
Toolkit S2: Deportation

What is deportation?

It is common to talk about someone being 'deported' when we mean that they are being removed. However, deportation and removal are two distinct actions.

Deportation is a sanction against someone who has committed a criminal offence. Removal is an administrative function to remove from the UK someone who does not comply with immigration rules.

Who can be deported?

Any foreign national can potentially be deported.

However, not every foreign national who commits an offence will be considered for deportation. **Consideration for deportation can be triggered in two ways:**

1. A sentencer can recommend deportation in addition to a sentence of imprisonment. This is becoming increasingly rare due to the increased scope of statutory deportation.
2. Meeting the criteria for deportation outlined in the UK Borders Act 2007 which is:
 - a. For a non-EEA national – sentence of 12mths + (or up to 3 sentences adding up to 12mths in last 5yrs)
 - b. For an EEA national – sentence of 24mths OR crime involving sex, drugs or violence

The following categories of person should NOT be deported:

- Any person for whom deportation would breach their rights contrary to either the Refugee Convention or the European Convention of Human Rights (ECHR)
- Any person for whom deportation would breach their rights under European Law
- Any person who was under 18 years old at the time of conviction
- Any person who is facing extradition
- Any person who has been ordered to serve a sentence or time in a psychiatric institution under certain provisions of the Mental Health Act
- A recognised victim of trafficking

Prison Service Instruction 38/2012 sets out the operational framework for removal and repatriation of FNPs.

Any FNP who meets the threshold for deportation under the 2007 Act may only appeal against deportation on the grounds outlined above (that they fall into the category of a person who should not be deported).

Any person who believes that they fall into any of the above categories should tell the Criminal Casework team this as soon as possible so that the case can be looked at. A person may potentially fall under more than one of the categories so it is important to consider all the categories and give all the relevant information. Below is more information about some of those categories.

Any person for whom deportation would breach their rights contrary to either the Refugee Convention or the European Convention of Human Rights (ECHR)

The Refugee Convention

The UK is a party to the 1951 Convention Relating to the Status of Refugees ('The Refugee Convention').

A person who is recognised as a refugee in the UK has been granted protection by the government because they are unable to return to their own country due to

“...a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” (Refugee Convention Article 1A.).

Parties to the Refugee Convention are prohibited from ‘refoulement’:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (Refugee Convention Article 33(1)).

So, essentially, if a person with refugee status can show that they would still be at risk of persecution for a Convention reason if they were returned to their country of origin then they should not be deported.

However, if the circumstances which led to the granting of refugee status have changed (e.g. a change of government), then refugee status may be revoked and the person will then face deportation unless they are covered by a different exemption category.

An ‘asylum seeker’ is a person who has applied to be given refugee status and whose case is still under consideration by the Home Office. A person should not be removed from the UK while their asylum case is still under consideration. This included cases where an appeal is being made against a refusal of asylum unless the applicant is a citizen of a country on the safe country or ‘White List’.

The list, originally set out in the Nationality, Immigration and Asylum Act 2002, sets out countries which the government presumes to be safe. This list is often referred to as the ‘White List’. Essentially, if a country is on the list then any asylum claim made by a national of that country is automatically presumed to be clearly unfounded and may be rejected and the applicant removed from the UK even if they are exercising a right of appeal against the decision. **The list of countries does change from time to time and should always be checked but at the time of writing the list included:**

- All EEA countries
- Albania
- Jamaica (pending review of Court of Appeal decision)
- Macedonia
- Moldova
- Serbia & Montenegro

- Brazil
- Ecuador
- Bolivia
- South Africa
- Ukraine
- India
- Mongolia
- Ghana (men only)
- Nigeria (men only)

Bangladesh and Sri Lanka were removed from the list following legal challenges. The Court of Appeal has recently ruled that Jamaica should not be on the list as it is accepted that there is a serious risk of persecution to a substantial minority (LGBT).

Any person who believes that they may have a claim to be recognised as a refugee should get legal advice about making a claim for asylum. Asylum applicants may be entitled to legal aid to make their case.

The European Convention on Human Rights

The UK is a signatory to the European Convention on Human Rights (ECHR). This has been transferred directly into UK law via the Human Rights Act 1998 (HRA). The Articles in the HRA are the same as those in the ECHR, but by incorporating them into UK law a person can use the Articles in the UK courts rather than having to take a case to the European Court of Human Rights.

