

Foreign National Prisoners Guidance

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Introduction

- 1.1 This guidance relates to prisoners who are not citizens of the UK¹, Crown Dependencies or citizens of the British Overseas Territories, and who are liable to be deported.
- 1.2 The guidance is for Parole Board members at the stages of MCA, panel chair directions and oral hearing and when cases are dealt with by the duty member.
- 1.3 A prisoner's citizenship status or liability for deportation does not affect the Parole Board test for release or panel procedures; but the risk assessment and decision-making processes may be informed by or constrained by certain factors when an applicant does not have an absolute right to remain in the country (a foreign national prisoner). In particular, foreign national prisoners facing deportation may not be eligible for transfer to open conditions, or may be referred for consideration of their release under risk management plans whose restrictions cannot extend beyond UK jurisdiction and which therefore would not be viable/effective following deportation.

Key Requirements

Parole Board Rules

- 2.1 The Parole Board Rules 2019 apply to all prisoners and do not explicitly refer to foreign national prisoners. However, the case of a prisoner liable to deportation may be influenced by legal, procedural and policy implications when considered by the Parole Board.
- 2.2 Prisoners can access an information sheet for foreign nationals in the prison system provided by the Prisoners' Advice Service.

HMPPS Guidance

- 2.3 A series of Prison & Probation Service orders and instructions set out policy and practice concerning deportation and foreign national prisoners. These include Generic Parole Process Policy Framework (January 2020); PSO 29/2014 (Release on licence for Foreign National Prisoners pending deportation); PSI 37/2014 (Eligibility for Open Conditions and for ROTL of Prisoners Subject to Deportation Proceedings); PSO 01/2015 (The Allocation of prisoners liable to deportation or removal from the United Kingdom); Recall, Review and Re-Release of Recalled Prisoners Policy Framework, April 2019; and Release on Temporary Licence (ROTL) Policy Framework, May 2019 ('the Policy Framework May 2019').

¹ The United Kingdom comprises of England, Scotland, Wales & Northern Ireland. The Crown Dependencies are Jersey, Guernsey (the Channel Islands) and the Isle of Man

Legislative framework

- 2.4 A foreign national prisoner is anyone remanded or convicted on criminal charges who does not have an absolute legal right to remain in this country. Even if deportation is not mentioned in court at sentencing, the case of any foreign national prisoner is referred to Home Office Immigration Enforcement (HOIE). Liability to deportation does not impact the Parole Board test for release but can affect how a case is dealt with.
- 2.5 A person with British citizenship is not a foreign national. Those with dual nationality are to be treated as British although, in very exceptional circumstances, naturalisation² may be removed where there are public protection issues. Cases of dual nationality (as well as those with indefinite leave to remain) are also referred to HOIE.
- 2.6 Power for deportation derives from the UK Borders Act 2007. Under the Act, Non-European Economic Area (non-EEA) citizens sentenced to 12 months or more can be automatically deported at the sentence-end unless they can show that their deportation would constitute a breach of their human rights. EEA citizens can also be deported, although the threshold for this is higher (Immigration (EEA) Regulations 2016 apply), the decision to remove must be taken on grounds of either public policy, public security or public health. Irish citizens can only be deported in exceptional circumstances. EEA citizens are all EU citizens and those who are citizens of Litchenstein, Iceland, Norway and Switzerland.

Deportation Procedures

- 3.1 Once an appeal against a conviction has been determined (or the deadline for appeal has passed), the HOIE serves the prisoner with notice of liability to deportation at completion of sentence. The prisoner can make representations to the Secretary of State regarding their deportation and whether the test for deportation is met. The Secretary of State will then proceed to determine the case.
- 3.2 If the Secretary of State confirms that a decision to deport has been made, the prisoner has the right of appeal. If an asylum or Human Rights claim is raised, there is an in-country right of appeal. If not, the prisoner is provided with an out of country right of appeal which is only exercisable from outside the UK. The decision to deport is to be taken up to three years ahead of the Conditional Release Date or Tariff Expiry Date.
- 3.3 An appeal goes to the First-Tier Tribunal (Immigration and Asylum Chamber) and will take a minimum of six months to process. Either party may, with permission, appeal on a point of law to the Upper Tribunal. A

² A person can only have indefinite leave to remain if they are not naturalised.

prisoner can make further representations to the Secretary of State at any time. If the further representations are also refused, a further right of appeal may be generated, although this is a rare outcome.

