

Foreign National Prisoners

Member Guidance

December 2023 (v2.0)

Document History

Document version	Date of Issue	Revision description
1.0	26.11.2020	This guidance was created as part of the Parole Board's project to launch fully revised and updated member guidance.
2.0	20.12.2023	The guidance was updated to reflect the changes following: <ul style="list-style-type: none">• The most recent HMPPS Policy Frameworks.• The Secretary of State's Directions on Open Conditions 2023.• Considerations for the "very low risk of abscond" open conditions criteria.• The inclusion of a Glossary (Annex A to the Guidance).• The Risk Management Plan Section was expanded to include more considerations for members when assessing the risk of Foreign National cases in the community.• The Set Aside process.

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1. Introduction

- 1.1 This guidance assists Parole Board panels with cases involving foreign national prisoners and applies at various stages of the review, including post-release.
- 1.2 This guidance relates to prisoners who are not citizens of the United Kingdom (UK)¹ or Crown Dependencies² and who are liable to be deported.
- 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 or constrained by certain factors when the prisoner does not have an absolute right to remain in the country (i.e.; a foreign national prisoner). In particular, foreign national prisoners facing deportation may not be eligible for a transfer to open conditions, or, may be referred for consideration of their release under risk management plans with restrictions that cannot extend beyond UK jurisdiction and which therefore may not be viable/effective following deportation.

2. Key Principles

- 2.1 As a matter of principle, the approach that the Board takes for foreign national prisoners is the same as for British citizens. The only point of difference is in relation to the eligibility for open conditions where certain categories of foreign nationals serving indeterminate sentences are, as a matter of HM Prison and Probation Service (HMPPS) policy, ineligible for open conditions (please see section 13 of this guidance on Open conditions for more information).
- 2.2 There are certain schemes available, such as the **Early Removal Scheme (ERS) and Tariff-expired Removal Scheme (TERS)** which are explained at section 6 of this guidance, to foreign nationals that allow for early release, or release without consideration by the Parole Board where it would otherwise be necessary, on the condition that they are removed from the UK. While these schemes are separate to a Parole Board review, members need to be aware of them.
- 2.3 It will often be important to obtain accurate, and up to date, information about a prisoner's immigration status. This will need to be considered at the Member Case Assessment (MCA) stage, and again by panel chairs when making their directions for those cases progressing to an oral hearing.
- 2.4 Risk on release is **not** confined to risk to the general public in England and Wales, but to the general public throughout the whole world.

¹ The United Kingdom is comprised of England, Scotland, Wales & Northern Ireland.

² The Crown Dependencies are the Bailiwicks of Jersey and Guernsey (the Channel Islands) and the Isle of Man

- 2.5 Panels will need to consider how an individual's risk will be managed in a different country where, in all likelihood, there will be no reciprocal arrangement for supervision or enforcement of licence conditions. Please see section 11 on Risk Management Plans for more information.
- 2.6 The fact that someone is a foreign national prisoner, does not mean that they will be detained by the Home Office. They may well be liable to be detained, but the circumstances where someone can be detained are very limited. Panels should not make an assessment of risk on the basis that the prisoner will be detained by the Home Office if released on licence from the criminal sentence. In short, decisions to place a foreign national prisoner in immigration detention are within the Secretary of State's remit and the Parole Board cannot assume that any such decision will be made.
- 2.7 Following the withdrawal of the UK from the European Union (EU), the rules on deportation of European Economic Area (EEA) and non-EEA nationals are the same. However, the situation is complicated by the fact that some EEA nationals will have historic retained rights.

3. Key Requirements

Parole Board Rules

- 3.1 The Parole Board Rules 2019 (as amended) apply to all prisoners but do not explicitly refer to foreign national prisoners. However, a Parole Board panel must take into account the legal and procedural implications of a prisoner liable to deportation, when conducting an independent risk assessment.

Legislative Framework

- 3.2 The case of any foreign national prisoner is referred to Home Office Immigration Enforcement (HOIE), even if deportation is not mentioned in court at sentencing. Liability to deportation does not impact the statutory test for release panels must apply but can affect how a case is dealt with.
- 3.3 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, citizenship may be removed where there are public protection issues. Cases of dual nationality (as well as those with indefinite leave to remain³) are also referred to HOIE.
- 3.4 Under the UK Borders Act 2007⁴, a deportation order must be made where a foreign national has been convicted of an offence and received a custodial sentence of at least 12 months.