In terms of resisting deportation we are most often talking of one of two Articles of the HRA which are Article 3 and Article 8.

Article 3 - Protection from torture and mistreatment

Article 3 of the HRA states:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

This means that no public authority in the UK can torture anyone or subject them to inhuman or degrading treatment or punishment, nor can they send any person back to any country if there is a real risk that they will face torture or inhuman or degrading treatment or punishment.

The meaning of ‘torture’ and ‘inhuman or degrading treatment or punishment’ has been defined by a number of cases in the courts.

Article 3 is an absolute right, which means that it cannot be limited or restricted in any way, regardless of a person’s conduct (for example if they have committed a criminal offence).

Any FNP who thinks that he or she should not be deported because of risk of torture or inhuman or degrading treatment or punishment in the country to which he or she would be removed should seek legal advice. An Article 3 application is treated in the same way as an application for asylum and applicants may be entitled to legal aid to make their claim.

Article 8 - Right to family and private life

Article 8 of the HRA states:

1. Everyone has the right for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The right to family and private life has quite a broad meaning, but in relation to deportation it usually involves the right to stay in the UK to be with family or to continue with the life that a person has established here.

You will notice that s2 of Article 8 allows that in certain circumstances a public authority can interfere with this right. That indicates that Article 8 is NOT an absolute right and the government can take into account a number of considerations when considering the right to family life.

It is sometimes helpful to think of the exercise of the right to family life as a balancing act – on one side of the scale might be the amount of time a person has been in the UK, the closeness of their family ties within the UK, their age upon entry to the UK, the quantity of family and friends in the UK, employment history, links within

their local community and any other relevant factors and on the other side would be the seriousness of the offence committed, any history of offending or anti-social behaviour and how easy it might be for the person to resettle in their own country or how easy it might be for close family to move to another country to be with the person. While the majority of Article 8 cases involve children it is not exclusive to such cases and other circumstances may fall within the remit of Article 8.

It is important to give the Criminal Casework team as much information as possible to about a person’s family and life within the UK so that it can be ascertained if there are any circumstances which might give rise to Article 8 arguments against deportation.

When the Criminal Casework team consider Article 8 rights they are not only looking at the right of the FNP to lead their life in the UK but the rights of their family members, particularly any children, present in the UK, to have the FNP present as part of their life. It is therefore important to also give information on the impact of deportation on any children or other family members who might be affected.

Any person who thinks that they may have a right to stay in the UK under Article 8 should seek legal advice.

Any person for whom deportation would breach their rights under European Law

The UK is a member of the European Union (EU) and the European Economic Area (EEA). Citizens of EU and EEA countries have the right of freedom of movement within other member states and to exercise various other rights known as ‘treaty rights’. These rights are so called because they come from the treaty agreements between the EU and EEA countries. Switzerland is not a member of the EU or the EEA but has an agreement which means that its citizens have equivalent rights in EU and EEA countries. All members of the EU are automatically members of the EEA, but EEA countries are not automatically members of the EU.

Below is a table showing the member countries of the EU and EEA. The date on which a country joined the EU is important as other member states may be allowed to restrict the rights of citizens of new member states (e.g. rights to access benefits or to take up employment) for up to seven years after the date of joining. So, for example, some states may have restrictions on the rights of Bulgarian and Romanian citizens up to the end of December 2013 but those restrictions must end on 1st January 2014. States may have restrictions on the rights of Croatian citizens up to 1st July 2020.

EU members prior to 1 May 2004	Countries joining EU on 1 May 2004 - restrictions ended on 1 May 2011	Countries joining EU after 2004	Countries which are NOT members of EU but are members of EEA	The other one
Austria Belgium Denmark Finland France Germany Greece Ireland Italy Luxembourg The Netherlands Portugal Spain Sweden United Kingdom	Cyprus (Greek Cyprus only) Malta Czech Republic Estonia Hungary Latvia Lithuania Poland Slovakia Slovenia	Joined 1 Jan 2007 (restrictions till Jan 2014): Bulgaria Romania Joined 1 Jul 2013 (potential restrictions till Jul 2020): Croatia	Iceland Lichtenstein Norway	Switzerland

Since all EU countries are members of the EEA, from this point on we will refer to the EEA meaning ‘all EU and EEA countries and Switzerland’.

