

Deportation and Detention

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Methods of Enforcement and Removal

i) Deportation

- criminally convicted

s.3 Immigration Act 1971

ii) Administrative Removal

e.g - illegal entrants, overstayers, failed asylum seekers

s.10 Immigration Act 1971

What is Deportation?

- its a form of expulsion and exclusion
- prevents return to the UK while the order is in force
- new rules on how long order should remain in force
- two regimes of enforcement are now in force and running alongside each other

Those Excluded per se

Certain groups are excluded from deportation by statutory definitions

- British Citizens and those with a right of abode
- Certain Commonwealth and Irish Citizens if
 - :resided in UK on 1st January 1973
 - :were ordinarily resident in UK on 1st January 1973
 - :have lived in UK continuously for 5 years prior to offence or deport decision

OLDER REGIME

A person becomes liable to deportation when :-

- over 17 and sentencing court recommends deportation –S.3(6) Immigration Act 1971
- the Secretary of State considers it is conducive to the public good-S.3(5) Immigration Act 1971
- dependant family member of deportee-S.3(5)b) Immigration Act 1971

What of the court recommendation ?

- a notice of liability to deport must be served on defendant at least 7 days before sentencing hearing
- its part of the criminal sentence and only challengeable by criminal appeal
- its makes a person with status subject to immigration detention powers
- UK Border Agency can't act on recommendation if any appeal is pending against conviction or court's recommendation

Important case law

- R-v- Nazari [1980] 1 WLR 1366
- R-v- Carmona [2006] EWCA Civ 508

Test is whether –

“the offence and other material before the court leads to the conclusion that the continued presence of the offender is detrimental to this country “

- R-v- Ahaiwe [2007] EWCA Crim 1018

“Conducive to the public good”

- decision for the Secretary of State
- each case has to be considered on merits
- under the immigration rules there is a presumption that the public interest requires deportation
- Presumption can be rebutted in exceptional cases
- presumption doesn't apply if can prove deportation breaches the Refugee Convention or ECHR

Provisions for EEA Nationals

- governed by EEA regulations 2006
- if acquired right to permanent residence can only be deported if the S of S felt it is necessary on serious grounds of public policy and security
- if been continuously resident for more than 10 years can only be deported on imperative grounds of public security i.e. terrorist

Procedure

- the initial decision is with the Criminal Casework Directorate
- older regime decisions are made towards end of custodial element of sentence
- often a letter is sent asking for representations to be made as to why deportation is not the appropriate course of action

Appeals

- in first instance appeal can be made to the Asylum and Immigration Tribunal (AIT)
- A deportation order can't be signed by the CCD until appeal rights have been exhausted
- Any immigration status is retained until the deportation order is signed
- There can be no lawful removal until appeal rights have been exhausted

New Regime

S.32 - S.39 Borders Act 2007

- has effect from 1st August 2008
- introduces the concept of “automatic deportation “
- applies to individuals who fall within the category of “foreign criminal “
- decisions are now likely to be made shortly after the sentencing exercise

Definition of “foreign criminal “

- not a British Citizen
- convicted in the UK of an offence
- sentenced to a period of imprisonment of at least 12 months

“sentence of imprisonment of at least 12 months “

- doesn't include suspended sentences (unless subsequently ordered to serve part of it)
- must be 12 months or more for a single offence
- includes sentence of detention other than in prison
- includes indeterminate sentences provided they may last for 12 months

Alternative condition (not yet in force)

-convicted of an offence listed in the Particularly Serious Crimes Order 2004 ;

AND

-sentenced to a period of imprisonment

Procedure

- Unlike old system, the deportation order is signed at the start of the process
- The appeal is then brought against the signing of the deportation order to the Asylum and Immigration Tribunal
- The appeal can be brought on the ground that one or more of a number of exceptions apply



Exceptions

The SSHD should not pursue deportation where:

- A person is exempt from deportation (eg British Citizen or certain Commonwealth citizens)
- Removal would be in breach of human rights or refugee convention (s33 (2) UKBA'07)
- Where person under 18 on date of conviction (S33 (3) UKBA '07)
- Removal would be in breach of EEA Regulations (s33 (4) UKBA '07)
- Person is subject to extradition proceedings (S33 (5) UKBA '07)
- In certain circumstances where a person is sentenced to hospital orders (s33 (6) UKBA '07)