³ *Indefinite Leave to Remain (ILR) is how an overseas national settles in the UK. It is also called 'settlement', and it gives overseas nationals the right to live, work and study in the UK for as long as they like. ILR also allows overseas nationals to apply for State benefits if they are eligible. Overseas Nationals can use ILR to apply for British citizenship. [Check if you can get indefinite leave to remain - GOV.UK \(www.gov.uk\)](#)*

⁴ *[UK Borders Act 2007 \(legislation.gov.uk\)](#)*

- 3.5 This is subject to several exceptions, including where to do so would breach a person's rights under the European Convention on Human Rights (ECHR) or the UK's obligations under the Refugee Convention. Those with a sentence below 12 months are eligible to be deported where it is conducive to the public good under the Immigration Act 1971.
- 3.6 EEA and Swiss citizens, and their family members, who are protected by the EU Withdrawal Agreement Act 2020, are considered for deportation on public policy, public security, or public health grounds where it concerns conduct (including any criminal convictions relating to it) committed on or before 31 December 2020.
- 3.7 Irish citizens will only be considered for deportation where a court has recommended it as part of their sentencing, or where the Secretary of State concludes that due to the exceptional circumstances of the case the public interest requires deportation.

HMPPS Guidance

- 3.8 A series of Prison & Probation Service Orders, Instructions, and Policy Frameworks set out policy and practice concerning deportation and foreign national prisoners. These include:
- [Generic Parole Process](#) (GPP) Policy Framework⁵;
 - [PSI 29/2014](#) (Release on licence for Foreign National Prisoners pending deportation⁶);
 - [PSI 37/2014](#) (Eligibility for Open Conditions and for ROTL of Prisoners Subject to Deportation Proceedings);
 - [PSI 01/2015](#) (The Allocation of prisoners liable to deportation or removal from the United Kingdom);
 - [Recall, Review and Re-Release of Recalled Prisoners](#) Policy Framework⁷;
 - [Release on Temporary Licence](#) (ROTL) Policy Framework⁸.

4 Deportation Procedures

- 4.1 Once an appeal against a deportation order has been determined (or the deadline for appeal has passed), the HOIE serves the prisoner with notice that, at the end of their sentence, they are liable to be deported (please see paragraph 6.2 below for more details on how this is calculated). 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.
- 4.2 The decision to deport should be taken up to three years ahead of the Conditional Release Date or Tariff Expiry Date. If the Secretary of State confirms that a decision to deport has been made, the prisoner has the

⁵ Implemented in January 2020, re-issued in August 2023

⁶ This PSI is to be replaced by a Policy Framework in early 2024.

⁷ Implemented in April 2019, re-issued in July 2023

⁸ Implemented in May 2019, re-issued in October 2022

right of appeal. If an asylum⁹ or Human Rights claim is raised, there is an in-country right of appeal¹⁰. If not, the prisoner is provided with an out of country right of appeal which is only exercisable from outside the UK.

- 4.3 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, then appeal on a point of law to the Upper Tribunal.
- 4.4 A foreign national prisoner can make further representations to the Secretary of State at any time. If the further representations are refused, a further right of appeal may be generated, although this is a rare outcome and would require something new (whether new evidence or argument).
- 4.5 A foreign national prisoner will be liable for detention under the Immigration Act 1971 or Immigration Act 2016. 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 prisoner may apply to the First-Tier Tribunal for bail. Once made, a bail application will be heard quickly, normally within three working days. If bail is granted, its terms will be tailored by the Tribunal around the conditions of any post-release licence¹¹.
- 4.6 Once a foreign national prisoner is deported, there are no legislative powers to enforce licence conditions or provide supervision outside of the UK.

5 Criteria for Deportation (EEA & non-EEA)

- 5.1 For a foreign national prisoner, sections 32-33 of the UK Borders Act 2007¹² states 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; or
 - A custodial sentence of any length for a serious criminal offence as set out in schedules to the Nationality, Immigration & Asylum Act 2002 (at the point of publication of this guidance, this provision has not yet been implemented).
- 5.2 The Nationality, Immigration & Asylum Act 2002 schedules identify cases where:

⁹ An asylum applicant is a person who has made a claim to be recognised as a refugee under the Refugee Convention, on the basis that it would be contrary to the United Kingdom's obligations under the Refugee Convention for them to be removed from or required to leave the United Kingdom. An asylum applicant can also be a person who has made a claim for humanitarian protection and who has made an application for asylum under the Immigration Rules. ([Immigration Rules - Guidance - GOV.UK \(www.gov.uk\)](#))

¹⁰ This means that the appeal will be heard whilst the person is in the UK, and they will not be required to leave until the appeal has concluded.

