**Deportation, Foreign Criminals, and Family Law**

In public law family proceedings, it is sometimes the case that one of the parents has been convicted for offences arising from how they have treated their children. In the care proceedings which would inevitably follow (or, in some cases, precede) such a conviction, the parent’s position may be that they want to resume full time care of their child, or have regular contact. However, if the parent is a not a British Citizen, there is a chance that they could be deported as a result of their conviction. Whether the parent is allowed to remain within the UK would need to be taken into account by the family court when deciding what order (if any) to make at the conclusion of the proceedings, and when considering how the case ought to be managed until then.

This article examines the law relating to deportation in the specific context of foreign nationals who have been found to have committed criminal offences in the UK, and is divided into four sections:

1. Deportation conducive to the public good (pursuant to section 3(5) Immigration Act 1971 (“IA 1971”))
2. Judicial recommendation of deportation during sentencing (pursuant to s3(6) IA 1971)
3. “Automatic” deportation (pursuant to s32 UK Border Act 2007 (“UKBA 2007”)
4. The influence of EU law

We will see that there are multiple routes under which an individual can be deported from the UK, and that all of them require a thorough balancing exercise to be undertaken by the Secretary of State. It is hard to envisage a case in which Article 8 will not be raised, and, in the case of EU nationals, the rights of the individual under EU law must be taken into account in addition to all other considerations. Whilst the case in favour of deportation in respect of a specific individual may be overwhelming, the cases in which deportation is truly “automatic” are incredibly rare: a balancing exercise of some description must be undertaken in every case, although, as we will see, the scope of the exercise may be circumscribed in certain factual situations. We will also see that, in some cases, it is possible for members of a deported individual’s family to be deported in addition to that individual.

1. Deportation conducive to the public good (s3(5) IA 1971)

The IA 1971 sets out one regime under which an individual can be deported. The core provision is section 3(5):

“A person who is not a British citizen is liable to deportation from the United Kingdom if –

1. The Secretary of State deems his deportation to be conducive to the public good; or
2. Another person to whose family he belongs is or has been ordered to be deported.”

Section 3(5) is a general discretion that the Secretary of State possesses: it is not dependent on any precondition being established, such as a judicial recommendation for deportation. This power is relevant in the context of this article for two reasons. Firstly, if a judicial recommendation for deportation is made, the actual decision about whether to deport the individual is undertaken by the Secretary of State in accordance with s3(5). And, secondly, if a judicial recommendation is not made (and if s32 UKBA 2007 does not apply) the individual may still be liable for deportation should the Secretary of State decide to exercise her discretion in that way.

When using her power under s3(5), the Secretary of State must undertake a balancing exercise, weighing up whether the public interest in deportation outweighs the right to remain in the UK (including a consideration of the individual’s human rights. This balancing exercise must be conducted in accordance with (among other provisions) paras 398 – 399A of the Immigration Rules 2004. The relevant provisions can be summarised as follows:

* In cases where an individual is sentenced to a period of imprisonment of between 12 months and 4 years (or where the Secretary of State takes the view that the individual’s offending has caused “serious harm”, or that they are a “persistent offender who shows a particular disregard for the law”) the Secretary of State must **consider** as part of the balancing exercise whether any of the below circumstances apply.
* The relevant circumstances are:
  + The individual’s “genuine and subsisting parental relationship” with a child under the age of 18 who is in the UK and who is a British Citizen (or has lived in the UK continuously for 7 years prior to the immigration decision) – **but only if** it would be “unduly harsh” for the child to live in the country to which the individual is to be deported, **and** unduly harsh for the child to remain in the UK without that individual.
  + The individual’s “genuine and subsisting relationship” with a partner who is in the UK and is a British Citizen (or who is settled in the UK) – **but only if**: (i) the relationship was formed at a time when the individual being considered for deportation was in the UK lawfully, and at that time “their immigration status was not precarious”; **and** (ii) it would be “unduly harsh” for the partner to live in the country to which the individual is to be deported because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM to the Immigration Rules 2004; **and** (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.
  + The individual has been lawfully resident in the UK “for most of his life”; **and** he is socially and culturally integrated in the UK; **and** there would be “very significant obstacle to is integration into the country to which it is proposed he is deported”.
* If none of these circumstances apply, the public interest in deportation will **only** be outweighed by other factors where there are very compelling circumstances over and above those listed above.
* In cases where an individual is sentenced to a period of imprisonment of 4 years or more, the the public interest in deportation will only be outweighed where there are “very compelling circumstances over and above” those listed above.

