



BRIEFING PAPER

Number 8062, 31 December 2019

Deportation of foreign national offenders

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Contents:

1. Powers to deport foreign criminals
2. Appeal and applications for revocation
3. Operation Nexus
4. Deportation with assurances
5. Scrutiny
6. Statistics



Contents

Summary	3
1. Powers to deport foreign criminals	5
1.1 Conducive to the public good	5
1.2 Automatic deportation of foreign criminals	5
1.3 EEA nationals while the UK is in the EU	7
1.4 EEA nationals after Brexit	7
1.5 Deportation, foreign national offenders and Windrush	9
2. Appeal and applications for revocation	10
2.1 Appeal considerations	10
2.2 'Deport first, appeal later' unlawful	11
2.3 Revocation of deportation orders	11
3. Operation Nexus	13
4. Deportation with assurances	17
4.1 Background	17
4.2 July 2017 report: "Deportation with assurances"	18
Government response	18
4.3 Further scrutiny of DWA	19
5. Scrutiny	21
5.1 Home Affairs Committee reports	21
2018 report on the Windrush generation	21
2016 report on the work of the Immigration Directorates	21
5.2 Public Accounts Committee	22
5.3 National Audit Office	22
6. Statistics	24

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Summary

Powers to deport foreign criminals

Deportation is a statutory power of the Home Secretary. People who are not British citizens are liable to deportation from the UK if the Home Secretary deems their deportation to be conducive to the public good.

The *UK Borders Act 2007* made provision for the automatic deportation of foreign criminals. The Home Secretary **must** make a deportation order in respect of a foreign criminal unless certain exceptions apply (e.g. where deportation would contravene the UK's obligations under the Refugee and Human Rights Conventions).

The Home Secretary's ability to deport criminals from EEA Member States is restricted by the operation of EU law, which requires that expulsion must be proportionate and based exclusively on the personal conduct of the individual concerned and level of 'threat' that they pose to public policy or public security.

The position of EEA citizens will change after Brexit, when EEA citizens and their family members will come within the scope of UK domestic law on deportation. The timeframe for the changes to be implemented will depend on the type of exit the UK has from the EU.

Appeals

The *Nationality, Immigration and Asylum Act 2002* sets out the considerations to which tribunals and courts must 'have regard' when hearing an appeal by a foreign national offender against a deportation order.

In July 2017 the Supreme Court found the 'deport first, appeal later' rules to be unfair and unlawful. Originally applied only to foreign national offenders facing deportation from the UK, the approach was extended in 2016 so that any appellant challenging an immigration decision (other than in asylum cases) could be required to leave the UK. In *R (Kiarie and Byndloss) v Secretary of State for the Home Department* the Supreme Court held that the Home Secretary had not established that 'deport first, appeal later' struck a fair balance between the rights of the appellants and the interests of the wider community.

Operation Nexus

Operation Nexus is a joint operation between the Home Office's Immigration Enforcement Directorate and several police forces. It was launched in London in 2012. Described as a means of more effectively tackling offending by foreign nationals, its focus was said to be on identifying 'high harm' offenders. However the initiative has attracted criticism for facilitating the deportation of people with no criminal convictions based on untested police reports or conduct that led to a criminal charge but did not result in a conviction. Critics say its mission has widened considerably since its inception, targeting specific groups for deportation.

An unsuccessful legal challenge was brought by the AIRE Centre in 2017, and their subsequent appeal was dismissed in 2018.

Deportation with assurances

As both the Refugee and Human Rights conventions prohibit deportation when there is a real risk of torture or inhuman or degrading treatment or punishment in the receiving

4 Deportation of foreign national offenders

state, the UK has pursued a policy of deportation with assurances [DWA] in the cases of foreign nationals suspected of terrorism.

The policy has been criticised by both human rights advocates and by those who feel the strict conditions imposed by the European Court of Human Rights infringe upon British sovereignty.

David Anderson QC, former Independent Reviewer of Terrorism Legislation, was tasked by the Coalition Government with reviewing the process of deporting foreign nationals suspected of terrorism. His report, co-authored with Clive Walker QC, professor emeritus of criminal justice studies at Leeds University, was published in July 2017.

Scrutiny

The Home Affairs Select Committee criticised the Home Office's decision to set targets for deportation in their 2018 report into the Windrush Generation.

In its June 2016 report on the work of the Immigration Directorates, the Home Affairs Committee focussed on efforts to deport foreign national offenders with EU citizenship, concluding that the Government 'should have done better'. In its response the Home Office argued that the number of foreign national offenders removed from the UK in 2015-16 was the highest since records began.

The lack of progress and inefficient approach 'dismayed' the Public Accounts Committee. The Committee noted in 2015 that over a third of failed deportations were within Home Office control. It pointed out that the number of British citizens returned to UK prisons through prison transfer agreements to serve the remainder of their sentences in the UK was broadly double the number of foreign national offenders removed from the UK. It called for a full end-to-end review of the deportation process.

The NAO's 2014 report described slow progress in deporting foreign national offenders despite both Labour and Coalition Governments having put greater effort and resources into removals. Its investigation found legal processes and administrative factors exacerbating problems caused by a lack of joint working and administrative errors. It recognised the Government's belief that the Immigration Act 2014 would reduce the number of appeals against deportation orders.

1. Powers to deport foreign criminals

1.1 Conducive to the public good

Deportation is a statutory power of the Home Secretary. Under section 3(5) of the *Immigration Act 1971*, a person who is not a British citizen is liable to deportation from the UK if the Home Secretary deems their deportation to be conducive to the public good.

A person made the subject of a deportation order is required to leave the UK. The order authorises their detention until they are deported. It also prohibits them from re-entering the country for as long as it is in force and invalidates any leave to enter or remain in the UK given them before the order was made or while it is in force.