¹¹ See [Guidance on Immigration Bail for Judges of the First-tier Tribunal \(Immigration and Asylum Chamber\) \(judiciary.uk\)](#)

¹² [UK Borders Act 2007 \(legislation.gov.uk\)](#)

- A sentencing judge recommended deportation;
- A serious drugs offence was committed;
- 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; or
- Where the individual has been convicted in the UK or overseas of an offence which has caused serious harm (the latter often referred to as 'foreign legacy cases').

Please note this is not an exhaustive list.

5.3 Section 33 of the UK Borders Act 2007¹³ 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; or
- 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.

6 Early Removal Scheme and Tariff-expired Removal Scheme

Early Removal Scheme (ERS)¹⁴
(Determinate and extended sentence prisoners)

6.1 The Early Removal Scheme (ERS) allows almost all foreign national prisoners¹⁵ serving determinate sentences to leave the UK prior to the end of their sentence.

6.2 The requirement is that the foreign national has served the 'minimum pre-removal custodial period' which is either:

- half the usual period to be served; or
- the usual period to be served minus a year.

As an example, if someone is sentenced to six years, they would normally be automatically released after three years. The two figures would be:

- 1 1/2 years and
- 2 years, (the person would be eligible for ERS after 2 years).

¹³ [UK Borders Act 2007 \(legislation.gov.uk\)](https://legislation.gov.uk)

¹⁴ The relevant instruction is [PSI 04/2013](#) The early Removal Scheme and Release of Foreign National Prisoners

¹⁵ The main exception is for someone who is a 'terrorist prisoner' as defined in Parts 1 or 2 Schedule 19ZA Criminal Justice Act 2003 or whose case is listed in Part 3 Schedule 19ZA and had a 'terrorist connection' as defined in s69 Sentencing Act 2020. Someone with outstanding criminal charges, or an unpaid confiscation order will also be ineligible.

- 6.3 The Parole Board plays no part in a decision as to whether someone is removed under the ERS, and the process can run in tandem with any Parole Board review. Paragraph 5.6 of PSI 04/2013 states the following:

"Foreign national prisoners cannot opt out of the parole process. Governors must ensure that parole eligible prisoners who are not removed are referred to the Parole Board for consideration for release on parole in the same way as other parole eligible determinate sentence prisoners (in line with Generic Parole Process (GPP) Policy Framework). The parole dossier must contain any relevant HOIE paperwork relating to the prisoner's immigration status and progress towards their removal or deportation...". Paragraph 5.6 also states, "If the prisoner's immigration status changes during the course of the parole process, the prison must notify the Parole Board".¹⁶

Tariff Expired Removal Scheme (TERS)
(Indeterminate sentence prisoners)

- 6.4 The Tariff-Expired Removal Scheme (TERS) is a discretionary scheme operated by the Ministry of Justice, but which relies on the Home Office having a deportation order in place. The scheme applies to foreign national prisoners serving an indeterminate sentence and gives the Secretary of State the power to remove them from prison for the purposes of deportation from the UK, once their tariff has expired, and without the Parole Board directing release. TERS is considered when the prisoner becomes barrier-free, i.e., they have a deportation order, they have exhausted their appeal rights, there are travel documents in place and there are no other impediments such as ongoing Court proceedings.
- 6.5 **The Parole Board takes no part in the decision to remove a prisoner under TERS which is within the Secretary of State's remit.**
- 6.6 The parole review runs in parallel with the TERS process. Neither decision is reliant on the other.
- 6.7 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. A full decision which follows the Decision Making Framework is required in all cases. The Parole Board must proceed until the referral is withdrawn.
- 6.8 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;*

¹⁶ Please note, where the prisoner does not have a home address/UK residence, the case would follow the same process as a case involving a prisoner who is of no fixed abode, and a COM would be allocated in the Probation Delivery Unit linked to last known address or sentencing Court.

