unduly harsh for the child to live in the country to which the person is to be deported and it would be unduly harsh for the child to remain in the UK without the person who is to be deported
  - the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision and it would be unduly harsh for the child to live in the country to which the person is to be deported and it would be unduly harsh for the child to remain in the UK without the person who is to be deported

Qualifying child

The onus is on the foreign criminal to provide credible evidence that a child is under 18, is a British citizen or has lived continuously in the UK for at least the 7 years immediately preceding the date of the immigration decision, meaning the decision to deport. Less weight will usually be given to claims unsubstantiated by original, independent and verifiable documentary evidence.

Any claim that a non-British citizen child has lived continuously in the UK for at least the 7 years preceding the decision to deport should be supported by appropriate original documentary evidence. It does not matter whether the child had leave to enter or remain during the 7 years. Short periods outside the country (such as for holidays or family visits) do not count as a break in continuous residence. However, where a child has spent more than 6 months out of the UK at any one time this should normally count as a break.

There is no prescribed evidence which must be submitted, but the evidence submitted should normally cover each year of the claimed length of residence to demonstrate continuous residence. This could include independent evidence that the child has been attending school for a certain number of years. Evidence that a child is in the UK at the time of the Article 8 claim might include evidence of a recent medical appointment or school attendance.

Genuine and subsisting parental relationship

Having family life with a child does not necessarily mean the person has a genuine and subsisting parental relationship with the child (or 'parental relationship' for short). A parental relationship is a particular type of family life. It is possible to have family life with a child without having a parental relationship with the child.

The following is a non-exhaustive list of relevant factors when assessing whether a foreign criminal has a genuine and subsisting parental relationship with a child. Relevant considerations include:

- whether the foreign criminal meets the definition of 'parent' given at paragraph 6 of the Immigration Rules
- whether the foreign criminal has legal parental responsibility for the child (note that where children are born in the UK, fathers do not always automatically have legal parental responsibility)
- whether the foreign criminal is the child's primary carer (a primary carer is someone who has primary responsibility for a child's care or shares equally the responsibility for a child's care with one other person)
- what part the foreign criminal plays in making decisions regarding the child (for example choice of school or where the child lives)
- what involvement the foreign criminal has in the child's day-to-day life
- who cared for the child while the foreign criminal was in prison and what role that carer now plays in the child's life
- whether there is credible evidence that the foreign criminal is genuinely willing and able to care for the child
- where the foreign criminal lives in relation to the child
- how regularly the foreign criminal and the child see one another
- whether there are any relevant court orders governing access to the child and if so, when they were sought – consideration must be given to the timing of any application for access or residence, and whether it was made with the intention of strengthening the foreign criminal's claim to remain in the UK

- whether any evidence has been provided in support of the claimed parental relationship, for example views of the child, other family members, social workers or other relevant professionals
- the extent to which the foreign criminal makes an active contribution to the child's life – this may include financial, emotional and other forms of support to ensure the child's wellbeing

When considering the extent of a foreign criminal's involvement in a child's life, factors which might prompt closer scrutiny include where:

- there is little or no contact with the child or contact is irregular
- any contact is only recent in nature
- support is only financial in nature, there is no contact or emotional or welfare support
- the child is largely independent of the foreign criminal

The quality of any evidence provided in deciding whether a foreign criminal has a parental relationship with a child must be carefully assessed and where appropriate challenged. Original documentary evidence, particularly where independent and verifiable, will be given more weight in the decision-making process than unsubstantiated assertions.

As a general principle, a foreign criminal will usually have a genuine and subsisting parental relationship with a child if they are someone to whom the interpretation of 'a parent' at paragraph 6 of these rules applies and there is credible evidence of significant involvement in the child's life.

A child may have 1 or 2 people in parental roles, but it would not ordinarily be accepted that there can be 3 or more people with parental roles in a child's life, unless there is a court ruling that more than 2 people share legal parental responsibility for the child. Where a child has 1 or 2 step-parents, they may all have a family relationship with the child, but they cannot all be said to have a parental relationship.

The evidence provided must be considered to determine who has a parental relationship with the child, and who has a non-parental family relationship with the child, unless there is a court ruling that 3 or more people share legal parental responsibility. The onus is on the foreign criminal to substantiate a claim that they have a parental relationship with a child.

If there is independent documentary evidence of a court ruling that more than 2 people have legal parental responsibility for the child, including the foreign criminal, you must consider whether the foreign criminal makes a real, practical contribution to the child's life that cannot be made by anyone else, including whether they make important decisions about the child's life. If so, then it is likely the foreign criminal will be said to have a parental relationship with the child.

Where a child is older (for example 16 or 17 years old) or otherwise semi-independent of their parents and there is evidence that they are being looked after

through other arrangements (for example, with local authority or wider community support), it will be difficult for the foreign criminal to show that they have a parental relationship with the child. If the child does not have valid leave to remain, then the child, the child's legal representatives or social services must be notified so that they can decide whether to make an application for leave to remain or make alternative arrangements for the child.

