
Prison Law & Resettlement for FNPs

Categorisation

The categorisation of prisoners is covered by PSI 40/2011 (adult male prisoners), PSI 39/2011 (adult female prisoners) and PSI 52/2011 (immigration, repatriation and removal services).

Security categories – adult male

The categories within prison are defined as:

Category A

Prisoners whose escape would be highly dangerous to the public or the police or the security of the State and for whom the aim must be to make escape impossible.

Category B

Prisoners for whom the very highest conditions of security are not necessary but for whom escape must be made very difficult.

Category C

Prisoners who cannot be trusted in open conditions but who do not have the resources and will to make a determined escape attempt.

Category D

Prisoners who present a low risk; can be reasonably trusted in open conditions and for whom open conditions are appropriate.

Security categories – adult female

The security categories for women are not the same as for men. They are:

Category A

Prisoners whose escape would be highly dangerous to the public or the police or the security of the state and from whom the aim must be to make escape impossible.

Restricted Status

Any female, young person or young adult prisoner convicted or on remand whose escape would present a serious risk to the public and who are required to be held in designated secure accommodation.

Closed Conditions

Prisoners for whom the very highest conditions of security are not necessary but who present too high a risk for open conditions for whom open conditions are not appropriate.

Open Conditions

Prisoners who present a low risk; can reasonably be trusted in open conditions and for whom open conditions are appropriate.

How categorisation works

Upon sentence (or on remand in some cases) a prisoner's categorisation will be considered following the guidance set out in PSI 40/2011, paragraph 4.

Thereafter, all prisoners serving over 12 months should have regular reviews of their categorisation. These can be at six monthly or twelve monthly intervals, depending on how much time the prisoner has left to service (PSI 40/2011, para 5.5).

The general principle of categorisation is that a prisoner should always be assigned the lowest security category for which they meet all the criteria. The assessment is based upon their needs in terms of security and control and is not governed by the availability of suitable spaces within the prison estate. However, a prisoner may be held in a prison of a higher security category than that assigned to him.

The purpose of review of categorisation is 'to determine whether... there has been a clear change in the risks a prisoner presented at his last review and to ensure that he continues to be held in the most appropriate conditions of security.'

Allocation is a separate process to re-categorisation and is dependent on availability of suitable places and the pressures on the prison estate.

On occasion, there may be a non-routine re-categorisation if it is deemed that 'there has been a significant change in their circumstances or behaviour which impacts on the level of security required.' (PSI 40/2011, para 5.9).

Categorisation and FNPs

In the case of Foreign National Prisoners, PSI 40/2011 must be read alongside PSI 37/2014, Eligibility for Open Conditions and for ROTL of Prisoners Subject to Deportation Proceedings, issued in August 2014, which made some major changes to categorisation and allocation for FNPs. Essentially, it states that:

- Prisoners who have a Deportation Order made against them and who have exhausted their appeal rights, or whose appeal rights must be exercised from abroad CANNOT be classified as suitable for Category D/Open conditions. They must continue to have their categorisation reviewed at the prescribed intervals or whenever there is a significant change in their circumstances;
- Prisoners who are liable for deportation can be considered for Category D/Open conditions, but additional risk assessment must be carried out including referring to the HOIE for further information and considering additional information as set out in Annex E of the PSI;

- Any FNP who is not liable for deportation can be considered for Category D/Open conditions in the same way as any other prisoner. FNP's should have their categorisation reviewed as soon as possible if decision is made not to deport (PSI 40/2011 para 5.9).

So, essentially, an FNP's deportation status must be checked with the HOIE using the forms provided in the PSI as part of any assessment for conditions of lower security.

The instruction does not require a change of categorisation for any FNP who is already in open conditions, but if there is any change in the FNP's deportation status then the categorisation must be re-assessed.

Challenges to categorisation

Any prisoner who is dissatisfied with their categorisation or re-categorisation can challenge the decision by completing the requests and complaints form and giving it to the line manager of the assessor or board chair. The categorisation decision will then be reviewed by a manager senior to the officer who made the decision.

Allocation

The allocation process is separate to that of categorisation.

There are special provisions relating to the allocation of male FNP's which are set out in PSI 40/2011, Annex B, para 19, which states:

'Subject to paragraphs 20 to 22 below all sentenced adult male foreign national prisoners who are categorised C and have between three months and three years to earliest release date (including ERS date) should be allocated to one of the prisons listed in the attached table [Annex H to PSI 40/2011] at the earliest opportunity. In the first instance sending establishments should seek to allocate to a prison listed in the priority allocation group. If this is not possible sending establishments should seek to allocate to a prison in the second priority group. If neither is possible, allocation should take place to any appropriate prison. All allocations are subject to specific allocation criteria for individual prisons.'