- *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.*¹⁷

6.9 Once a deportation order has been served, and the appeal rights have been exhausted, the prisoner is excluded from open conditions under the Secretary of State's current policy (please see section 13 on open conditions for more information). A panel must follow the terms of the Secretary of State's referral and, therefore, if open is included in the referral, then it will still need to be considered. If a panel is aware that appeal rights have been exhausted in a specific case, it should direct the Secretary of State to confirm the terms of the referral and whether a revised referral is to be sent to the Parole Board.

6.10 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 which will proceed separately to the parole review.

7 Return to the United Kingdom

7.1 If someone returns to the UK after early removal, then they will be liable to be returned to prison to serve the remainder of the sentence. A foreign national prisoner removed under ERS on or after 28 June 2022 is subject to section 261 Criminal Justice Act 2003, as introduced by section 47 Nationality and Borders Act (NABA) 2022. *"The effect of this provision is to pause the foreign national's sentence at the point they were removed from prison under the ERS (this is known as the stop the clock provision). This means that should they return to the UK at any time in the future, they are required to be returned to custody to continue serving the remainder of the custodial part of their sentence from the point at which it was paused. Prior to the commencement of section 47 of the NABA 2022 foreign national prisoners removed under ERS who returned to the UK were only returned to prison if they were apprehended before their sentence expiry date."*¹⁸

¹⁷ Paragraph 5.3.2 Generic Parole Process Policy Framework

¹⁸ Page 6, *The Early Removal Scheme (Version 9.0)*, published by the Home Office. [The Early Removal Scheme \(ERS\) \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

7.2 *Someone who has been deported* will have had any leave to remain cancelled and will not be permitted to return unless they have successfully applied to revoke the deportation order and then for leave to enter. If they do not do so, they will be committing a criminal offence under s24(A1) (or s24(D1)) of the Immigration Act 1971. If they return with valid leave to enter, any licence conditions set by the Parole Board prior to release will be reactivated.

8 Implications for Practice and Decision-Making

Notice of Deportation

8.1 The term “liable to deportation” applies to prisoners who¹⁹:

- Are confirmed by the Home Office as meeting the initial criteria for deportation based on such factors as nationality and sentence length (whether the prisoner 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 UK²⁰.

8.2 Deportation decisions will generally be taken three years prior to Parole Eligibility Date or Tariff Expiry Date. A final decision may not have been made when a case is referred to the Parole Board, especially for indeterminate sentence foreign national prisoners.

8.3 There should be references within the dossier when a case involves a foreign national prisoner, for example, updates from HOIE, references in reports and information contained in the OASys assessment report. If the panel are unsure, they should check with the case manager, as there should be a flag on PPUD to identify if the case is a foreign national prisoner.

8.4 The MCA panel, oral hearing panel chair, or duty member should check that there is a current report in the dossier from the HOIE. If not, a copy may be directed (via the Board’s Third Party Directions Team). Where the MCA panel is directing the case to an oral hearing, an updated report from the HOIE should be directed because circumstances may have changed. A panel chair setting directions should do likewise, if the HOIE report is not already in the dossier.

8.5 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 prisoner came to Immigration

¹⁹ Paragraph 6.96 Release on Temporary Licence (ROTL) Policy Framework

²⁰ This is where someone who does not meet the criteria for automatic deportation but the Secretary of State is considering whether the person’s deportation ‘is conducive to the public good’ (s3(5)(a) Immigration Act 1971).

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 prisoner has exhausted all appeal rights, the 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.

- 8.6 The panel's direction may extend to asking the HOIE (via the Board's Third Party Directions Team) for information relating to abscond risk. For example, asking how well the prisoner complied with Immigration Act reporting requirements prior to sentence.

9 Interpreters and Communication Specialists

- 9.1 For prisoners whose first language is not English, and who have notified of their need or preference to conduct the hearing in a language other than English, 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.
- 9.2 There may be some cases where there are additional hidden speech, language and communication needs, for example, intellectual disabilities, that are masked when English is not the first language. This could involve other language-based communication styles including British Sign Language (BSL), which may include visual frame signing, hands-on signing, Sign Supported English (SSE); Makaton; Braille; Deafblind Manual Alphabet etc.
- 9.3 Communication specialists such as Speech and Language Therapists, Intermediaries, Specialist Deaf Intermediaries etc, may be helpful to overcome other communication barriers. Finding and using the right combination of communication methods, for example non-verbal, or symbol systems, can offer improved engagement in the parole process.
- 9.4 Securing a communication specialist with the appropriate skills should be approached in the same way as for a spoken language interpreter and is the responsibility of the prison.
- 9.5 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 their attendance can be organised and confirmed by HMPPS in advance of the hearing.
- 9.6 It may be necessary to defer or adjourn if a fair hearing cannot take place without an interpreter or communication specialist present.
- 9.7 Please refer to the Parole Board 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.