Consideration of a child's best interests

The requirements in paragraph 399(a) reflect the duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK, by which we mean their best interests. In the context of paragraph 399(a) you must consider whether the effect on the child of deporting the foreign criminal will be unduly harsh.

The onus is on the foreign criminal to substantiate their Article 8 claim, so an assessment of a child's best interests must be based on the evidence submitted by the foreign criminal and any other evidence which is in the Home Office file.

You must have regard to the best interests of the child as a primary consideration (but not the only or the paramount consideration). Primary does not mean that the best interests of the child have to be considered first, before other factors. What matters is that there is a full consideration of the child's best interests and that this is properly explained in the decision letter.

It will normally be in the child's best interests to be cared for by both parents, but careful consideration must be given to any evidence from experts such as social services that suggests this may not be the case.

The following is a non-exhaustive list of relevant factors when assessing what is in a child's best interests:

- the child's age and nationality
- the child's immigration history, for example how long they have lived in the UK, whether they have lived in any other countries, whether they were born a British citizen, or naturalised or registered as such
- whether the foreign criminal has submitted evidence demonstrating that the child does not hold the nationality of the country to which the foreign criminal is to be deported or that the child could not qualify for it if an application were made
- who the child's primary carer is
- whether it is in the child's best interests to remain in the care of the foreign criminal parent, the other parent, both or neither, and why
- where the other parent lives
- if the other parent is in the UK, whether they are British or have leave to enter or remain in their own right or a right to reside derived from the EEA Regulations 2016 or is exempt from immigration control
- whether the other parent could choose to go to the country of return with the foreign criminal parent and the child

- whether it is in the child's best interests to accompany the foreign criminal parent to the country of return, and why
- whether it is in the child's best interests to remain in the UK, and why

Any claim that it is in the child's best interests to remain in the UK must be carefully and thoroughly assessed on the basis of all relevant information and evidence. This may include reports from children's services or family court judgments which may make findings as to what is in a child's best interests.

It will not necessarily be in the child's best interests to remain in the UK solely due to having British citizenship or having lived in the UK for at least 7 years. These are both very important factors, but will not necessarily be the determinative factors in an individual case. For example, the requirement that a non-British citizen child has lived in the UK for a continuous period of at least 7 years recognises that over time children start to put down roots and integrate into life in the UK. You must assess the quality of any evidence provided to determine the extent of the child's private life in the UK.

You must not assume that living in the UK is inherently 'better' than living in any other country or that British citizenship is to be accorded more importance than citizenship of another country (for example, if the child has dual nationality or could apply for another nationality) in the consideration of a child's best interests.

The assessment must be made on the basis of all relevant factors including the child's particular circumstances. For example whether relocation would maintain the family unit, and cultural ties.

You must take into account any order made by the family court when assessing a child's best interests but this is not determinative of the deportation decision. Family orders, such as contact, care, ward of the court and residence orders, do not limit the exercise of the Secretary of State's powers with respect to immigration control. However, any order of this type is a relevant and important consideration to take into account in assessing the best interests of the child.

Would the effect of deportation on the child be unduly harsh?

When considering whether the effect on a child of deporting a foreign criminal is unduly harsh, consideration needs to be made in the context where the parent is required to leave and it may be reasonable to expect the child to either leave the UK or be separated from one parent. The outcome of the consideration may be undesirable but that does not make it unduly harsh. For the outcome of the consideration to be unduly harsh, there needs to be a degree of harshness beyond what would necessarily be involved for any child faced with the deportation of a parent.

The natural consequences of deportation can involve difficult decisions for families; the child either relocating to a country where the quality of life is less favourable than

in the UK or that deportation splits families, but deportation in itself does not meet the threshold of unduly harsh.

Having determined deportation is in the public interest, your consideration must not balance the relative type or severity of offending in determining whether the effect of deportation would be unduly harsh on the child.

See sections on public interest and unduly harsh for further guidance.

Would it be unduly harsh for the child to live in the country to which the foreign criminal is to be deported?

Although a child's nationality and length of residence in the UK are both important factors to be considered, it is not inherently unduly harsh to expect a child who is a British citizen and/or has lived in the UK for at least 7 years to leave the UK. That is why the rules expressly provide for a child's nationality and length of residence to be considered separately from the unduly harsh question. It will depend on the circumstances of the case.

Many people around the world reasonably and legitimately take their children to live in another country either temporarily or permanently and where this complies with the law, the state does not interfere with those decisions. It is the responsibility of the foreign criminal to consider the impact on their family of the consequences of their criminal activity.

In the same vein, although children are innocent of any wrongdoing, sometimes they will be affected by the consequences of a foreign criminal's offending. In a deportation context, that can mean the child will go and live in another country, usually because the parents decide that the child should go with the foreign criminal (and perhaps the other parent) to that country, or in a smaller number of cases because the child cannot remain in the UK without the presence of the foreign criminal.

Just as there is no automatic bar to sentencing a parent to a period of imprisonment despite the adverse impact on a child (and imprisoning a parent does not mean the child is being punished), there is no automatic bar to deporting a parent and the consequences of deportation are not a punishment for the child. However, Parliament accepts that where a foreign criminal has not been sentenced to a period of imprisonment of 4 years or more and the effect of deportation on a child would be unduly harsh, the child's best interests outweigh the public interest in deporting the parent.