1.2 Automatic deportation of foreign criminals

The *UK Borders Act 2007* made provision for the automatic deportation of foreign criminals.

A criminal court can still recommend the deportation from the UK of any non-British citizen over the age of 17 who is convicted of an offence punishable by imprisonment.¹ However the Court of Appeal has stated that the operation of the 2007 Act means it is no longer appropriate for a court to recommend the deportation of a 'foreign criminal' (as defined in section 32 of the Act, see below).²

The *UK Borders Act 2007* requires the Home Secretary to order the deportation of a foreign criminal. In the following circumstances, the Home Secretary's discretionary power to make a deportation order becomes a duty.

'Foreign criminal' is defined in section 32 of the 2007 Act:

- (1) In this section "foreign criminal" means a person—
 - (a) who is not a British citizen,³
 - (b) who is convicted in the United Kingdom of an offence, and
 - (c) to whom Condition 1 or 2 applies.
- (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
- (3) Condition 2 is that—

The UKBA 2007 means criminal courts need no longer consider recommending deportation of foreign criminals

¹ *Immigration Act 1971*, section 3(6)

² [R v Kluxen \[2010\] EWCA Crim 1081](#) at para 9. The Court of Appeal added, at para 28, that it will rarely be appropriate to recommend the deportation of a foreign national offender to whom the *UK Borders Act 2007* does not apply.

³ Changes are pending to s32 as [regulation 17 of the Immigration, Nationality and Asylum \(EU Exit\) Regulations 2019/745](#) will amend the definition of a 'foreign criminal' to exclude Irish citizens. This will grant Irish citizens an exemption from the automatic deportation provisions. The amendments are not in force at time of writing.

6 Deportation of foreign national offenders

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

‘Convicted’ does not include those deemed not guilty of an offence by reason of insanity and who are then made the subject of an order under section 5 of the *Criminal Procedure (Insanity) Act 1964*.⁴

The reference to a period of imprisonment in Condition 1 refers to the sentence imposed rather than the period of imprisonment actually served. It **does not include** a reference to a person who receives a suspended sentence (unless a court later orders that some or all of that sentence is to take effect).⁵ Nor does it include a reference to a person who receives a custodial sentence of at least 12 months only by virtue of consecutive sentences amounting in aggregate to more than 12 months.⁶ It **does include** a reference to a person sentenced to at least 12 months detention in an institution other than a prison (eg a hospital or young offender institution).⁷ Those sentenced to imprisonment or detention for an indeterminate period are also within the condition’s ambit.⁸

The Home Secretary **must** make a deportation order in respect of a foreign criminal unless certain exceptions, set out in [section 33](#) of the 2007 Act, apply.⁹ Such exceptions include:

- where the removal of the foreign criminal would breach his rights under the European Convention on Human Rights or the UK’s obligations under the Refugee Convention;
- where the Home Secretary thinks that the foreign criminal was under the age of 18 on the date of conviction;
- where the removal of the foreign criminal from the UK would breach his rights under EU treaties;
- where the foreign criminal is subject to extradition proceedings;
- where a hospital order, guardianship order, hospital direction or transfer direction under the Mental Health Act 1983 has effect in respect of the foreign criminal;
- where the Home Secretary thinks that removal would contravene the UK’s obligations under the Council of Europe Convention on Action against Trafficking in Human Beings.

The power to make a deportation order is to be exercised so as to secure the person’s return to the country of which he is a national, or which has most recently provided him with a travel document, unless he can show that another country will receive him.¹⁰

Unless a statutory exception applies, the Home Secretary **must** order the deportation of a foreign criminal

⁴ *UK Borders Act 2007*, section 38(3)

⁵ *UK Borders Act 2007*, section 38(1)(a)

⁶ *UK Borders Act 2007*, section 38(1)(b)

⁷ *UK Borders Act 2007*, section 38(1)(c)

⁸ *UK Borders Act 2007*, section 38(1)(d)

⁹ *UK Borders Act 2007*, section 32(5)

¹⁰ [Immigration Rules](#), r.385

1.3 EEA nationals while the UK is in the EU

The scope to deport EEA nationals¹¹ is restricted by European law. Directive [2004/38/EC](#) – often referred to as the “Citizens Rights Directive” or the “Free Movement Directive” – sets out the circumstances in which an EEA national with a “right to reside” in another Member State (or the family member of an EEA national) may be expelled.

The Directive does not specify any particular sentence thresholds that must apply in expulsion cases. Instead, it requires that expulsion must be proportionate and based exclusively on the personal conduct of the individual concerned and level of ‘threat’ that they pose to public policy or public security. Previous criminal convictions cannot, in themselves, be grounds for expulsion, and nor can expulsion be justified on general prevention grounds. Furthermore, more demanding grounds justifying deportation are required in order to deport EEA national offenders who have resided in a host Member State for over five or ten years. See in particular [Articles 27 - 31](#) of the Directive.

The Immigration (European Economic Area) Regulations 2016 (the “EEA regulations”) transpose the directive into UK law. [Part 4](#) of the EEA regulations addresses refusal of admission and removal.

Different rules apply to offenders from elsewhere in the EEA but their situation will change after Brexit

1.4 EEA nationals after Brexit

The rules on deportation of EEA nationals and their family members will change after the UK leaves the EU. This is because the UK will no longer be bound by EU law and can extend domestic criminality and conduct provisions to EEA nationals. When these changes will come into effect for EEA nationals and their family members depends on the outcome of Brexit.

The current thresholds for EEA nationals are tied to EU free movement law. Free movement will continue until legislation is passed to repeal or modify it. This is because of the European Union (Withdrawal) Act 2018 which will retain EU law as transposed in the UK, including the EEA regulations, on exit day.