- 3.4 When released automatically or by direction of the Parole Board, a prisoner will be liable for detention under the Immigration Act. The Secretary of State decides whether secure detention is warranted on the basis of risk of harm to the public and risk of absconding. If detained, a foreign national may apply to the First-Tier Tribunal for bail. If bail is granted, its terms will be tailored by the tribunal around the conditions of any parole licence.
- 3.5 Once a foreign national prisoner is deported, there are no legislative powers to enforce parole licence conditions or provide supervision outside of the UK.

Criteria for deportation (EEA & non-EEA)

EEA

- 4.1 A person entitled to remain in this country by virtue of the Immigration (EEA) Regulations 2016 may only be removed on the grounds of public policy, public security or public health.
- 4.2 For an EEA citizen, the test depends on the length of residence in the UK. The Secretary of State is likely to seek deportation for someone receiving a sentence of two years or more and for a prisoner serving one year or more for a sexual, violent or drugs-related offence. As the regulations apply to "family members of an EEA national", a prisoner who is not an EEA national but of close kinship is also covered by these rules.
- 4.3 Sections 23 and 26 of the Immigration (EEA) Regulations 2016 also allows for the Secretary of State to deport an EEA citizen who is deemed to have misused the right to residence.
- 4.4 It must be demonstrated that there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Commonly, this will amount to a propensity to reoffend as indicated by criminal history or expert assessment.

Non-EEA

- 4.5 For a non-EEA national prisoner, sections 32-33 of the UK Borders Act 2007 determine that deportation is automatic in the following cases:
 - a single custodial sentence of 12 months or more

- two or three custodial sentences aggregated to 12 months or more over the last five years
 - a custodial sentence of any length for a serious criminal offence as set out in schedules to the Nationality, Immigration & Asylum Act 2002.
- 4.6 These schedules identify cases where a sentencing judge recommended deportation, a serious drugs offence was committed, or deportation is deemed conducive to the public good. This could include having undesirable associations, character or conduct and the possibility of infringing UK law or causing someone to commit an offence.
- 4.7 Section 33 of the UK Borders Act 2007 allows the following exceptions to the automatic criteria:
- where the prisoner was under 18 at date of conviction or is detained under the Mental Health Act
 - where extradition proceedings are ongoing
 - where a claim has been lodged that deportation would be a breach of obligations under EU Treaties or the Refugee Convention, European Convention on Human Rights or Trafficking Conventions.

Early removal schemes (ERS & TERS)

ERS

- 5.1 The Early Removal Scheme (ERS) allows foreign national prisoners serving determinate sentences of over three months to leave the UK prior to the end of their sentence. The maximum ERS period of time that a foreign national prisoner can be deported/ removed from the UK, before the end of their sentence, is 270 days before the conditional release date, automatic release date or parole eligibility date. The foreign national prisoner must serve a minimum of half of the custodial period of their sentence (one quarter of the total sentence for determinate and sentence for offenders of particular concern (SOPC), and one third for extended sentence prisoners) before being removed. Prisoners excluded from the scheme are those subject to; Sex Offenders Register notification, recalled on Home Detention Curfew and recalled for allegedly committing another offence.

TERS

- 5.2 The Tariff Expired Removal Scheme (TERS) allows early removal of foreign national prisoners serving an indeterminate sentence once their sentence has been served to date of tariff. TERS is not an automatic consideration in every case for foreign national prisoners serving indeterminate sentences. TERS is considered when the prisoner becomes barrier-free, i.e. they are

going to be deported, they have exhausted their appeal rights and there are travel documents in place.