The following is a non-exhaustive list of relevant factors to consider when assessing whether it would be unduly harsh for a child to live in the country to which the foreign criminal will be deported:

- the age and nationality of the child
- whether the child could obtain citizenship or a visa to reside in the country of return

- whether the child would be able to adapt to life in the country of return or whether there would be very significant obstacles to their integration there, and if so, the nature and extent of those obstacles
- whether the child could be raised by both parents in the country of return (including, if the other parent lives in the UK, whether it is open to them to choose to go with the foreign criminal and the child to the country of return)
- the prevailing conditions in the country of return and whether they are such that it would be unduly harsh for the child to live there (this is likely to be rare, and the onus is on the foreign criminal to particularise the impact country conditions will have on the child - you must assess claims on the basis of country conditions with reference to the country guidance used in asylum cases)
- whether the child has formed any family or private life in the UK outside of the home and the strength of those ties
- the Court of Justice of the European Union (CJEU) judgment in Ruiz Zambrano (European citizenship) [2011] EUECJ C-34/09

Families or children may highlight the differences in quality of education, health and wider public services and economic or social opportunities between the UK and the country of return and argue that these work against the best interests of the child. Other than in exceptional circumstances, such differences would not normally mean it is unduly harsh for the child to live in the country of return, particularly if one or both parents or wider family have the means or resources to support the child on return or the skills, education and training to provide for their family on return, or if facilitated return scheme (FRS) support is available.

Consideration must also be given to the extent of a child's private life in the UK, taking into account factors such as the child's age, length of residence, dependence on wider family in the UK and any other ties to the community, to determine whether it would be unduly harsh to expect the child to live in a country other than the UK. In many cases it will not be unduly harsh, because, as explained above, many parents reasonably and legitimately take their children to live in other countries even though it will cause a degree of disruption, but you must make an assessment based on the individual facts of the case.

Consideration must be given to Ruiz Zambrano (European citizenship) [2011] EUECJ C-34/09 (08 March 2011) if deporting a foreign criminal would mean that a British citizen or EEA national child would be unable to reside in the UK or another EEA Member State.

In SSHD v CS (Judgment: Citizenship of the Union) [2016] EUECJ C-304/14 (13 September 2016), the CJEU ruled that a non-EEA national who would otherwise have a derivative right to reside on this basis can be deported if such a decision is justified on grounds of public policy and public security because their personal conduct constitutes a genuine, present and sufficiently serious threat adversely affecting one of the fundamental interests of society. This means that where a derivative right of residence is established, deportation must be considered under regulation 23(3)(b) and regulation 27 of the EEA Regulations 2016, and not under the UK Borders Act 2007 or the Immigration Act 1971.

Would it be unduly harsh for the child to remain in the UK without the foreign criminal?

To answer this question, it is first necessary to establish whether the child would be able to remain in the UK when the foreign criminal is deported.

The following is a non-exhaustive list of relevant factors to consider in order to determine whether a child could remain in the UK in the care of another person or whether the child would have no choice but to leave the UK with the foreign criminal:

- the child has a legal guardian, a family member who has a legal obligation to care for the child (for example, responsibility or a residence order) or an existing relationship with a family member
- someone other than the foreign criminal is the child's primary or joint-primary carer and whether that person normally has day-to-day care and wider welfare and developmental responsibility for the child
- the person who cared for the child while the foreign criminal was in prison would be able to care for the child when the foreign criminal is deported
- it is reasonable to expect the other person to fulfil the role of primary carer (for example: whether they have fulfilled that role in the past, whether they can care for the child, whether they care for any other children or have done so before)
- there are any factors which undermine the ability of that person to act as the primary carer of the child or would suggest they are unsuitable (for example, criminal convictions, concerns expressed by social services)

Whether another person would have to make a choice about working full-time or part-time or not at all and might need to arrange suitable childcare is not likely to be a determinative factor in their ability to care for the child, particularly in the case of someone with a legal responsibility towards the child, and particularly where family life was formed in full knowledge that the foreign criminal may not be able to remain in the UK (because their immigration status was unlawful or precarious, or because they were liable to deportation). All parents and guardians have to make difficult choices about how to balance their working lives and their parental responsibilities.

It is not appropriate to conclude that a child can remain in the UK in the care of another person who is themselves liable to removal or deportation. If there is someone who would be able to care for the child in the UK but for having no immigration status then that person's status should be resolved before it can be determined whether it would be unduly harsh for the child to remain in the UK without the foreign criminal. You must check whether the person has an outstanding application for leave to remain in their own right. If they do, you must liaise with the other case working unit to ensure that the application is decided before the foreign criminal's claim is considered. If the person is granted leave to remain then this will factor into the consideration of the unduly harsh question.