However, changes to the EEA deportation provisions will be made via the Immigration, Nationality and Asylum (EU Exit) Regulations 2019/745 (the “EU exit regulations”). These changes will come into effect on exit day under a no-deal Brexit, or on 31 December 2020 under a deal with a transition period.¹² The regulations were made under powers in the European Union (Withdrawal) Act 2018 by the May Government.

On the changes to deportation powers for EEA nationals, the explanatory memorandum summarises:

This instrument amends the Immigration (European Economic Area) Regulations 2016 so that EEA nationals (and their family

EEA nationals will become subject to UK rules on criminality for conduct after exit day under a no-deal, or after 31 December 2020 if a deal is ratified.

¹¹ EEA nationals are citizens of the other 27 EU member states and of Iceland, Lichtenstein and Norway. Whilst Switzerland is neither an EU nor EEA member state its citizens have the same rights to live and work in the UK as other EEA nationals.

¹² [Explanatory memorandum to the Immigration, Nationality and Asylum \(EU Exit\) Regulations 2019/745, 7.2](#)

8 Deportation of foreign national offenders

members), coming to the UK for the first time after exit day, will be subject to UK rules on criminality. These include requirements which provide for the refusal of admission or leave to remain based on clear sentence-based thresholds, for exclusion or deportation from the UK where it is conducive to the public good, and for a presumption of deportation where a person has received a custodial sentence of at least 12 months. For EEA nationals (and their family members) who are resident in the UK before exit day, these tests will also apply to conduct committed after the commencement of this instrument. This will replace the EU test of public policy or public security, which will continue to apply to their conduct before the commencement of this instrument.¹³

EEA citizens and their family members who obtain status under the EU settlement scheme will also be subject to these changes, for conduct occurring after the transition period. As the regulations would come into effect from exit day under a no-deal Brexit they will apply to conduct from that date.

However, conduct committed during the transition period under the Withdrawal Agreement would continue to be subject to existing EU law thresholds.¹⁴

A notable exception will be made for Irish citizens, who will be excluded from the automatic deportation provisions being extended to EEA nationals. The EU exit regulations will amend s32 of the UK Borders Act 2007 to exempt Irish citizens from the definition of a 'foreign criminal' for the purpose of mandatory deportation.¹⁵ This is in line with Government policy which has long held that Irish citizens should only be deported from the UK in exceptional circumstances.

On the changes to deportation rules, the immigration law website Free Movement commented:

This is a major policy change for EEA nationals, who will now find it easier to be deported by the UK government, no matter how long they have been living in the UK or the status of their residence in the UK. Under the pre-exit day position, if an EEA national had been resident for ten years or was under 18 they could not be deported without there being imperative grounds of public security. This was an extremely high threshold requiring serious criminality. Now a prison sentence of 12 months will give rise to a presumption of deportation.

This seems like a significant policy change to be implementing via statutory instrument. Particularly given the government's earlier statements that the statutory instruments facilitating Brexit would not be a "vehicle for policy changes".¹⁶

¹³ [Explanatory memorandum to the Immigration, Nationality and Asylum \(EU Exit\) Regulations 2019/745, 7.10](#)

¹⁴ This is provided for in the European Union (Withdrawal Agreement) Bill currently before parliament

¹⁵ [Immigration, Nationality and Asylum \(EU Exit\) Regulations 2019/745, s17](#)

¹⁶ ['How new immigration regulations will make it easier to deport EU citizens after Brexit'](#), *Free Movement*, 13 March 2019

1.5 Deportation, foreign national offenders and Windrush

Then Home Secretary Sajid Javid told the Home Affairs Select Committee in 2018 that 32 members of the Windrush generation may have been deported as foreign national offenders.¹⁷

In their 2018 report on the inquiry the Home Affairs Committee recommended that the Home Secretary confirm whether the 32 individuals were legally deported.¹⁸ The Committee stated:

We need to know whether any were in fact British—and so illegally deported—and the grounds for the decision to deport. Whilst the Home Office rightly has provisions in place to deport foreign national offenders, we do not believe that the Home Office can dismiss those Windrush cases where people have a criminal record without further investigation into the circumstances of their removal.¹⁹

In response to the report the Home Secretary said that given those deported as foreign national offenders would have had an opportunity to appeal, it is up to each individual to ‘determine whether they think they are protected under the 1971 Act’.²⁰

¹⁷ Home Affairs Committee, [Oral evidence: Windrush children](#), 15 May 2018, HC 990 2017-19, q 238

¹⁸ Home Affairs Committee, [The Windrush generation](#), 3 July 2018, HC 990 2017-19, para 20

¹⁹ Home Affairs Committee, [The Windrush generation](#), 3 July 2018, HC 990 2017-19, para 20

²⁰ Home Affairs Committee, [The Windrush generation: Government response to the Committee's sixth report of session 2017-19](#), 4 September 2019, HC 1545 2017-19, p 3

2. Appeal and applications for revocation

2.1 Appeal considerations

A deportation order cannot be made if deportation would be contrary to the UK's obligations under the UN Refugee Convention or the European Convention on Human Rights.

When hearing an appeal by a foreign national offender against a deportation order made in response to the offences for which he was convicted, tribunals and courts must 'have regard' to the considerations listed in section 117C of the *Nationality, Immigration and Asylum Act 2002*.