Timing of Decision

- A deportation order cannot be made while an appeal can be brought against conviction or sentence, unless person has informed the SSHD he does not intend to pursue criminal appeal
- Possibility of an appeal out of time disregarded



Effect of Deportation Order

- Only once an appeal is no longer pending or appeal rights are exhausted will the deportation order take effect
- Consequence of the deportation order will be to invalidate any leave granted and associated benefits (eg the right to work)
- However, if appeal against decision not submitted in time, it will take effect immediately – crucial that appeals are therefore submitted before the deadline passes



Detention

Those liable to detention when remand or sentence ends include the following circumstances -:

- i) Where criminal court has recommended deportation
- ii) Where SSHD has made a decision to deport
- iii) Where a deportation order has been signed
- iv) Other Categories who can be removed

Schedule 3 Immigration Act 1971

Detention

- SSHD has brand new powers to detain, including:
 - a) where she 'considers' whether to make a deportation order; and
 - b) where she thinks she is going to make a deport order, pending the making of it
- A court determining an appeal against conviction or sentence may direct release from detention – s36 (3) UKBA 07



Criteria for detention

- risk of absconding
- removal imminent
- risk of further offending
- risk of public harm
- determination to breach the law
- no close ties in UK
- no settled address or employment

Home Office Approach

- historically was a presumption in favour of release
- all changed July 2006-“Operation Alien”
- Recently uncovered policy of presumed detention
- Potential for unlawful detention claims
- Now statutory effect to presumption contained in S.36 Borders Act 2007

Challenge to detention

- Written representations for bail to CIO within UK Border Agency
- Application for bail to Asylum Immigration Tribunal (AIT)
- Bail application to High Court if proceedings issued
- Writ of Habeas Corpus

New Offences/Powers introduced by the UK Borders Act 2007

- Assaulting an Immigration Officer – s22 UKBA 07
- IO's obtain powers to seize cash similar to constables under Ch 3 of Pt 5 of Proceeds of Crime Act 2002
- Forfeited property may be taken into possession of SSHD (rather than police)
- Property can be disposed of by SSHD s24
- Offence of disclosing confidential information if person's identity can be deduced from disclosure, s42

IO's power to detain

- Immigration Officers may detain person if he 'thinks' that the person is liable to arrest by a Constable for a period of up to 3 hours
- IO may search an individual for anything used to assist escape or cause injury. If anything found on search which is evidence of commission of an offence IO may retain this also.
- Offence committed by anybody who absconds from or assaults an immigration officer exercising the above powers – s3 UKBA '07



Search Powers for Nationality Documents (s 44 UKBA '07)

- Police are given powers to search for Nationality Documents where a person has been arrested if a constable/IO suspects:
 - a) A person not a British citizen; and
 - b) Nationality documents may be found on their premises
- Premises may be entered to conduct search
- Power of search may be exercised on with written authority of a senior officer, i.e.:
 - a) An IO with at least the rank of CIO
 - b) A constable with at least the rank of Inspector
- A nationality document may be seized following such a search



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Be Aware of overlaps

- Immigration Offences
 - use and possession of false documents :Identity Cards Act 2005;Forgery and Counterfeiting Act 1981
 - Entering UK with no passport :s.2 Asylum and Immigration Act 2004
 - Deception :s.24A Immigration Act 1971
- Statutory Defences – S.31 Immigration and Asylum Act 1999
 - applies to limited list of offences
 - protects refugees if illegal activity is for good cause,presented self to authorities without delay and claimed asylum as soon as reasonably practicable
- recent decision
 - R-v- Asfaw [2008] UKHL 31- abuse of process in charging of two offences covering same facts one carrying the s.31 defence and one not .

Prison law overlap

- Early Removal Scheme-s.260 Criminal Justice Act 2003 and s.46A Criminal Justice Act 1991
- Home Detention Curfew-s.246 Criminal Justice Act 2003
- Categorisation – PSO 4630 (July 2006)
- Parole – R-v- Hindawi [2006] UKHL 54
- Repatriation –Repatriation of Offenders Act 1984