If the only way a child could remain in the UK if a foreign criminal is deported would be in the care of social services or foster care that is not already in place (excluding care provided by a family member or a private fostering arrangement), it will usually be unduly harsh for the child to remain in the UK without the person who is to be

deported, unless there is evidence that the child's best interests would be better served in such care than in the care of the foreign criminal. However, you must consider the age of the child and how long they are likely to remain in care.

If it is established that the child is able to remain in the UK when the foreign criminal is deported, the following is a non-exhaustive list of relevant factors to consider when assessing whether it would be unduly harsh for the child to continue living in the UK without the presence of the foreign criminal:

- whether there are any reasons (related to the foreign criminal's offending history, or other reasons) why it would be in the child's best interests to be separated from the foreign criminal
- the age of the child
- how in practice the child would be affected by the foreign criminal's absence
- whether there is credible evidence that the foreign criminal's presence is needed to prevent the child's health or development being significantly impaired, or their care being other than safe and effective
- the extent of any practical difficulties the remaining parent or guardian would face in caring for the child alone (if they are not already effectively caring for the child alone)
- whether there is credible evidence that the child would lose all contact with the foreign criminal, for example because telephone and internet contact would not be possible and there would be no possibility of visits either to the country of return or a third country:
  - if so, whether this is unduly harsh will depend on the nature of the relationship the foreign criminal has with the child, and the impact on the child of the loss of contact

Where a child's parents or guardians have a choice about whether the child leaves or remains in the UK, it will not be appropriate for the decision to deport to prescribe any particular outcome for the child. It is the responsibility of the family to decide for themselves whether the child will accompany the foreign criminal overseas or whether to make suitable arrangements for the child to remain in the UK based on where they think the child's best interests lie. The decision to deport requires the child's parents or guardians to make this decision.

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Family life with a partner

This section tells decision makers how to consider family life with a partner in the context of deportation.

The exception to deportation on the basis of family life with a partner is set out at paragraph 399(b) of the Immigration Rules. It can only be considered in the case of a foreign criminal who has not been sentenced to a period of imprisonment of 4 years or more.

Where a foreign criminal has been sentenced to less than 4 years' imprisonment in the UK, but at least 4 years' imprisonment abroad, then the exception does not apply (see sections on public interest and deportation on the basis of convictions abroad for additional guidance on overseas convictions). This is because the criminality threshold at paragraph 398(a) of the Immigration Rules looks at whether: 'the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years' and because paragraph 6 of the Immigration Rules provides that 'conviction' means conviction for a criminal offence in the UK or any other country.

The exception will be met where:

- the foreign criminal has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK, and all of the following apply:
  - it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM
  - it would be unduly harsh for that partner to remain in the UK without the person who is to be deported
  - the relationship was formed at a time when the foreign criminal was in the UK lawfully and their immigration status was not precarious

Qualifying partner

The onus is on the foreign criminal to provide credible evidence that their claimed partner is in the UK and is either a British citizen or settled in the UK. Less weight will usually be given to claims unsubstantiated by original, independent and verifiable documentary evidence.

'Settled in the UK' means being ordinarily resident without being subject under the immigration laws to any restriction on the period for which they may remain. This means indefinite leave to enter or remain in the UK, or permanent residence in accordance with the EEA Regulations 2016.

Genuine and subsisting relationship

Assertions of a relationship with a partner must not be accepted without confirmation from the partner, in writing and with a verifiable signature, though this in itself will not necessarily be sufficient to accept the relationship is genuine and subsisting.

For guidance on assessing whether a partner relationship is genuine and subsisting, please refer to section FM 2.0 of the Immigration Directorate Instruction (IDI): Genuine and subsisting relationship.

Would the effect of deportation on the partner be unduly harsh?

When considering whether the effect of deporting a foreign criminal would be unduly harsh on a partner, the strength of the family life claim must be considered against the context of the public interest in deportation.

As a general principle the nature and severity of offending is considered when assessing whether deportation is in the public interest. Having determined deportation is in the public interest, consideration of whether the effect of deportation would be unduly harsh on the partner should not balance the relative type or severity of offending in determining whether deportation would be unduly harsh on the partner.

Having determined deportation is in the public interest, your consideration must not balance the relative type or severity of offending in determining whether the effect of deportation would be unduly harsh on the partner.

For more information, see sections on public interest and unduly harsh.

Was the relationship formed at a time when the foreign criminal was in the UK lawfully and their immigration status was not precarious?

This rule is partially underpinned by section 117B(4) of the 2002 act which provides that little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the UK unlawfully. For the purposes of paragraph 399(b), a foreign criminal was in the UK unlawfully if they required leave to enter or remain but did not have it.

The Immigration Rules also require that a relationship not be formed at a time when the foreign criminal has precarious immigration status because a claim to respect for a family life formed when there was no guarantee that family life could continue indefinitely in the UK, or when there was no guarantee that if the person was convicted of an offence while they had limited leave they would qualify for further leave, will be less capable of outweighing the public interest.

For the purposes of this guidance, a person's immigration status is precarious if they are in the UK with limited leave to enter or remain, or they have settled status which was obtained fraudulently, or they have committed a criminal offence which they should have been aware would make them liable to removal or deportation.