Section 117C first addresses the public interest:

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

Turning to foreign national offenders ('C') who were sentenced to a period of imprisonment of **less than four years**, section 117C then states the public interest requires their deportation unless one of two exceptions applies:

- (4) Exception 1 applies where—
 - (a) C has been lawfully resident in the United Kingdom for most of C's life,
 - (b) C is socially and culturally integrated in the United Kingdom, and
 - (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

For foreign national offenders sentenced to a period of imprisonment of **at least four years**, section 117C states:

- (6) ... the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

What may constitute such very compelling circumstances? The Supreme Court recently suggested a number of factors:²¹

- a) the depth of the appellant's integration in UK society in terms of family, employment and otherwise;
- b) the quality of his relationship with any child, partner or other family member in the UK;

²¹ [R \(Kiarie & Byndloss\) v Secretary of State for the Home Department \[2017\] UKSC 42](#) at [55]

- c) the extent to which any relationship with family members might reasonably be sustained even after deportation, whether by their joining him abroad or otherwise;
- d) the impact of his deportation on the need to safeguard and promote the welfare of any child in the UK;
- e) the likely strength of the obstacles to his integration in the society of the country of his nationality; and, surely in every case,
- f) any significant risk of his re-offending in the UK, judged, no doubt with difficulty, in the light of his criminal record set against the credibility of his probable assertions of remorse and reform.

2.2 'Deport first, appeal later' unlawful

Section 94B of the *Nationality, Immigration and Asylum Act 2002*, inserted by the *Immigration Act 2014*, conferred upon the Home Secretary a power to certify human rights claims brought by those facing deportation proceedings. The effect of certification is that appeals can be pursued only after deportation to countries of origin.²²

In *R (Kiarie & Byndloss) v Secretary of State for the Home Department*²³ the Supreme Court considered the question of whether the Home Secretary breaches the rights of a person entitled to appeal against a deportation order by deporting him before he can bring the appeal and without making proper provision for him to participate in the hearing of it.

The public interest in the removal of an appellant in advance of his appeal is outweighed, the Court said, by the public interest that a right of appeal should be effective. It held that an appellant's ability to effectively present his appeal against a deportation order was obstructed by the requirement of bringing it from abroad. As the Ministry of Justice had not made provision for facilities at the hearing centre, or for access to such facilities abroad, as would allow the appellants to give live evidence and participate in the hearing, the certificates requiring deportation ahead of appeal represented an interference with the appellants' rights to respect for their private and family life in the UK and with their right to effectively challenge potential breaches of those rights. The certificates were therefore unlawful.

The Home Secretary failed to establish that 'deport first, appeal later' struck a fair balance between the rights of the appellants and the interests of the community

2.3 Revocation of deportation orders

A person cannot return to the UK whilst a deportation order remains in force against them. They [can apply for the order to be revoked](#), but whether or not this will happen depends on the circumstances of the case (including the reason the order was made - eg the nature of the offending - and the length of time that has passed since it was imposed). In some cases the order may never be revoked.

²² Section 94B was amended by section 63 of the *Immigration Act 2016* so as to further extend the Home Secretary's power.

²³ [R \(Kiarie & Byndloss\) v Secretary of State for the Home Department \[2017\] UKSC 42](#)

12 Deportation of foreign national offenders

The Immigration Rules state:

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of an effective immigration control;
- (iv) the interests of the applicant, including any compassionate circumstances.

For how long will a deportation order continue? In the case of a person deported after being convicted and sentenced to a period of imprisonment of **less than four years**, the Home Office policy is that an application for leave to enter the UK will not be entertained before the end of a prescribed period of ten years from the date of the making of the order.²⁴ In the case of a person deported after being convicted and sentenced to a period of imprisonment of **at least 4 years**, the continuation of the deportation order is deemed to be the proper course.²⁵

In the 19 December 2019 Queen's Speech the Government announced a new bill to:

- increase sanctions on FNOs who return to the UK in breach of a deportation order
- introduce measures to make it easier to deport FNOs²⁶

²⁴ Immigration Rules paragraph 391

²⁵ Immigration Rules paragraph 391

²⁶ Prime Minister's Office, [The Queen's Speech 2019: Background briefing notes](#), 19 December 2019, p 84

3. Operation Nexus

Operation Nexus is a joint operation between the Home Office's Immigration Enforcement Directorate and several police forces. It was initially introduced by the Metropolitan Police in September 2012 ahead of its official launch by the force and Home Office on 9 November 2012. It was extended to the West Midlands Police in June 2013 and to forces in Greater Manchester and the East Midlands in 2014.

Operation Nexus was launched in London in 2012.

The Government views Operation Nexus as supporting its Immigration Enforcement strategic objectives. As Home Secretary responsible for its roll-out, Theresa May described it as a "ground-breaking initiative"²⁷ and favoured its introduction throughout the UK.²⁸

The Home Office previously defined the aim of Operation Nexus as follows:

...to more effectively tackle offending by foreign nationals, through close working and smarter use of police and immigration interventions. This includes the identification of those lawfully here (both EU and non EU nationals) but whose conduct merits their removal or deportation from the United Kingdom, and has included criminals where intelligence demonstrates involvement in serious crimes including sexual offences against children and rape.²⁹

In a letter to a member of the London Assembly in July 2013, the Assistant Commissioner of the Metropolitan Police, Mark Rowley, explained that the initiative was a response to a perceived lack of effectiveness in tackling foreign-national offenders.³⁰ He stated that Operation Nexus was focussed on addressing 'high harm' offending:

The other main driver for Operation Nexus is to identify high harm offenders who are foreign nationals. By definition, this will include subjects involved in serious violence (including sex offending), prolific gang members, or those offenders who carry firearms or other weapons. Such subjects are a priority for intervention by Operation Nexus.