When we talk about ‘ a person for whom deportation would breach their rights under European law’ we are largely talking about citizens of European countries who are or have been exercising treaty rights (for example the right to work or study) in another European country and the family members of such people, even if the family members are from outside of Europe.

Because the EEA want to encourage citizens to move for employment and study European law gives greater protection to those people and their families than to

people from outside of the EEA. European law also gives some rights to the parents/ carers of European children, particularly those who are sole parents or carers.

In practical terms, this means that the threshold for consideration for deportation for an EEA national or the family member of an EEA national exercising treaty rights is higher than that for an equivalent person from outside of the EEA (24 month custodial sentence rather than a 12 month custodial sentence unless the offence is an offence involving sex, violence or drugs).

An EEA national who meets the criteria above will trigger consideration for deportation but the Criminal Casework team will also consider information about how long the person has been resident in the UK and what they and their spouse or dependant family members have been doing while in the UK (e.g. history of employment or studying) and will need to seek an opinion from the Probation Service about whether the person would be considered a risk to the community upon release.

People who are not themselves EEA nationals but are the spouses, partners, dependant relatives of EEA nationals (not including UK nationals) who are present in the UK may also be able to avail themselves of this higher level of protection from deportation under European law. Sole parents of children who are EEA or UK nationals who are present in the UK may also benefit from the protection of European law. It is important that any person who believes that they fall into this category ensure that they inform the Criminal Casework team of this as soon as possible. It is important to seek legal advice on this as it is a fast developing area of law.

Irish citizens are generally exempted from deportation but can be deported in 'exceptional circumstances'. This may include someone convicted of a terrorist offence, murder or serious sexual or violent offence and serving a sentence of at least 8 years.

Any person who may have their rights under European law breached by deportation must provide the Criminal Casework team with information about this as soon as possible providing information on such issues as length of residence in the UK, what they any relevant family members have been doing during their time in the UK (e.g. work or study including children in school) or other issues. It is advisable to seek further legal advice.

Any person who has been ordered to serve a sentence or time in a psychiatric institution under certain provisions of the Mental Health Act

A person who is under treatment under s37, s45A or s47 of the Mental Health Act 1983 comes under the exemptions for deportation as long as he or she continues under that treatment.

If a person is discharged from such hospital treatment for the purposes of deportation any arguments against deportation would usually be made on human rights grounds or under relevant policies on the deportation or removal of the mentally ill. A person facing deportation in such circumstances should be advised to seek further legal advice.

A recognised victim of trafficking

Trafficking can be most simply explained as the movement of a person for the purposes of exploitation.

People often think of trafficking mainly in terms of sex trafficking, that is forced prostitution or other forms of sexual exploitation, but the definition of what constitutes trafficking is much wider. It includes sexual exploitation and prostitution but also includes (but is not restricted to) forced labour, slavery or removal of organs. Recent legislation also mentions that trafficking may cover forced marriage, including forced begging, pick-pocketing, shop lifting, drug trafficking or illegal adoption but there is at present little UK case law which would give guidance on these newer areas.

In addition, trafficking does not necessarily mean having been moved across an international border by the trafficker(s), but can also include movement within a country. So, for example, a person could come of their own free will to the UK, then fall into the hands of people who move them from one area in the UK to another area also in the UK in order to exploit them. This movement could constitute trafficking.

The UK has signed a number of international treaties designed to prevent trafficking and to protect the victims of trafficking.

Identifying whether a person has been trafficked can be difficult. To begin with, it might be very difficult to talk about experiences of having been trafficked. The trafficking victim might feel ashamed, embarrassed or scared of what will happen if they tell what happened. They or their loved ones may have been threatened with harm if they tell, or they may believe that what has happened is their own fault; this feeling of blame can be exacerbated by receiving a criminal conviction. The victim may mistrust authorities. Time, a relationship of trust and a secure and confidential environment may help people to open up about their experiences but these can often be hard to come by in a prison environment.

Any person who thinks that they may have been trafficked should seek expert advice.