If a relationship was formed when a foreign criminal had limited leave to enter or remain or was exempt from control for a limited period, then their immigration status was precarious. This is because they will, or should, have been aware that one of the following would apply:

- they will not be able to qualify for indefinite leave to remain, because, for example, they are in the UK with limited leave that does not provide a route to settlement
- they may not qualify for indefinite leave to remain if there is a change in their circumstances, for example if they commit a criminal offence
- that a temporary exemption from immigration control does not provide a legitimate expectation that they will be able to remain permanently in the UK

To meet this part of the exception, the onus is on the foreign criminal to provide evidence that the relationship with their partner was formed when they were in the UK with indefinite leave to enter or remain and before the criminality which they should have been aware would make them liable to removal or deportation.

If a foreign criminal formed a relationship with a partner at a time when they had indefinite leave to enter or remain which was obtained by means of deception, then that will provide a basis for saying that their immigration status does not benefit them under this provision because they should have been aware that they were not entitled to that status and the need to maintain effective immigration controls outweighs their immigration status.

Would it be unduly harsh for the partner to live in the country to which the foreign criminal is to be deported?

It will only be unduly harsh for a partner to live in the country to which the foreign criminal is to be deported if there is evidence of compelling circumstances **over and above** the very serious hardship described in paragraph EX.2. of Appendix FM to the Immigration Rules.

> EX.2. For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

When you consider whether it would be unduly harsh for a partner to live in the country to which the foreign criminal is to be deported you are looking for something over and above very significant difficulties which would entail very serious hardship for the foreign criminal's partner. This means that something which is considered to

be an insurmountable obstacle for a partner of a non-criminal may not be sufficient to meet the unduly harsh threshold.

In determining whether the unduly harsh threshold is met, you must consider the difficulties which the partner would face and whether they entail something that could not (or could not be expected to) be overcome, other than with a very severe degree of hardship for the partner. It is only the impact on a foreign criminal's partner which must be considered, not the impact on the foreign criminal.

Lack of knowledge of a language spoken in the country in which the foreign criminal and their partner would be required to live would not reach the unduly harsh threshold. It is reasonable to conclude that the couple must have been communicating whilst in the UK. Therefore, it is reasonable for that to continue outside the UK, whether the partner chooses to learn the (or a) language spoken in the country to which the foreign criminal is to be deported.

Being separated from extended family members would also be unlikely to reach the unduly harsh threshold, such as might happen where a partner's parents and siblings live here, unless there were very compelling factors in the case.

The factors which might be relevant to the consideration of whether it would be unduly harsh for a partner to live in the country to which the foreign criminal is to be deported include but are not limited to:

- the ability of the partner lawfully to enter and stay in the country to which the foreign criminal is to be deported - the onus is on the foreign criminal to show that this is not possible in order for the unduly harsh threshold to be met; a mere preference to live in the UK would not meet the threshold
- cultural barriers - this might be relevant in situations where the partner would be so disadvantaged that they could not be expected to go and live in that country - it must be a barrier which either cannot be overcome or would present very severe hardship such that it would be unduly harsh
- the impact of a mental or physical disability - whether a partner has a mental or physical disability, a move to another country may involve a period of hardship as the person adjusts to new surroundings (just as there may have been when a foreign national first came to live in the UK)
    - but a mental or physical disability could be such that in some cases it could lead to very severe hardship such that it would be unduly harsh

Would it be unduly harsh for the partner to remain in the UK without the foreign criminal?

When assessing whether it would be unduly harsh for a partner who could not accompany the foreign criminal to the country of return to be separated from the foreign criminal, consideration must be given to the practical impact of separation on the partner and whether that impact is unduly harsh. The onus is on the foreign criminal to submit evidence demonstrating that the effect would be unduly harsh, not on the Secretary of State to demonstrate that it would not be. Less weight will be

given to claims unsubstantiated by original, independent and verifiable documentary evidence.

An example of what might be considered unduly harsh, depending on the facts in an individual case, would be where there is credible evidence that the foreign criminal's presence is essential to prevent the partner's health from being severely impaired because it would not be possible to receive adequate care from other family members, medical professionals, social services.

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Private life

This section tells decision makers about the exception to deportation on the basis of private life.

The exception to deportation on the basis of private life is set out at paragraph 399A of the Immigration Rules. It can only be considered in the case of a foreign criminal who has not been sentenced to a period of imprisonment of 4 years or more. Foreign criminals who have been sentenced to a period of imprisonment of 4 years or more must demonstrate there are very compelling circumstances over and above the circumstances described in paragraph 399A.

Where a foreign criminal has been sentenced to less than 4 years' imprisonment in the UK, but at least 4 years' imprisonment abroad, then the exception does not apply (see sections on public interest and deportation on the basis of convictions abroad for additional guidance on overseas convictions). This is because the criminality threshold at paragraph 398(a) of the Immigration Rules looks at whether: "the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years" and because paragraph 6 of the Immigration Rules provides that 'conviction' means conviction for a criminal offence in the UK or any other country.