Mr Rowley denied that the scope of Operation Nexus had widened beyond its original remit:

It does not focus on lower level criminality, but clearly if an offender is identified as a foreign national with illegal UK status via the existing processes within our custody suites, we will inform HOIE who will intervene in accordance with their policy.³¹

The Home Office published guidance on Operation Nexus in March 2017. This defined the 'overarching aim' as follows:

²⁷ HC Deb 10 November 2014 cc1230-1

²⁸ HC Deb 22 October 2014 c906

²⁹ Home Office, *The Home Office response to the Independent Chief Inspector's report 'An inspection of Immigration Enforcement activity in London and the West Midlands ('Operation Nexus')*, 4 December 2014

³⁰ [Letter from Assistant Commissioner Mark Rowley to Joanne McCartney AM](#), dated 24 July 2013 (accessed 1 August 2017)

³¹ [Letter from Assistant Commissioner Mark Rowley to Joanne McCartney AM](#), dated 24 July 2013 (accessed 1 August 2017)

14 Deportation of foreign national offenders

The overarching aim of Operation Nexus is to improve the management of foreign nationals and foreign national offenders (FNOs) with a focus on strengthening cross-organisational working between the Home Office and police.³²

The guidance identified two strands to Operation Nexus:³³

- **Nexus Custody** – Immigration Officers (IOs) deployed to designated police custody suites to examine all foreign nationals who are arrested. Cases identified as illegal entrants suitable for detention will be referred to Immigration Enforcement’s National Removal Command or to the Removals Casework Command for case-progression.
- **Nexus High Harm** – Police forces refer High Harm cases to the Nexus High Harm team where the individual is deemed to be a threat to the public. The Nexus High Harm team assess every referral and establish whether the known offending justifies referral for immigration enforcement action. This action can include administrative removal, conviction-led deportation and intelligence-led deportation.³⁴

The ‘intelligence-led removal’ aspect of Nexus High Harm has attracted criticism for allowing deportations/removals of people with no criminal convictions based on untested police reports or conduct that led to a criminal charge but did not result in a conviction.³⁵

‘High harm’ is defined as follows:

For the purposes of Operation Nexus, Foreign National Offenders (FNOs) are considered as ‘High Harm’ cases **where their conduct incurs significant adverse impact, whether physical, emotional or financial, upon individuals or the wider community.**

The definition is drafted to enable police partners to identify High Harm FNO’s within their jurisdiction. Police colleagues may choose to focus on specific offences or offending, where appropriate, provided the conduct or offending or behaviour engages the definition above.³⁶

Writing on his *Free Movement* blog, immigration barrister Colin Yeo suggested this definition amounted to ‘mission creep’:

The original purpose of Operation Nexus was to target serious criminals. This is what ‘high harm’, in ordinary English, means.

The initiative, it was categorically stated by Assistant Metropolitan Police Commissioner Mark Rowley in 2013, did ‘not focus on lower level criminality’ but instead upon individuals ‘involved in

Critics say Operation Nexus has morphed into a wider purge, targeting foreign nationals without criminal convictions

³² Home Office, [Operation Nexus: High Harm](#), 15 March 2017, page 4

³³ A third strand - intelligence and data sharing between the police and Home Office - was identified by Mrs Justice McGowan in a legal challenge to Operation Nexus brought by the AIRE Centre (see page 13 below)

³⁴ Home Office, [Operation Nexus: High Harm](#), 15 March 2017, page 4

³⁵ See, for example, *the Justice Gap*, ‘[Caught in the Nexus dragnet](#)’, March 2016; *Free Movement*, ‘[Operation Nexus for dummies: happening now, in our time](#)’, 20 February 2015

³⁶ Home Office, [Operation Nexus: High Harm](#), 15 March 2017, page 5 [emphasis in original document]

serious violence (including sex offending), prolific gang members, or those offenders who carry firearms or other weapons.’

The definition which appears in this guidance, however, demonstrates that the scope of Operation Nexus is clearly much wider, and could conceivably include a very large range of different behaviours.³⁷

In response to a Parliamentary Question querying whether those deported under Operation Nexus have an opportunity to challenge their deportation in the courts, the then Immigration Minister Robert Goodwill stated that “all deportation decisions, including those pursued under Operation Nexus, adhere to existing legislative requirements with regards to the service of those decisions”. He referred to [Chapter 60](#) of the UK Visas and Immigration’s [Enforcement instructions and guidance](#), relating to judicial review.³⁸

Legal challenge

In May 2017 the High Court heard a legal challenge brought by the AIRE Centre against Operation Nexus. Lodging the claim, the charity’s legal project manager Audrey Cheryl Mogan described Operation Nexus as “implemented unfairly, targeting specific groups for deportation, and ignoring the rule of law and breaking up families in its wake.”³⁹

The AIRE Centre argued that it is unlawful for the police, in the purported exercise of police powers, to question people for non-policing purposes. It also asserted that Operation Nexus contravened EU law. It argued that by systematically checking whether EEA citizens are exercising EU Treaty rights in the absence of a reasonable doubt to the contrary in a specific case, immigration enforcement and police officers breached the Citizens’ Rights Directive’s equal treatment provisions.⁴⁰

Mrs Justice McGowan dismissed the claim.⁴¹ She accepted the argument of the lawyers for the Metropolitan Police Commissioner that police officers have the same right as a member of the public to ask non-coercive questions of another person and that such questioning need not be for ‘policing purposes’ to be lawful. She found that the ambit of policing purposes is not confined to the investigation of crime or maintenance of public order and encompasses asking questions in order to provide the answers to the Home Office for the proper enforcement of immigration law.

