

Foreign Nationals in the prison system

Who is classed as a foreign national prisoner (FNP)?

The term 'foreign national prisoner' (FNP) is applied to anyone remanded or convicted of criminal charges who does not have an absolute legal right to remain in Britain. If you have British citizenship you are not a foreign national, although if you were not born in Britain the Prison Service may still inquire into your status to ascertain that you have obtained citizenship legally. Dual nationals are treated as British, although their details are still passed to the Home Office, as in exceptional circumstances they may be considered for revocation of their British citizenship. Outside of such a decision, if you have dual nationality you cannot be processed for ERS, TERS etc unless you renounce your British citizenship. This is done on a Home Office form RN and is liable for a fee of £482.

Once an FNP is sentenced, their case is referred to the Home Office, which considers whether to deport the person.

The term 'foreign criminal' (FC) is also used, and is defined in section 32 UK Borders Act 2017 as a person who is not a British Citizen, convicted in the UK of an offence and either sentenced to a term of imprisonment of 12 months or more, or a term of imprisonment of any length if the offence is classified as serious.

Under sections 32 and 33 UK Borders Act 2007, FCs sentenced to 12 months or more will be automatically considered for deportation, usually when their sentences end. To contest this, they must show that deportation would breach their rights under the Human Rights Act 1998, Refugee Convention, Trafficking Convention or that deportation is not applicable because the prisoner is held under other specific legislation (eg a hospital order).

If you have indefinite leave to remain or refugee status, you can still have leave revoked and be deported. Irish citizens can only be deported in exceptional circumstances.

Immigration Act detainees

Prisoners who have completed their criminal sentences often remain in prison under Immigration Act powers to detain.

Detainees can be held in prisons or in immigration removal centres; however the latter will not accept certain detainees, including those convicted of sexual offences involving children, or of supply/importation of Class A drugs, or those who are considered to pose a serious risk to security and control. (See PSI 52/11 para 2.65-2.74 for further guidance.)

If you are held in prison solely under the Immigration Act, you will have the same status and privileges as an unconvicted prisoner. These rights are listed in Prison Service Order 4600 Unconvicted, Unsented and Civil Prisoners

Categorisation and Release on Temporary Licence (ROTL)

In all the higher security categories, categorisation procedures are the same for FNPs as for British citizens. However, this changes when it comes to Category D or open prison status. PSI 37/2014 sets out guidance on when prisoners in closed conditions faced with deportation will be prohibited from going to open conditions or prohibited from being released on temporary licence (ROTL). Further guidance along the same lines can be found in the HMPPS Recategorisation Framework document, section 10, and Release on Temporary Licence Framework, paragraph 6.92.

Prisoners who have a deportation order and who have either exhausted appeal rights in Britain or whose appeal rights must be exercised from abroad - are prohibited from being classified as suitable for open conditions (Prison Rule 7 (1a)/YOI Rule 4 (2)) and prohibited from being granted ROTL (prohibited by Prison Rule 9 (1A)/YOI Rule 5 (1A)). Therefore, these prisoners cannot be categorised or allocated to Category D/Open conditions.

Prisoners who have not exhausted deportation appeal rights but are liable for deportation must have their categorisation considered on an individual basis subject to assessment against a "strengthened risk assessment". Factors relevant to that risk assessment are detailed in forms CCD3 and ROTL 9 in PSI 37/2014 and may include: information about family ties (in Britain or in the country of origin); strong community links; compliance/non-compliance with immigration conditions including bail; any previous abscond

from an Immigration Removal Centre (IRC); behaviour during any previous detention in IRC; any history of deception to gain leave to enter/remain or evade removal;; whether there is an appeal against deportation; known aliases; whether removal is imminent/ unlikely in the near future; any other relevant factors.

The following groups of FNP's should receive a normal risk assessment for ROTL and open conditions where information returned from the Home Office shows them to fall into one of the following categories - those who:

- The Home Office has confirmed do not match the initial criteria for deportation; or
- have been considered for deportation by the Home Office and it has been decided that they may remain in the UK.
- there are no removal procedures underway against them.

Home detention curfew (HDC)

FNP's will be ineligible for HDC if there is a decision to deport or a current notification of a decision to refuse leave to enter the UK or that they are an illegal entrant/immigration offender subject to removal under section 10 of the Immigration and Asylum Act 1999.

If HOIE is still considering deportation action, has issued an authority to detain (IS91) or intends to issue an IS91 if the prisoner is released from prison, then the FNP will be "presumed unsuitable" for HDC.

If an FNP is presumed unsuitable they may be released on HDC only in exceptional circumstances which may include "the likelihood of re-offending on HDC is extremely small; **and** the HDC applicant has no previous convictions; **and** the applicant is infirm by nature of disability or age or both". The presence of any of the following factors might also be taken into account when determining if the prisoner is suitable for release: removal from the UK is imminent or is unlikely in the foreseeable future, the prisoner has a history of failing to comply with immigration conditions or has previously absconded, the prisoner has a history of verbal/documentary deception to gain leave to enter/remain or evade removal from the UK, or the prisoner has failed to produced evidence of their nationality/identity or is otherwise failing to comply with the directions of HOIE. This makes it very difficult for a foreign national to get HDC.

Irish nationals may be released on HDC unless deportation is court recommended or there are exceptional circumstances.

Early Removal Scheme (ERS) and Tariff Expired Removal Scheme (TERS)

ERS allows determinate sentence prisoners to be removed up to 48 months prior to their earliest release date (provided that they have served at least 30% of the requisite custodial period). Governors are directed to refuse ERS to anyone with a consecutive term for contempt or in default of payment (fine or confiscation order) or outstanding criminal charges. Prisoners facing extradition are also unable to access ERS, even if they are not contesting extradition.

Under TERS, indeterminate sentenced FNP's can be removed on or at any date after tariff expiry without waiting for release to be ordered by the Parole Board. Details are set out in the Generic Parole Process Policy Framework.

Repatriation

The Repatriation of Prisoners Act 1984 enables FNP's to be transferred back to serve their sentence in their country of origin. Sentenced prisoners from countries which are signatories to transfer conventions or bilateral agreements can apply for repatriation if they have at least six months left to serve and no outstanding appeals. To apply you should submit a Repatriation Application Form (Annex T of PSI 52/2011), giving your name, date and place of birth, home country address, nationality and passport number. This is forwarded to the Cross Border Transfer Section, which consults with the government of the country to decide whether to repatriate. Time served here is taken into account; however there is no recognition in the calculation of the fact that most sentences are not served in full, meaning that repatriated prisoners frequently serve longer in total.

Prior to Brexit, under Council Framework Decision 2008/909/JHA: EU Prisoner Transfer Agreement, prisoners from EEA countries could be forcibly repatriated to serve their sentences in their home country. Such forcible transfers are continuing under the Council of Europe Convention on the Transfer of Sentenced Persons and its Additional Protocol. Since 2022, forcible transfers are also in operation to Albania under a bilateral agreement.

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