The exception will be met where:

- the person has been lawfully resident in the UK for most of their life
- they are socially and culturally integrated in the UK
- there would be very significant obstacles to their integration into the country to which it is proposed they be deported

All 3 parts of the exception must be met, otherwise the public interest in deportation will outweigh the foreign criminal's right to respect for their private life in the UK.

Has the foreign criminal been lawfully resident in the UK for most of their life?

In assessing a foreign criminal's residence in the UK, 'most of their life' means more than half of their life. Lawful residence means where the person had limited or indefinite leave to enter or remain, had a right of residence in accordance with the EEA Regulations 2016, or was in the UK while exempt from immigration control.

The onus is on the foreign criminal to substantiate any claim that they have been lawfully resident in the UK for most of their life. Claims of residence, including unlawful residence, will only be accepted where they are supported by original, documentary evidence from independent sources. There is no prescribed evidence which must be submitted, but the evidence submitted should cover the whole period of claimed residence.

Is the foreign criminal socially and culturally integrated in the UK?

Positive and negative factors will need to be balanced against each other to form an overall assessment of whether a foreign criminal is socially and culturally integrated in the UK.

Section 117B(2) of the Nationality, Immigration and Asylum Act 2002 states that it is in the public interest that people who seek to remain in the UK are able to speak English. If a foreign criminal cannot speak English, this will indicate that they are not integrated in the UK because they are unable to communicate with the majority of the population. If a foreign criminal can speak English, this alone will not be sufficient to demonstrate integration, but it will count in the foreign criminal's favour when balancing all the evidence for and against integration.

There is no prescribed standard of English which must be met here and no prescribed evidence which must be submitted. You must consider all available information, though less weight will be given to claims unsubstantiated by original, independent and verifiable documentary evidence. Indications that a foreign criminal can speak English may include evidence:

- of citizenship (such as a passport) of a country where English is the (or a) main or official language
- of an academic qualification that was taught in English
- of passing an English language test
- that they have been interviewed (for example in connection with an asylum claim) or given evidence at an appeal hearing in English

Section 117B(3) of the 2002 act states that it is in the public interest that people who seek to remain in the UK are financially independent. If a foreign criminal cannot demonstrate that they are financially independent, this will indicate that they are not integrated in the UK because they may be reliant on public funds, wider family members or charities rather than contributing to the economic wellbeing of the country. If a foreign criminal can demonstrate that they are financially independent, this alone will not be sufficient to demonstrate integration, but it will count in the foreign criminal's favour when balancing all the evidence for and against integration.

Financial independence here means not being a burden on the taxpayer. It includes not accessing income-related benefits or tax credits, on the basis of the foreign criminal's income or savings or those of their partner, but not those of a third party. There is no prescribed financial threshold which must be met and no prescribed evidence which must be submitted. You must consider all available information, though less weight will be given to claims unsubstantiated by original, independent and verifiable documentary evidence, for example from an employer or regulated financial institution.

Immigration status is likely to be important. A person who has been in the UK with limited leave to enter or remain is less likely to be integrated because of the

temporary nature of their immigration status. A person who is in the UK unlawfully will have even less of a claim to be integrated.

Criminal offending will also often be an indication of a lack of integration. Criminal offending alone does not necessarily mean a person is not socially and culturally integrated into the UK. The nature and/or frequency of offending, such as anti-social behaviour against a local community or offending that may have caused a serious and/or long-term impact on a victim or victims (such as sexual assault or burglary) may be further evidence of non-integration. Whether criminal offending can be interpreted to mean an offender is not socially and culturally integrated needs to be made on a case by case basis. If the person has been resident in the UK from a very early age it is unlikely that offending alone would mean a person is not socially and culturally integrated.

To outweigh any evidence of a lack of integration, the foreign criminal will need to demonstrate strong evidence of integration. Mere presence in the UK is not an indication of integration. Positive contributions to society may be evidence of integration, for example an exceptional contribution to a local community or to wider society, which has not been undertaken at a time that suggests an attempt to avoid deportation. If such a claim is made, you should expect to see credible evidence of significant voluntary work of real practical benefit.

It will usually be more difficult for a foreign criminal who has been sentenced more than once to a period of imprisonment of at least 12 months but less than 4 years to demonstrate that they are socially and culturally integrated, because they will have spent more time excluded from society, than for a foreign criminal who has been convicted of a single offence.

Less weight will usually be given to claims unsubstantiated by original, independent and verifiable documentary evidence.

Would there be very significant obstacles to the foreign criminal's integration into the country to which they are proposed to be deported?

When assessing whether there would be 'very significant obstacles to the foreign criminal's integration into the country to which they are proposed to be deported', the starting point is to assume that the foreign criminal will be able to integrate into their country of return, unless they can demonstrate why that is not the case. The onus is on the foreign criminal to show that there would be very significant obstacles to that integration, not on the Secretary of State to show that there are not.

You should expect to see original, independent and verifiable documentary evidence of any claims made in this regard, and must place less weight on assertions which are unsubstantiated. Where it is not reasonable to expect corroborating evidence to be provided, you must consider the credibility of the foreign criminal's claims.