Mrs Justice McGowan also accepted the Home Secretary’s submission that it did not infringe the equal treatment provisions of the directive for

A High Court challenge to Operation Nexus was dismissed in July 2017

³⁷ *Free Movement*, ‘[Home Office belatedly issues guidance on Operation Nexus](#)’, 24 April 2017

³⁸ [PQ 45629](#), 13 September 2016

³⁹ ‘[Human rights charity crowdfunds judicial review against Operation Nexus](#)’, *Solicitors’ Journal*, 26 April 2016

⁴⁰ Skeleton argument of claimant, available at http://www.airecentre.org/data/files/AIRE_centre_v_SSHD_subs_skeletonfinal.pdf (accessed on 1 August 2017)

⁴¹ [Centre for Advice on Individual Rights in Europe v Secretary of State for the Home Department \[2017\] EWHC 1878 \(Admin\)](#)

16 Deportation of foreign national offenders

officers to ask preliminary questions and, if answers gave rise to a reasonable doubt, to seek evidence or to call the detained person for interview.

The AIRE Centre's appeal to the Court of Appeal was dismissed in 2018.⁴²

⁴² [R \(The Centre for Advice on Individual Rights In Europe\) v Secretary of State for the Home Department and Commissioner of Police for the Metropolis \[2018\] EWCA Civ 2837](#)

4. Deportation with assurances

4.1 Background

When considering deportation the Government must comply with its international obligations under article 3 of the UN Convention against Torture (UNCAT) and article 3 of the European Convention on Human Rights (ECHR). Both conventions prohibit deportation when there is a real risk that the detainee would be subject to torture or to inhumane or degrading treatment or punishment in the state to which they would be sent.

To get around this obstacle the UK has pursued a policy of deportation with assurances (DWA) in the cases of foreign nationals suspected of terrorism.

In the seminal case of *Chahal v UK*⁴³ the European Court of Human Rights held that the deportation to India of a Sikh separatist who had previously suffered torture would breach his rights under Article 3 ECHR, given the risk that he would face torture upon his return. As people may only be detained for deportation if there is a chance of that deportation happening within a reasonable timeframe, the judgment had the effect that terrorist suspects at risk of torture in their countries of origin could neither be deported nor held in immigration detention.

Following the terrorist attacks in the USA on 11 September 2001 the Labour Government sought to find a way around the impasse created by the *Chahal* ruling. Its efforts, and those of the Coalition Government, are set out in [chapter 2](#) of the July 2017 report by David Anderson QC, former Independent Reviewer of Terrorism Legislation, and Clive Walker QC, Professor Emeritus of criminal justice studies at the University of Leeds, on the process of deporting foreign nationals suspected of terrorism.⁴⁴

The UK Government negotiated arrangements with six countries:

- Jordan, 10 August 2005
- Libya, 18 October 2005
- Lebanon, 23 December 2005
- Algeria, 11 July 2006
- Ethiopia, 12 December 2008
- Morocco, 24 September 2011.

Aside from the agreement with Algeria, these arrangements took the form of memorandums of understanding (MoU). The Algerian Government was unwilling to enter into a MoU and so the arrangement took the form of an exchange of letters.

⁴³ Application 22414/93 ECtHR 1996, 23 EHRR 413

⁴⁴ Independent Reviewer of Terrorism Legislation, '[Deportation with assurances](#)', 20 July 2017

Since October 2018, however, the Government has signalled a shift in policy. It said it will seek DWA in response to “operational needs” which may include urgently negotiating “agreements as needed.”⁴⁵

Speaking in a Westminster Hall debate in 2006, then Trade Minister Ian McCartney said of the arrangements:

Such agreements enable us to obtain assurances that will safeguard the rights of those individuals being returned, including the right to access to medical treatment, to adequate nourishment and to accommodation, as well as to treatment in a humane manner in accordance with internationally accepted standards.

By signing an MOU and agreeing to the appointment of a monitoring body—this is an important point that has been raised—Governments make a public commitment to safeguarding the well-being of individuals deported under such memorandums. A memorandum therefore provides an additional layer of protection over and above the provisions in international human rights instruments. Individuals will retain the right to challenge a decision to deport them in the UK courts. I believe that the memorandums provide adequate assurances to enable deportation of certain individuals to take place in a manner that is consistent with the UK’s human rights obligations.⁴⁶

4.2 July 2017 report: “Deportation with assurances”

Turning to the questions the Coalition Government had tasked him to consider, Mr Anderson said DWA policy was at a “low ebb” and accepted that questions as to its future use were legitimate.⁴⁷ Nevertheless he took the view that DWA has a significant role to play in counter-terrorism. However, he warned that its effectiveness and legitimacy in international law depended on the Government taking “laborious care.”⁴⁸

Mr Anderson noted the UK has “taken the lead in developing rights-compliant procedures for DWA” and he felt it has little to learn from alternative practices of other states. Acknowledging the “inordinate length” of some DWA proceedings, he advised that future cases are likely to take less time now that the central legal principles have been established by the highest courts. He did not hear any suggestion for saving time that would not sacrifice the fairness of proceedings.

Government response

In response to the July 2017 report by David Anderson and Clive Walker QCs, the Home Secretary explained that the Government will no longer

⁴⁵ [The Government response to the report on deportation with assurances by the independent reviewer of terrorism legislation](#), October 2018 p 9

⁴⁶ [HC Deb 15 June 2006 c354WH](#)

⁴⁷ Independent Reviewer of Terrorism Legislation, ‘[Deportation with assurances](#)’, 20 July 2017, page 31

⁴⁸ Independent Reviewer of Terrorism Legislation, ‘[Deportation with assurances](#)’, 20 July 2017, page 35

seek “country-to-country DWA agreements on an ‘if needed’ basis” but will rather respond to ‘operational needs’:

For the present, I have agreed that we will seek to respond to operational needs. Subject to demand from the security and intelligence agencies, this may mean a more flexible, adaptable DWA approach, with urgently negotiated agreements as needed and potentially with more of a focus on the specific issues in hand, whilst recognising that cases will develop over time.⁴⁹

Information on how the Government plans to proceed is limited.