This does not apply if Immigration Enforcement have stated that they have no interest in deporting or removing the FNP in question. Also, some consideration of individual needs or circumstances should be made, in particular:

'Adult male category C FNP's should NOT generally be allocated to a prison in the priority allocation group if;

- They have less than three months or more than three years left to serve to earliest release date (including ERS date)
- They have outstanding medical appointments which cannot be serviced from the receiving prison
- There are other substantive reasons as to why a move to an FNP priority allocation prison should not take place (for example compassionate grounds).' (PSI 40/2011, Annex B, para 22).

FNP's sentenced to under 12 months imprisonment who are not subject to deportation action must be considered for allocation to open conditions (PSI 52/2011, para 2.22).

Release On Temporary License

PSI 37/2014 clarifies which Foreign National Prisoners are eligible for Release on Temporary License.

The instruction states that:

- Any prisoner who is in closed condition and who has a Deportation Order against them and has either exhausted all appeal rights or whose right to appeal must be exercised from abroad (e.g. when a human rights or asylum claim is classed as 'clearly unfounded') must not be granted ROTL.
- Any prisoner who is liable for deportation or removal can be considered for ROTL but will be subject to a more rigorous risk assessment as outlined in the instruction. Information must be requested from HOIE and ROTL should only be granted when the risk is assessed as very low.
- The bar on ROTL does not apply to FNP already in open conditions. Any change in a prisoners deportation status while they are in open conditions should trigger a re-assessment for both any ROTL license and continued suitability for open conditions
- Any FNP who is not liable for deportation or removal should be considered for ROTL in the same way as any other prisoner.
- When an FNP applies for ROTL the prison must apply to HOIE for confirmation of the prisoner's current deportation status, unless HOIE have already confirmed that they have taken a decision not to remove the FNP from the UK.

The instruction defines prisoners as 'liable for deportation if:

- They are assessed by the HO as meeting the initial criteria for deportation based on such factors as sentence length; or
- They have received a formal notice of liability for deportation; or
- Have received a deportation order with appeal rights in the UK remaining; or
- Are not liable for deportation but are being considered or made subject to removal from the UK (e.g. a person who was in the UK without any immigration status at the time of their arrest).

Only FNPs whose immigration status allows them to work or study would be allowed ROTL for this purpose. Those without this permission may still undertake unpaid community work from prison (PS0 6300 para 5.5.1.),

In cases where an FNP may apply for ROTL, the final decision on grant of ROTL remains with the prison governor who should be presented with an adequate assessment of all the relevant factors to aid him/her in his/her decision. If a governor was perceived not to be using their decision making power properly, for example by implementing a blanket ban on ROTL for all FNPs without due consideration of the individual circumstances of the case or improperly delegating the ROTL decision to Immigration Enforcement by treating that view as binding, then the decision on whether to grant ROTL could be challenged as unlawful (legally known as 'fettering a discretion').

Home Detention Curfew

Home Detention Curfew (HDC) is commonly known as ‘tagging’. It is the system which allows some prisoners to be released from prison earlier than usual and to spend the remainder of their sentence in the community, by agreeing to wear an electronic tag and to spend a certain period of time, usually 12 hours each night, in their designated home address.

The rules around HDC are largely set out in PSO 6700, although this has been supplemented by a number of other PSIs.

A prisoner who is serving a sentence between 3 months and 4 years in length should be considered for HDC up to 135 days before their Earliest Release Date or after serving at least one quarter of their total sentence (whichever is the latest date of those two), unless they fall within one of the statutory exceptions.

Most FNPs will not be eligible for Home Detention Curfew (HDC) because they fall within the statutory exception of a person who is ‘liable to removal from the UK’ as defined by s246(f) Criminal Justice Act 2003. Essentially if a FNP has not been served with any decision to deport and is not facing administrative removal then they are not statutorily excluded (even if Criminal Casework is still considering whether or not to deport them).

However, even if an FNP is not statutorily excluded, there are still two potential obstacles to a grant of HDC

PSI 52/2011 states that FNPs who have been notified by Immigration Enforcement that they are ‘liable to deportation’ and under consideration for deport (even if no decision yet served) should be presumed to unsuitable for HDC unless there are exceptional circumstances justifying release. Those FNPs should be given a risk assessment for HDC, but decision makers should proceed on the basis of an assumption that the FNP will be deported. If it appears fairly certain that an FNP will not be deported it may be worth pressing Criminal Casework to make a decision so that the possibility of HDC is not lost.

The second barrier, case law in *R (Francis) v SSJ & SSHD* suggests that if a prisoner has been served an IS91 (detention authority) form then the Secretary of State for Justice is entitled to operate a policy of not granting HDC.