A very significant obstacle to integration means something which would prevent or severely inhibit the foreign criminal from integrating into the country to which they are

to be deported. You are looking for more than obstacles. You are looking to see whether there would be ‘very significant’ obstacles, which is a high threshold. Very significant obstacles will exist where the foreign criminal demonstrates that they would be unable to establish a private life in the country of return, or where the genuine attempt to form a private life in the country of return would entail very severe hardship for the foreign criminal.

You must consider all the reasons put forward by the foreign criminal as to why there would be obstacles to their integration into the country of return. These reasons must be considered individually and cumulatively to assess whether there would be very significant obstacles to integration. You must consider whether the foreign criminal has the ability to form an adequate private life by the standards of the country of return – not by UK standards. You will need to consider whether a foreign criminal will be able to establish a private life in respect of all its essential elements, even if, for example, their job, or their ability to find work or network of friends and relationships are differently constituted in the country of return.

The fact the foreign criminal may find life difficult or challenging in the country to which they are to be deported does not mean that they have established very significant obstacles to integration there. You must consider all relevant factors in the foreign criminal’s background, and the conditions they are likely to face in the country of return to decide whether it is accepted that there would be very significant obstacles to integration.

You will need to consider the specific obstacles raised by the foreign criminal. You will also need to set these against other factors in order to make an assessment in the individual case. Relevant considerations include whether the foreign criminal:

- has familiarity with language and culture in the country to which they are to be deported
- has lived in the country to which they are to be deported, how long for, and how old they were when they left or last visited
- has family or friends in the country to which they will be deported to whom they should be able to turn for support to help them integrate into society on return
- or their family, have hosted visits in the UK by family and friends from the country of return, or whether the foreign criminal has visited family or friends there
- has ties which could be strengthened on return even if they are not very strong ties at the date of decision
- received education or worked in the country to which they will be deported, or whether they have received education or developed skills in the UK which they could use to integrate into society on return
- has previously demonstrated an ability to integrate in a new place, for example if they came to the UK as an adult

The degree of private life a foreign criminal has established in the UK is not relevant to the consideration of whether there are very serious obstacles to integration into the country to which they are to be deported.

Guidance on some examples of common claims is provided below.

Claims that a foreign criminal has no friends or family members in the country of return

Where there are no family, friends or social networks in the country of return that is not in itself a very significant obstacle to integration. Many people successfully migrate to countries where they have no ties. If there are particular circumstances in the foreign criminal's case which mean they would need assistance to integrate it will also be relevant to consider whether there are any organisations in the country of return which may be able to assist with integration.

Claims that a foreign criminal has never lived in the country of return or only spent early years there

If a foreign criminal has never lived in the country of return, this will not necessarily mean that there are very significant obstacles preventing them from integrating, particularly if they can speak a language of that country, for example if the country of return is one where English is spoken or if a language of the country was spoken at home when they were growing up. For these purposes, fluency is not required – conversational level language skills or a basic level of language which could be improved on return would be sufficient. The cultural norms of the country and how easy it is for the person to adapt to them will also be relevant.

Claims that a foreign criminal cannot speak any language spoken in the country of return

Where credible evidence exists that a foreign criminal cannot speak any language spoken in the country of return, this will not normally be considered a very significant obstacle to integration unless they can also show that they would be unable to learn a language spoken there, for example because of a severe mental or physical disability, or unless they would not be able, after a period of adjustment, to establish a private life in that country, even within a diaspora community.

Claims that a foreign criminal would have no employment prospects on return

Lack of employment prospects is very unlikely to be a very significant obstacle to integration. In assessing a claim that an absence of employment prospects would prevent a foreign criminal from integrating into the country of return, their circumstances on return should be compared to the conditions that prevail in that country and to the circumstances of the general population, not to their circumstances in the UK.

Less weight will be given to generalised claims about country conditions that have not been particularised to take account of the foreign criminal's individual circumstances.

It may also be a relevant consideration if the foreign criminal has lived in the UK with permission to work but has not held or sought lawful employment, or if they have only worked sporadically. A foreign criminal cannot claim there are very significant obstacles preventing integration into the country of return on the basis of ways in which they have failed to integrate into the UK.

A further relevant consideration might be whether it is open to the foreign criminal to apply for the facilitated return scheme (FRS) for financial assistance while they seek employment on return.

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Very compelling circumstances

This section sets out how to consider very compelling circumstances over and above those set out in paragraphs 399 and 399A.

Paragraph 398 of the Immigration Rules sets out that in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least 4 years, or in the case of a foreign criminal who otherwise does not meet the exceptions to deportation, the public interest requires deportation unless there are very compelling circumstances over and above the circumstances described in paragraphs 399 and 399A.

A sentence of 4 years' imprisonment or more means the person is a serious criminal and 'very compelling circumstances' is an extremely high threshold. As a general principle, the greater the public interest in deporting the foreign criminal, the more compelling the foreign criminal's circumstances must be in order to outweigh it.

See the section on the public interest and the section on unduly harsh for guidance on how to consider whether a foreign criminal is able to speak English or is financially independent.