4.3 Further scrutiny of DWA

The DWA policy has proved controversial. The human rights campaign group, Liberty, takes the view that diplomatic assurances are inherently unreliable and should carry little, if any, weight in deciding whether the risk of torture has been eliminated.⁵⁰ Justice maintains that negotiating assurances with countries known to use torture is wrong in principle and ineffective in practice.⁵¹ On the other hand, David Anderson QC pointed out the strong criticism by politicians and the media of the strict conditions imposed by the European Court of Human Rights.

At the time of the report, Mr Anderson found successful uses of the DWA process to be limited to the following cases:

- the nine Algerian nationals deported to Algeria between 2006 and 2009
- the two Jordanians deported to Jordan in 2012 and 2013.⁵²

A Government report on disruptive and investigatory powers from July 2018 indicated that, by the time the report was published, there had been a further individual removed by DWA.⁵³

In response to a parliamentary question on deportation answered in June 2019, the Home Office explained that it does not separately record returns made via arrangements with foreign countries.⁵⁴

⁴⁹ [The Government response to the report on deportation with assurances by the independent reviewer of terrorism legislation](#), October 2018 p 9

⁵⁰ Liberty, [Deportation to torture](#), (accessed on 1 August 2017)

⁵¹ Justice, [Deportation with Assurances: Call for Evidence](#), February 2014

⁵² Independent Reviewer of Terrorism Legislation, [‘Deportation with assurances’](#), 20 July 2017, pages 22-23

⁵³ Home Office, [HM Government transparency report 2018: disruptive and investigatory powers](#), Cm 9609, July 2018 para 5.10

⁵⁴ [PQ 267362 \[on deportation\] 26 June 2019](#)

Box 1: The case of Abu Qatada

One of the two Jordanians deported to Jordan was the cleric Abu Qatada (born Omar Mahmoud Othman). In his review of the process of deporting foreign nationals suspected of terrorism, David Anderson QC summarised the case:⁵⁵

- In August 2005, Abu Qatada was detained pending his deportation under the DWA programme.
- His appeal against deportation was dismissed by the Special Immigration Appeals Commission (SIAC) in February 2007, upheld by the Court of Appeal in April 2008 and dismissed by the judicial committee of the House of Lords in February 2009.
- His application to the European Court of Human Rights was made in 2009, heard in December 2010 and the subject of a judgment in January 2012 which became final (because it was not referred to the Grand Chamber) in April 2012.
- The court found there was a real risk that evidence obtained by torture would be used at his trial. The real risk of such a flagrant denial of justice meant deportation would violate his rights to a fair trial.
- Further litigation ensued in relation to Abu Qatada's ongoing detention, culminating in a SIAC ruling in November 2012 against his continued detention, and his release on bail.
- In March 2013 he was detained once again, and the Government and Jordan signed the Mutual Legal Assistance Treaty (negotiated in response to the European Court's judgment). The Court of Appeal dismissed the Home Secretary's appeal in the same month, and she applied to the Supreme Court.
- In June 2013 the Home Secretary made a fresh immigration decision, refusing to revoke the deportation order against Abu Qatada and certifying any appeal as clearly unfounded.
- In July 2013 the Mutual Legal Assistance Treaty came into force and Abu Qatada was deported to Jordan. He declined to challenge the immigration decision of June 2013.
- Abu Qatada was acquitted of all charges against him in June and September 2014 (despite Jordan's breaches of the agreed arrangements for his trial).

⁵⁵ Independent Reviewer of Terrorism Legislation, '[Deportation with assurances](#)', 20 July 2017, pages 25-26

5. Scrutiny

5.1 Home Affairs Committee reports

2018 report on the Windrush generation

The Home Affairs Select Committee published a report in July 2018 on the Windrush Generation.⁵⁶ During the Windrush Generation inquiry it became evident that the Home Office had in the past set targets for removals in the years 2015-16, 2016-17 and 2017-18.

The Committee expressed concern that the use of a 'target-led approach may have led immigration enforcement officers to focus on people like the Windrush generation, who may have been easier to detain and remove than those less vulnerable...' and were supportive of the Government's decision to end the use of targets.⁵⁷

2016 report on the work of the Immigration Directorates

In its June 2016 report on the work of the Immigration Directorates, the Home Affairs Committee stated that the Government 'should have done better' in deporting foreign national offenders with EU citizenship, describing the failure to remove such offenders from the UK as disappointing and damaging to confidence in the immigration system. It said progress had been too slow and challenged the Home Office to set out the practical steps it intends to take to significantly reduce this number of EU national offenders. The Committee warned that it would set its own targets to be monitored in future reports should the Home Office fail to act.⁵⁸

In its response the Home Office argued that the number of foreign national offenders removed from the UK in 2015-16 was the highest since records began.⁵⁹ It said the *Immigration Act 2014* had made the deportation of foreign national offenders easier and quicker.⁶⁰

⁵⁶ Home Affairs Committee, [The Windrush generation](#), 3 July 2018, HC 990 2017-19

⁵⁷ Home Affairs Committee, [The Windrush generation](#), 3 July 2018, HC 990 2017-19, para 63

⁵⁸ Home Affairs Committee, [The work of the Immigration Directorates \(Q4 2015\)](#), 3 June 2016, HC 22 2016-17, para 91

⁵⁹ The response actually provided two figures for the year 2015-16 - 5,692 and 5,810 - both of which were said to be the highest number of removals since records began.