10 Test for Release

- 10.1 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 statutory 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 test²¹.
- 10.2 Although the fact that a prisoner's immigration position is precarious may impact on their likelihood or inclination to comply with licence conditions, this does not, of itself, preclude a direction for release.
- 10.3 If a prisoner has no, or limited, immigration status then this does not preclude a direction for release. However, the fact that they may have, for example, limited ties and an incentive to live in a clandestine manner to avoid deportation are matters that could properly be taken into account by a panel.
- 10.4 In ERS and TERS cases the test for release whether at MCA stage or oral hearing does not change. However, the panel may wish to consider the effect the absence of an enforceable risk management plan may have on risk should ERS or TERS be implemented. Please refer to section 11 below for more information about Risk Management Plans.
- 10.5 It is important to note that when considering the risk of serious harm to the public, this means to the public anywhere in the world which includes people in the country to which deportation is proposed. Case law²² says that public safety is not limited to the UK 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.

11 Risk Management Plans

- 11.1 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 and/or there is a delay in the deportation order being activated. Even in situations where the Home Office have confirmed that they will be applying to detain the prisoner if released, it is possible for the prisoner to apply for bail.
- 11.2 Although there is power for someone in immigration detention to be granted 'home leave' (which is temporary Release on Licence), this is rare, and will require the permission of the Home Office Foreign National Offender Returns Command²³.

²¹ Please refer to the Parole Board's Types of Cases Guidance for more information on the statutory test for release.

²² *R v Parole Board ex p White* (1994) December 1994

²³ More information about this can be found in the [Home Office Detention: General Instructions Guidance](#)

- 11.3 The risk management plan must extend to the country to which removal is proposed.
- 11.4 A panel can expect to have:
- A robust risk management plan (outlining the risks posed to victims within the UK). It should be informed by a nuanced understanding of the prisoner's current immigration status.
 - How barriers to accessing services caused by irregular immigration status inhibit the risk management plan in the prisoner's particular context.
 - A narrative about the interplay between the current immigration status and dynamic risk factors, as well as how these can be inhibited/ mitigated by established social, capital and internal/ external strengths and support (that can be evidenced).
- 11.5 Directions may be made at the MCA stage for the Community Offender Manager (COM) report to include:
- Details of a risk management plan in the UK and details of a risk management plan in the country where the prisoner may be deported (this should not be a separate risk management plan document). However, the reality is that risk management plans managing behaviour in other countries will be rare.
 - If available, an outline of what the intended resettlement activity in the country of origin currently looks like.²⁴
- 11.6 Currently there are no information sharing protocols in place between the Probation Service and their counterparts in countries to which a foreign national prisoner may be deported.
- 11.7 The reality is that once the prisoner is deported, there is no supervision in the other jurisdiction and the risk management plan would not be enforceable in the receiving country. 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 consider risk to potential victims in the country to which the prisoner will be deported.
- 11.8 If the panel wishes to obtain information from outside the UK (such as details of previous foreign convictions (where there is evidence to suggest criminality in other jurisdictions) or a prisoner's home situation), a direction can be set for the Secretary of State to submit such evidence²⁵.

²⁴ There are a variety of Home Office reintegration schemes (only for certain destinations currently) that work with the International Organisation for Migration in the country of origin.

²⁵ 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.

Although an application may be made by PPCS to the relevant embassy²⁶, there will be some cases where applications should not be made, such as cases where the prisoner does not consent to contact being made with their country of origin embassy²⁷. Accordingly, before such a direction is made, the panel should first contact the Board's Policy and Practice Advisor. Consideration to directing provision of such information should be made as early as possible, preferably at MCA, due to the extended timescales likely to be required²⁸.