- 5.3 The Parole Board takes no part in the decision to remove a prisoner under TERS which is within the Secretary of State's remit.
- 5.4 The Parole review runs in parallel with the TERS process. Neither decision is reliant on the other.
- 5.5 The Parole Board panel may find it helpful to direct a report from the HOIE. The HOIE report should set out the current immigration status of the prisoner. It should indicate date of and reasons for entry to the UK, established nationality, how the individual came to Immigration Enforcement notice, and the progress in processing deportation orders with specific details about applications, appeals, and court or tribunal decisions. Where a deportation order has been served and the offender has exhausted all appeal rights, HOIE should comment on the process for arranging travel documentation and any nationality issues. Directions to provide this information, if required, should be made at the earliest opportunity.
- 5.6 When a case is referred to the Parole Board, a full decision will be required even if the prisoner is scheduled for removal under TERS as relevant parties may benefit from the Board's assessment of risk and of absconding. The Parole Board must proceed until the referral is withdrawn.
- 5.7 In deciding whether to refuse removal under TERS, PPCS will consider:
- *"Whether the prisoner has a confiscation order made against him or is subject to confiscation order proceedings;*
 - *Whether the prisoner has outstanding criminal charges (in which case the holding establishment must notify PPCS of any outstanding criminal proceedings or police investigations and report the outcome as soon as it is known);*
 - *Whether there is evidence that the prisoner is planning further criminal offences, including plans to evade immigration control and return to the UK unlawfully;*
 - *Whether the prisoner is serving a sentence for a terrorism-related offence (in considering such cases, PPCS must always consult with the HMPPS Extremism Unit before a final decision is made);*
 - *Whether the removal of the prisoner from prison would undermine the confidence of the public in the criminal justice system."*³

³ Paragraph 3.3.2, Generic Parole Process Policy Framework (January 2020)

- 5.8 Once a deportation order has been served and the appeal rights have been exhausted, the prisoner is excluded from open conditions.
- 5.9 In determining whether an adjournment is needed to obtain immigration documentation or for other reasons, the panel must, as in all cases, make a decision on the merits of the case. However, a panel should not adjourn or defer for a TERS decision. The decision of the Parole Board is not reliant on the TERS decision and in fact, a Parole Board release decision will supercede the TERS agreement to remove.

Implications for Practice and Decision Making

Notice of deportation

- 6.1 The term "liable to deportation" applies to prisoners who⁴:
- are confirmed by the Home Office as meeting the initial criteria for deportation based on such factors as nationality and sentence length (whether the offender has been informed of this or not); or
 - have received a formal notice of liability for deportation; or
 - have received a deportation order with appeal rights in the UK remaining; or
 - fall below the threshold for deportation but are being considered for or made subject to removal from the UK.
- 6.2 Deportation decisions will generally be taken three years prior to Parole Eligibility Date or Tariff Expiry Date. Final decisions may not have been made when a case is referred to the Parole Board, especially for indeterminate sentence foreign national prisoners.
- 6.3 When a prisoner is subject to deportation proceedings, this must be flagged up by PPCS on the front sheet of the dossier. Relevant information may also be contained in the OASys assessment report.
- 6.4 In such a case, the MCA member, panel chair or duty member must check that there is a current report in the dossier from the HOIE. If not, a copy may be directed via PPCS. When the MCA member is directing the case to an oral hearing, an updated report from the HOIE must be directed because circumstances may have changed. A member setting panel chair directions must do likewise, if the HOIE report is not already in the dossier.
- 6.5 The panel's direction may extend to asking the HOIE (via PPCS) for information relating to abscond risk. For example, asking how well the

⁴ Paragraph 6.96, The Policy Framework May 2019.

prisoner complied with Immigration Act reporting requirements prior to sentence.

Interpreters

- 7.1 For prisoners whose first language is not English, and have notified of a need or preference to conduct the hearing in a foreign language, the Parole Board must enable them to use their preferred language where reasonably practical. An interpreter should be supplied automatically (by the prison) if it is evident from the dossier that one will be needed.
- 7.2 The need for an interpreter or signer should be referenced in the main text of MCA, duty member or panel chair directions and flagged with the Parole Board case manager so that the attendance of the interpreter can be organised and confirmed in advance of the hearing.
- 7.3 It may be necessary to defer or adjourn if a fair hearing cannot take place without an interpreter present.
- 7.4 Please refer to the Member Guidance on Translations and Interpreters which provides information and advice relating to parole cases where the prisoner's first language is not English, and translation of documents, or an interpreter, may be needed.