Where a foreign criminal cannot speak English, or is not financially independent (for example through lawful employment), it will be even more difficult for them to show that that there are very compelling circumstances such that they should not be deported.

A foreign criminal sentenced to at least 4 years' imprisonment must be able to show that there are very compelling circumstances over and above the circumstances described in the exceptions to deportation. This is because Parliament has expressly excluded those sentenced to at least 4 years' imprisonment from the exceptions to deportation. Missing out on the exceptions by a small margin, or a series of near misses taken cumulatively, will not itself be compelling enough to outweigh the public interest in deportation. The best interests of any child in the UK who will be affected by the decision are **a** primary consideration but not **the** primary consideration and must be not only compelling, but very compelling, to outweigh the public interest.

Family life claims on the basis of a genuine and subsisting relationship with a non-qualifying partner (such as where the partner is a refugee or has humanitarian protection or other leave to enter or remain) and on the basis of a genuine and subsisting parental relationship with a non-qualifying child (for example where the child is not a British citizen and has lived in the UK for less than the 7 years preceding the date of the immigration decision) will only succeed where there are very compelling circumstances. You must decide whether family life can continue outside the UK, in doing so you must consider:

- if the partner or child are refugees from the country of return or from a third country, do they continue to require international protection?

- the impact on the partner or child if the foreign criminal is deported and they have to remain in the UK.

When considering whether there are very compelling circumstances you must consider **all** relevant factors that the foreign criminal raises. Examples of relevant factors include:

- the best interests of any children who will be affected by the foreign criminal's deportation
- the nationalities and immigration status of the foreign criminal and their family members
- the nature and strength of the foreign criminal's relationships with family members
- the seriousness of the difficulties (if any) the foreign criminal's partner and/or child would be likely to face in the country to which the foreign criminal is to be deported
- the Court of Justice of the European Union (CJEU) judgment in Ruiz Zambrano (European citizenship) [2011] EUECJ C-34/09
- how long the foreign criminal has lived in the UK, and the strength of their social, cultural and family ties to the UK
- the strength of the foreign criminal's ties to the country to which they will be deported and their ability to integrate into society there
- whether there are any factors which might increase the public interest in deportation – see section on the public interest
- cumulative factors, for example where the foreign criminal has family members in the UK but their family life does not provide a basis for stay and they have a significant private life in the UK. Although, under the rules, family life and private life are considered separately, when considering whether there are very compelling circumstances, both private and family life must be taken into account

A foreign criminal may claim that where there has been a delay in decision-making (for example between the end of the custodial sentence and the decision to deport, or the date of any representations and the date of decision), the public interest in their deportation is reduced or their private and/or family life has strengthened in the intervening period, such that deportation would be disproportionate.

Delay should always be considered and explained in the assessment of very compelling circumstances even if the foreign criminal has not relied on it at this stage.

Delay caused by a foreign criminal or those acting on their behalf will be given no weight in the foreign criminal's favour in an Article 8 assessment. Delay caused by the Home Office will be given less weight if the foreign criminal was, at the time of the delay, in the UK unlawfully. The consequence of Home Office delay when the foreign criminal was in the UK lawfully is likely to depend on the reasons for, and consequences of, the delay on the foreign criminal's family and private life (see, for example, EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41).

This guidance takes account of relevant case law on Article 8 in identifying the factors that are relevant to an Article 8 proportionality assessment. These remain the factors to be considered in an Article 8 case. However, the weight to be attached to the public interest in weighing up proportionality is now set out in primary legislation.

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Article 8: grant leave

This section tells decision makers what leave to grant when an Article 8 claim made by a foreign national criminal is successful.

Paragraph 399B of the Immigration Rules sets out that where an Article 8 claim by a foreign criminal is successful, because either the Secretary of State or a tribunal or court decides that deportation would breach Article 8, limited leave shall be granted for a period of up to 30 months, subject to such conditions as the Secretary of State considers appropriate.

Where, after a deportation order having been made and come into force, a foreign criminal's extant limited or indefinite leave to enter or remain has been cancelled, and there is an Article 8 barrier to deportation, there is no provision for the foreign criminal's previous leave to be re-instated. Instead, they must be given limited leave for a period of up to 30 months, subject to such conditions as the Secretary of State considers appropriate.

If a foreign criminal has indefinite leave to enter or remain but it is decided that deportation would breach Article 8, either by the Secretary of State or at appeal, before a deportation order has been made against them or before it has come into force, consideration must be given to revoking their indefinite leave under section 76 of the Nationality, Immigration and Asylum Act 2002. This is because they are liable to deportation but there is a legal barrier (Article 8) to deportation. For further guidance, see the instruction revocation of indefinite leave. It will only be in exceptional compassionate circumstances that indefinite leave to remain (ILR) is not revoked.

Where a foreign criminal has previously been granted limited leave on the basis of Article 8, they will only be granted further leave if they qualify under the Article 8 provisions set out in paragraphs 398 to 399A, even if their first period of leave was granted before those provisions came into force, or before the previous private and family life rules were introduced on 9 July 2012. This is because of the provision at paragraph 399C which sets out that: "where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain their deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave".

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