- 11.9 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. Decisions should make clear that any court considering bail must have sight of the licence conditions which have been set.
- 11.10 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. Accordingly, the length of time that removal will take will vary from days to potentially years.
- 11.11 For example, if bailed from immigration detention, the Parole Board's release requirements may be relevant in shaping bail conditions. Alternatively, the prisoner may successfully appeal deportation and be released on licence in the UK.
- 11.12 Panels will also need to consider the consequences of the 'hostile environment' which sets up a framework of criminal and civil penalties in various areas of public life. For example, it is a criminal offence to employ someone who is not permitted to work, and the person who works without permission is also committing an offence. It is also a criminal offence to rent a property to someone without leave to remain.
- 11.13 Those without leave to remain will also not be able to access almost all state benefits that would be available to a British citizen or someone with immigration leave. The exceptions would be where the prisoner has children under 18 where support may be available, or they have an outstanding asylum application or appeal, where they may be entitled to 'asylum support' to meet their basic needs.
- 11.14 The aim of this is to restrict the ability of those without leave, to remain in the UK. This does not extend to Approved Premises (AP), where someone without leave and subject to a deportation order, can be housed.

²⁶ 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.

²⁷ The exception to the above is if the country has a Bi-lateral Consular agreement with the UK, in which case, the UK is obliged to disclose the prisoner's details. Please see [Prison Service Instruction - Immigration and repatriation and removal service - PSI 52/2011 \(publishing.service.gov.uk\)](#) for more information.

²⁸ It is not possible to give a clear idea of timescales, as it will vary from country to country and from agency to agency.

- 11.15 For that reason, panels will need to give consideration to how someone without leave will be able to support themselves on a day-to-day basis if released to a non-AP accommodation or following an AP placement. Typically, they will be assisted by friends and families, but that will not always be possible and, even when it is, panels will need to consider how realistic any offers of long-term support would be, such as any financial implications on the friends/families. The panel should also consider whether the friends/family are considered as protective factors, whether they are likely to simply provide support or whether they could be a negative influence.
- 11.16 In the above circumstances, an MCA panel or panel chair may wish to issue directions seeking information regarding the financial status of the prisoner's support network in the community. Such directions could be made to the COM. It will be for the panel to place the appropriate weight on such evidence in analysing the efficacy of the proposed risk management plan. In some cases, it may be necessary to direct relevant family or friends to give evidence, although this is likely to be in exceptional circumstances.
- 11.17 On the other hand, a prisoner who is actively seeking leave to remain may have an incentive for that reason to stay in touch with the Home Office. As a consequence, they may be more inclined to co-operate with probation and the police, and this could be considered to be a protective factor.
- 11.18 It is possible for someone in immigration detention to be granted temporary leave without reference back to the Parole Board.
- 11.19 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 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.
- 11.20 In practice, there will be cases where prisoners will be unable to be removed from the UK, but will not qualify for leave to remain. This will be because it is not possible for them to obtain documentation from their home country, or their home country will not take them back. In such a case, whilst the immigration outcome will vary depending on the prisoner's individual circumstances, it will generally not be possible to detain them forever under the Immigration Acts. Generally, immigration detention can only be used by the Home Secretary where they intend to deport someone, and deportation is likely to happen in a reasonable period of time²⁹.

²⁹ Known as the 'Hardial Singh principles'. R (Hardial Singh) v Governor of Durham Prison [1983] EWHC 1 (QB)

- 11.21 It cannot be said how that will be applied in any individual case, but panels will need to be aware that the fact that someone is currently detained in immigration detention does not mean that they will not be released from that detention (often with very little notice).
- 11.22 In such a case, panels will need to consider what outstanding applications to the Home Office a prisoner has, what family members they may have in the UK (who may, for example, have put up a surety for a bail application) and what their history of compliance or engagement with probation and other agencies is.

12 Processes Following a Direction for Release

- 12.1 If a person returns to the UK following a removal under TERS, they will be deemed as unlawfully at large and will be liable to be detained. If the Board did not direct release prior to the prisoner's removal under TERS, the person will continue to be detained in pursuance of their sentence. If release was directed by the Board, they will be treated as if they have been recalled to prison. The prisoner will remain in custody unless release is directed by the Board, or they are further removed from the UK.
- 12.2 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 Removal Centre (also known as an immigration detention centre). These are matters for the 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.
- 12.3 The decision by the Parole Board remains provisional for 21 calendar days³⁰ if it is eligible for reconsideration³¹ or becomes final if no application for reconsideration is received within the specified time³². For more information, please see the Parole Board Guidance on the Reconsideration Mechanism.
- 12.4 A final decision may be set aside following a successful application by either of the parties to the proceedings (Secretary of State or prisoner). Set aside may also be initiated by the Parole Board.
- 12.5 The decision subject to a set aside application must be final and relate to whether the prisoner is to be released or not. For more information on the

³⁰ A panel chair or duty member can utilise the power set in rule 9 Parole Board Rules 2019 (as amended) to extend or reduce the time set by rule 28 Parole Board Rules 2019 (as amended) for submitting an application for reconsideration.