⁶⁰ Home Affairs Committee, [The work of the Immigration Directorates \(Q4 2015\): Government response to the Committee's Second Report of Session 2016-17](#), 16 September 2016, HC 675 2016-17, page 15

5.2 Public Accounts Committee

The lack of progress in removing foreign national offenders from the UK 'dismayed' the Public Accounts Committee.⁶¹ Its January 2015 report described an 'inefficient' approach to processing cases, with avoidable delays and administrative errors.⁶² Whilst the Home Office classified more than a third of failed removals as being within its control, it told the Committee that some failures classified as outside its control were in fact due to poor management practice (eg cancellation of flights).⁶³

Over a third of failed deportations were within Home Office control

The PAC also noted the Government's confidence that the *Immigration Act 2014* would address many of the obstacles to deportation.

The Committee pointed out that the number of British citizens returned to UK prisons through prison transfer agreements to serve the remainder of their sentences in the UK was broadly double the number of foreign national offenders removed from the UK.⁶⁴ It recommended a full review of the end-to-end process for foreign national offender removal. It called on the Home Office to set out how it proposed to improve the management of foreign national offenders, the specific measures against which it expected to be held accountable, and the progress it expected to make against each measure in the future.

5.3 National Audit Office

In its October 2014 report 'Managing and removing foreign national offenders', the NAO said that despite both Labour and Coalition Governments putting more effort and resources into removing foreign national offenders from the UK, overall progress had been slow.⁶⁵ Despite an increase in the number of Home Office staff working on foreign national offender casework and the introduction of tougher legislation the number of foreign national offenders in prison in England and Wales had remained fairly constant.

The NAO investigation found that legal processes and administrative factors exacerbated problems caused by a lack of joint working and administrative errors. Legal restrictions were said to include the European Convention on Human Rights and the greater protection for EU citizens mandated by EU law, as well as requests for the extradition of some foreign national offenders.⁶⁶ Administrative factors included embassies' unwillingness to provide the Home Office with travel

The NAO identified legal and administrative hurdles and poor coordination between agencies

⁶¹ Public Accounts Committee, [Managing and removing foreign national offenders](#), 20 January 2015, HC 708 2014-15, page 3

⁶² Public Accounts Committee, [Managing and removing foreign national offenders](#), 20 January 2015, HC 708 2014-15, para 14

⁶³ Public Accounts Committee, [Managing and removing foreign national offenders](#), 20 January 2015, HC 708 2014-15, para 15

⁶⁴ Public Accounts Committee, [Managing and removing foreign national offenders](#), 20 January 2015, HC 708 2014-15, para 18

⁶⁵ National Audit Office, [Managing and removing foreign national offenders](#), 22 October 2014, HC 441 2014-15

⁶⁶ National Audit Office, [Managing and removing foreign national offenders](#), 22 October 2014, HC 441 2014-15, para 1.7

documents for their nationals, or their slowness and inconsistency in doing so.⁶⁷ Equally poor coordination or administration on the part of the relevant public bodies allowed opportunities for deportation to be missed.⁶⁸

The report noted the 2013 cross-government action plan on foreign national offenders that aimed to improve caseworking and remove legal barriers to removal. It recognised the Government's belief that the *Immigration Act 2014* would reduce the number of appeals against deportation orders.

⁶⁷ National Audit Office, [Managing and removing foreign national offenders](#), 22 October 2014, HC 441 2014-15, para 1.8

⁶⁸ National Audit Office, [Managing and removing foreign national offenders](#), 22 October 2014, HC 441 2014-15, para 1.9

6. Statistics

The table below shows that in the year ending 31 March 2019 there were just over 5,300 foreign national offenders (FNOs) returned. This was around 600 fewer than in the previous year. Of the offenders that were returned in 2018/19, just over 9% (489) were known to have an overseas criminal record.

The number of returns of EU-national FNOs has risen over time, while the number of non-EU-national returns has fallen. In 2018/19, there were just over 3,600 returns of EU-national FNOs, which made up two-thirds (68%) of the total returned.

These figures include enforced removals (a subset of which are deportations) and voluntary removals where the individual was subject to immigration enforcement action.

RETURNS OF FOREIGN NATIONAL OFFENDERS				
Year	Number of foreign national offenders returned	of which:		of which:
		EU nationals	Non-EU nationals	known to have overseas criminal record
2009/10	5,471	807	4,664	0
2010/11	5,367	1,016	4,351	0
2011/12	4,539	1,271	3,268	0
2012/13	4,720	1,727	2,993	0
2013/14	5,118	2,303	2,815	0
2014/15	5,325	3,041	2,284	15
2015/16	5,844	3,468	2,376	550
2016/17	6,370	4,218	2,152	984
2017/18	5,977	4,011	1,966	795
2018/19	5,322	3,633	1,689	489

Source: Home Office, [Immigration statistics quarterly, year ending June 2019](#), table rt 06 q

Notes: Figures include enforced removals and voluntary returns.

A foreign national offender (FNO) is someone who:

- (a) is not a British citizen; and
- (b) is/was convicted in the UK or abroad of any criminal offence.

Following the introduction of Association of Chief Police Officers Criminal Records Office (ACRO) cases, the FNO returns figure has included cases where foreign nationals who had a criminal conviction in another country, were picked up by police in the UK, and subsequently returned from the UK. In addition, these people could also have a UK conviction. This case type is now sufficiently well established to warrant separate identification in the statistical series. These figures are a count of an administrative process and, as such, are provisional and will be revised in line with the existing series. Those with an overseas criminal record may also have a UK criminal record.

The number of FNOs returned in 2018/19 was around the same as the numbers in 2009/10 and 2010/11. Between 2011/12 and 2013/14 there was a slight drop in the number being returned each year and between 2015/16 and 2017/18 the numbers were higher than they are now.

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