Test for release

- 8.1 The Parole Board must apply the statutory test for release in all cases where the question of release is part of the terms of referral from the Secretary of State. The legal test for release is clear: The Board must not give a direction [for release] unless the Board is satisfied that it is no longer necessary for the protection of the public that prisoner should be confined [in prison]. This is also known as the public protection test.
- 8.2 In ERS and TERS cases the test for release whether at oral hearing or MCA stage does not change. However, the panel may wish to consider the effect on risk of the absence of an enforceable risk management plan should ERS or TERS be implemented.
- 8.3 Risk of serious harm to the public includes people in the country to which deportation is proposed. This could be anywhere in the world. Case law⁵ says that public safety is not limited to Britain but applies to public safety in any country outside its jurisdiction. Even if a prisoner is to be deported or removed immediately, a full risk assessment must be conducted.

⁵ R v Parole Board ex p White (1994) Times 30 December

Risk Management Plans

- 9.1 A risk management plan must be produced and assessed for every foreign national prisoner as for any other parole case. This is because, following a panel's direction for release, a prisoner scheduled for deportation may still successfully appeal the order and be released into the community.
- 9.2 The MCA member or panel chair must, therefore, direct submission of a risk management plan if one is not already available.
- 9.3 A release plan must extend to the country to which removal is proposed. However, once an offender has been deported, there are no legal agreements between countries to enforce licence conditions, to provide supervision or any release or risk management plan which would ordinarily be provided in the UK. Equally, risk is unlikely to be subject to management by external factors. Accordingly, the panel may need to make an assessment of manageability based only upon internal factors (how the prisoner can manage their own risks) as the panel has a responsibility to potential victims in the country to which the prisoner will be deported.
- 9.4 If the panel wishes to obtain information from outside the UK (such as details of previous foreign convictions or a prisoner's home situation), a direction can be set for the Secretary of State to submit such evidence⁶. An application may be made by PPCS to the relevant embassy. In some cases the Secretary of State may instruct an advocate to apply for a court order in the home country for the release of material. Success in obtaining information will vary depending on cooperative relations with that country, availability of relevant evidence and timescales to access information. Consideration to directing provision of such information must be given during MCA and directions made accordingly due to the extended timescales likely to be required.
- 9.5 If release is directed, licence conditions which can be enforced in the UK should be considered by the panel and set even if deportation seems a likely outcome. Decision letters should make reference to those supervising the case to ensure that any immigration court considering bail has sight of the licence conditions. Normally, deportation takes place soon after the direction to release: but a delay in making removal arrangements could mean the prisoner is released temporarily in the UK. For example, if bailed from immigration detention, the Parole Board's release requirements may be relevant in shaping bail conditions. Alternatively, the prisoner might successfully appeal deportation and be released on licence in the UK.
- 9.6 It should be noted that Immigration Enforcement can only detain a foreign national prisoner where it is considered removal can take place within a reasonable timescale. If an appeal becomes protracted and /or the documentation process is lengthy and / or the returns process to the

⁶ The directions should set out the information/ material required by the panel but should not detail how the Secretary of State should obtain such information.

country of origin is on hold there is a higher likelihood that the foreign national prisoner may be granted bail by an immigration judge or the Secretary of State.

Processes following a direction for release

- 10.1 The prisoner to be removed from the UK under TERS will remain on life or IPP licence when the panel directs release. If the prisoner returns to the UK in the future, recall on that licence will follow. At which point, the individual can be considered for TERS again, and therefore potentially deported, or the matter referred to the Parole Board as a recall case.
- 10.2 A deportation order carries powers to detain pending removal and applies separately from the Board's direction for release. Although directed for release, a prisoner subject to deportation may be detained in prison or at an immigration detention centre. These are matters for HOIE. The individual may be granted bail into the community or succeed in overturning the deportation order. For this reason, a panel directing release must consider appropriate licence conditions.
- 10.3 The release decision from the Parole Board remains provisional for 21 calendar days if it is eligible for reconsideration⁷ or becomes final if no application for reconsideration is received within the specified time⁸.

Open conditions

- 11.1 Panels should read the Secretary of State's referral letter in the dossier to check whether the prisoner is eligible for open conditions. It is also important to check what documentation, if any, is provided in the dossier from UK Immigration about the prisoner's deportation status, and where necessary to direct an update.
- 11.2 Where all appeal rights against a deportation order have been exhausted, or where the appeal rights must be exercised from abroad, the prisoner must not be classified as suitable for open conditions. This condition does not apply to prisoners already in open conditions unless their deportation status changes whilst they are in open conditions, in which case their suitability to remain in open conditions will need to be re-assessed.