³¹ 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 Parole Board Rules 2019 (as amended)).

³² 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.

eligibility criteria, the grounds for setting aside a decision, and the set aside process, please see the Setting Aside a Decision Guidance.

13 Open Conditions

- 13.1 Panels should check the Secretary of State's referral in the dossier to see whether it includes consideration of the prisoner's suitability 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.
- 13.2 Where all appeal rights against a deportation order have been exhausted³³, or where the appeal rights must be exercised from abroad, HMPPS policy is that the prisoner must not be classified as suitable for open conditions. Paragraph 5.10.9 of the GPP Framework states the following, "*IFNPs³⁴ that have been transferred to open conditions will be removed and returned to closed conditions once they have exhausted the appeal process. Prison should not be removing such prisoners until this has been confirmed.*"³⁵
- 13.3 For those foreign national prisoners who are liable for deportation but are eligible for open conditions (and where open conditions are part of the referral), the Board must be satisfied that the prisoner presents a very low risk of abscond and that the criteria in the Secretary of State's Directions (August 2023)³⁶ have been met. Guidance on what to consider when assessing 'very low risk of abscond' can be found at paragraphs 13.8-13.9 below.
- 13.4 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 information available to the panel.
- 13.5 The MCA panel, duty 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.

The Secretary of State's Directions to the Parole Board August 2023 - Transfer of indeterminate sentence prisoners to open conditions

³³ If a prisoner has been served with a deportation order it does not necessarily mean that their appeal rights have been exhausted. Accordingly, if a panel have questions over whether the prisoner is eligible for open conditions, it is best to make a direction to clarify matters with PPCS.

³⁴ Indeterminate Sentenced Foreign National Prisoners.

³⁵ Please note, paragraph 1.6 PSI 37/2014, states the following, "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". However, the GPP Policy Framework referenced at paragraph 13.2 above supersedes paragraph 1.6 of the PSI.

³⁶ [Secretary of State Directions to the Parole Board 1 August 2023 PC .pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

- 13.6 The Secretary of State's Directions³⁷ set out the criteria which must be met in order for the Parole Board to recommend a progressive move to open conditions. Guidance on the Secretary of State's Directions, along with a copy of the Directions, can be found in the Parole Board's Types of Cases Guidance.
- 13.7 For those foreign national prisoners who are liable for deportation but are eligible for open conditions (and where open conditions are part of the referral), the Board must be satisfied that the indeterminate sentence prisoner presents a **very low risk of abscond** and that the first criterion in paragraph 2(ii) of the Secretary of State's Directions (August 2023) is met, namely: *"The prisoner has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm (in circumstances where the prisoner in open conditions may be in the community, unsupervised under licensed temporary release.)"*
- 13.8 The Directions are silent on what a panel should take into account when considering whether the prisoner meets the criteria of **very low risk of abscond**; however, panels may wish to consider the following factors (this is not intended to be an exhaustive list):
- The risk that the prisoner will use the low security of the open estate or temporary release to evade not only custody but also possible removal/deportation action. This risk may be heightened in circumstances where it is known the prisoner is unwilling to be removed/deported from the UK and has previously 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.
 - Previous failures by the prisoner within prison, not only in terms of failures to return from previous ROTL but also late returns and other failures to comply with prison rules and regulations that may indicate an inclination to abuse the privilege afforded by open conditions or ROTL and abscond or fail to return when considered in conjunction with their deportation status. Any failure of this nature in prison or immigration custody should normally be seen as proof of not falling within the "very low risk" of abscond category.
 - Risk may be lessened where the prisoner is known to be cooperative and is seeking to return to their home country, as will other factors such as strong family ties in this country or that the prisoner does not wish to jeopardise their chances of successfully appealing and remaining in this country.
- 13.9 In considering the above factors, the panel may also wish to consider the following:

³⁷ issued on 17th July 2023 and came into effect on 1st August 2023

- The prisoner's background, including the nature, circumstances and pattern of any previous offending;
- The nature and circumstances of the index offence and the reasons for it, including any information provided in relation to its impact on the victim or victim's family;
- The trial judge's sentencing comments or report to the Secretary of State, and any probation, medical, or other relevant reports or material prepared for the court;
- Whether the prisoner has made positive and successful efforts to address the attitudes and behavioural problems which led to the commission of the index offence;
- The nature of any offences against prison discipline committed by the prisoner;
- The prisoner's attitude and behaviour to other prisoners and staff;
- The category of security in which the prisoner is held and any reasons or reports provided by the Prison Service for such categorisation, particularly in relation to those prisoners held in Category A conditions of security;
- The prisoner's awareness of the impact of the index offence, particularly in relation to the victim or victim's family, and the extent of any demonstrable insight into their attitudes and behavioural problems and whether they have taken steps to reduce risk through the achievement of sentence plan targets;
- Any medical, psychiatric or psychological considerations (particularly if there is a history of mental instability);
- The prisoner's response when placed in positions of trust, including any outside activities and any escorted absences from closed prisons; and
- Any indication of predicted risk as determined by a validated actuarial risk predictor model or any other structured assessment of the prisoner's risk and treatment needs.

13.10 Before recommending transfer to open conditions, the panel should also consider the prisoner's relationship with the Probation Service (in particular the COM), and other outside support such as family and friends. However, with this, it should be noted that friends/family may, in some cases, be a negative influence.

13.11 The criteria of, "**very low**" is a higher standard than "**low**". Accordingly, panels should be even more cautious about proposals to transfer to open conditions than they normally would in cases not involving foreign national prisoners.

13.12 Please see the Types of Cases Guidance for more information on the criteria for open conditions.

14 Release on Temporary Licence (ROTL) Eligibility

14.1 The Release on Temporary Licence (ROTL) Policy Framework 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. Where a foreign national prisoner is liable to be removed from the UK, it would be for HMPPS to obtain information about the prisoner's

immigration status from HOIE. Foreign national prisoners who meet the following criteria are statutorily excluded from ROTL (Paragraphs 6.93 and 6.94 of the Release on Temporary Licence (ROTL) Policy Framework):

- *"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) / YOI³⁸ 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."*

14.2 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 Release on Temporary Licence (ROTL) Policy Framework, namely:

"Offenders liable for deportation must not be assessed as suitable for ROTL, unless it is judged that there is a 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.*

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

³⁸ Young Offenders Institute.

- 14.4 *Governors must also consider factors that might indicate lower risk of failure to return, for example, where the prisoner 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 prisoner would not wish to jeopardise their chances of successfully appealing and remaining in this country.*
- 14.5 *Where the prisoner is in open conditions when it is confirmed that they are liable for deportation, they must have their security category reviewed. Only once it has been confirmed that they 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."*

Annex A - Glossary

Asylum – technically, someone who will be seeking protection in the United Kingdom due to a well-founded fear of persecution for a ‘convention reason’ (namely, race, religion, political opinion, nationality or membership of a ‘Particular Social Group’) in their home country. It’s typically used to cover someone coming to the UK to seek protection from harm in their country of origin.

Citizenship – the country that someone is a national of.

Confiscation order – an order by the Crown Court when sentencing someone for a criminal offence that requires them to pay a specified sum of money that represents the benefit of their criminal activity.

Deportation – the removal of a foreign national from the United Kingdom following a criminal conviction. This is to be distinguished from someone who has no leave to remain and is being removed because of that (generally called administrative removal).

Detained – someone who is kept in the custody of the state – typically either a prison or immigration detention centre.

Dual nationality – someone who is a citizen of more than one country.

Exhausted all appeal rights – someone who is to be removed from the UK and, having appealed the decision, had their appeal dismissed and there is no opportunity for further appeals.

Extradition – the process whereby a foreign government will apply to the United Kingdom to seek the return of someone for reasons related to a criminal allegation. This is typically to face charges or serve a prison sentence.

Home Office Immigration Enforcement (HOIE) – a successor to the UK Border Agency (UKBA), HOIE is responsible for enforcing immigration law.

In-country right of appeal – the ability of someone to stay in the United Kingdom whilst their appeal against a home office decision is heard.

‘Leave’ – almost everyone who is not a British or Irish citizen requires leave to enter and remain in the UK – this is permission from the Home Secretary.

Liability for deportation – someone who has received a sentence that triggers the automatic deportation provisions or who has received a formal notice that they can be deported or who are being considered for deportation because it would be for the public good or who has a deportation order in place.

Notice of liability to deportation – a formal notice that the Home Secretary believes that the person meets the criteria to be deported.