⁷ The prisoner is serving an indeterminate sentence; an extended sentence; a determinate sentence subject to initial release by the Parole Board under Chapter 6, Part 12 of the Criminal Justice Act 2003 (Rule 28 (2) of the 2019 Rules).

⁸ Within 21 days of the MCA paper decision; decision on the paper after a direction for oral hearing or the decision following an oral hearing.

- 11.3 Prisoners in closed conditions who are liable for deportation must be subject to a more rigorous risk assessment before open conditions is considered.
- 11.4 A foreign national prisoner not subject to deportation is treated like any other parole prisoner and standard Parole Board considerations apply.
- 11.5 If recommending open conditions is an option available to the Parole Board, a panel must consider carefully the risk of absconding. This should take account of all available information. In the case of a foreign national prisoner facing removal, this might include attitude towards deportation and the possible benefits of resettlement for a prisoner unlikely to be released in the UK. Such a prisoner will be unable to access public funds and undertake paid or unpaid employment and most forms of study.
- 11.6 Although the proposed release plan may be limited in scope, there may be opportunities for a prisoner to demonstrate application and consolidation of learning from offending behaviour programmes if transferred to the environment of an open prison. In any case, the threat of deportation may be lifted at some stage, making transfer to open conditions more productive in the longer term.
- 11.7 The MCA member or panel chair setting directions for additional reports or hearing requirements may include brief guidance for report writers and/or witnesses as to whether recommendations for open prison should be considered, if this is included in the referral.

Release on Temporary Licence (ROTL) Eligibility

- 11.8 The Policy Framework May 2019 outlines the position in terms of ROTL for foreign national prisoners. Eligibility for ROTL for foreign national prisoners is linked to the prisoner's deportation status. This is a matter for officials outside the Parole Board. Foreign national prisoners who meet the following criteria are statutorily excluded from ROTL (Paragraphs 6.93 and 6.94 of the Policy Framework May 2019):
- *"Offenders with a Deportation Order who have exhausted all deportation appeal rights in the UK are statutorily prohibited from ROTL under Prison Rule 9 (1A) / YOI Rule 5 (1A) unless the prisoner is located in open conditions. If a notification is received that appeal rights have been exhausted then the relevant security alert, "Appeal Rights Exhausted (ARE)" must be activated on the offender's NOMIS record".*
 - *"There may be cases where a decision has been made to release on ROTL, or the prisoner is on ROTL, when they become statutorily excluded; i.e. they exhaust their in-country appeal rights against deportation. Where the prisoner has yet to be released the decision should be rescinded. Where they are on ROTL at this point, the governor, must revoke the licence and recall the offender to prison unless they are due back from ROTL on the same day the notification is received."*

11.9 Those who have not exhausted their deportation appeal rights in the UK must have their ROTL considered on an individual basis. This will be subject to an enhanced risk assessment, the principles of which are set out in paragraphs 6.97 to 6.99 of the Policy Framework May 2019, namely:

"Offenders liable for deportation must not be assessed as suitable for ROTL, unless it is judged that there is a very low risk of failure to return. In making the assessment, there must be an assumption that removal from the UK will take place. The risk that the offender will use temporary release to evade not only custody but also possible deportation action must be weighed and specific account taken of the following:

- Any evidence that the offender has sought to frustrate or evade the immigration process, for example - through their previous failure to comply with immigration restrictions, immigration bail or via the terms of leave in the UK, or because they have previously absconded from an immigration removal centre.*
- Any failures of temporary release or other instance of lack of compliance with prison rules and regulations that may indicate an inclination to abuse the privilege afforded by ROTL when considered in conjunction with their deportation status.*

Any evidence of this nature should normally be seen as proof of not falling within the "very low risk" of abscond category.

Governors must also consider factors that might indicate lower risk of failure to return, for example, where the offender is known to be cooperative with the deportation process. Other factors indicating lower risk may include strong family ties in this country and/or other evidence to indicate that the offender would not wish to jeopardise his or her chances of successfully appealing and remaining in this country.

Where the offender is in open conditions when it is confirmed that they are liable for deportation, the offender must have their security category reviewed. Only once it has been confirmed that the offender may remain in open conditions may the application for ROTL be considered, and it may be considered under the usual and not the enhanced risk assessment process."