The effect of these rules is best brought to life by way of an example:

A family, all of whom are South Korean nationals, came to live in the UK 5 years ago. The father (F) was emotionally and physically abusive to his wife and his children. F is convicted for numerous offences and is sentenced to 12 months in custody for one of the offences. During the care proceedings following his conviction, the mother (M) says that she has ended her relationship with F (for obvious reasons), and F’s position is that he has ended his relationship with M, but wants to resume care of the children by himself as a sole carer when he is released from prison.

Looking to the rules above, none of the relevant circumstances apply: the children are not British Citizens and have not lived in the UK for the required 7 years; the relationship between M and F is no longer “subsisting” (it not being “unduly harsh” for M to stay in the UK without F given the history of domestic abuse in any event); and F has not been in the UK for “most of his life” having only arrived 5 years ago. In this case, “very compelling circumstances” are required to outweigh the public interest in deportation; it looks likely that F would be deported.

Importantly, the Secretary of State must also consider the positon under EU law (see section 4 of this article below). This has a significant impact, and if the family in the above example comprised of EU nationals it is doubtful that the probability of the father’s deportation would be so high.

It should be noted that there is a blanket exemption from the effect of s3(5) for Commonwealth citizens, (and citizens of the Republic of Ireland) where, at the time of the conviction, the individual has been “ordinarily resident in the United Kingdom and Islands” for the last 5 years. In such cases, s3(5) does not apply (s7(1) IA 1971). Note that the 5 year period excludes any period spent in the UK in imprisonment if the period of imprisonment was for 6 months or more (s7(3) IA 1971).

It is worth nothing, in addition, that pursuant to s5(3) IA 1971, the family members (defined in s5(4) as spouses and children under 18) of an individual who is deported can only themselves be deported under s3(5)(b) if the deportation order in respect of the family members is made within 8 weeks of the date the deportee left the country. Furthermore, any deportation order made in respect of the family members will not be enforceable if they cease to be members of the deportee’s family within the statutory definition (by divorcing the deportee, or attaining the age of 18, for example), or if the original deportation order ceases to have effect.

2. Judicial Recommendation for deportation during sentencing (s3(6) IA 1971)

Judicial Recommendations for deportation fall within the same statutory deportation regime as s3(5) IA 1971. Section 3(6) gives any court which has the power to sentence an individual the power to recommend that a person be deported from the UK as part of their sentence:

“Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.”

Importantly, when a judicial recommendation for deportation is made, the actual decision as to whether the individual is deported is made by the Secretary of State. The court’s recommendation is merely a recommendation, and is not binding. In deciding whether to deport, the Secretary of State will undertake the balancing exercise set out above, pursuant to s3(5) IA 1971, and will only deport the individual if the outcome of the balancing exercise so demands.

The leading case appears to be R v Kluxen [2010] EWCA Crim 1081, which (at paragraph 33 ) conveniently summarises the type of case in which a recommendation would be appropriate:

1. In cases to which the [UKBA 2007] applies, it is no longer necessary or appropriate to recommend the deportation of the offender concerned.
2. In cases to which the [UKBA 2007] does not apply, **it will rarely be appropriate to recommend the deportation of the offender concerned, whether or not the offender is a citizen of the EU**.
3. If in a case to which the [UKBA 2007] does not apply a court is, **exceptionally**, considering recommending the deportation of the offender concerned, it should apply the Nazari test in tandem with the Bouchereau test, there being no practical difference between the two. This is so whether the offender is or is not a citizen of the EU.
4. However, the court should **not** take into account the Convention rights of the offender; the political situation in the country to which the offender may be deported; the effect that a recommendation might have on innocent persons not before the court; the provisions of article 28 of Directive 2004/38; or the [Immigration (EEA) Regulations 2006 (SI 2006/1003)]

(emphasis added)

Regarding (iv), it should be emphasised that these considerations remain relevant to the Secretary of State’s decision as to whether the offender should be deported.

The tests in R v Nazari and R v Bouchereau referred to above are:

* R v Nazari [1980] 1 WLR 1366 – “does the potential detriment to this country justify the recommendation for deportation of this appellant?”
* R v Bouchereau [1978] QB 732 – “whether or not a full enquiry into the circumstances reveals that a genuine and sufficiently serious threat to the requirements of public policy has affected the fundamental interests of society”

At paragraph 27 of the judgment in R v Kluxen, the Court of Appeal made clear that “it will rarely be that either test is satisfied in the case of an offender none of whose offences merits a custodial sentence of 12 months or more”. It should be noted, however, that if no judicial recommendation is made, this does not prejudice the Secretary of State’s general power to deport an individual if it is in the public good to do so (see R v Kluxen, para 27, for clarification of this point).

3. “Automatic” deportation (s32 UKBA 2007)

The UKBA 2007 introduced a brand new regime under which an individual can be deported. The UKBA regime is entirely separate from the IA 1971 regime but, as will become evident, the growing influence of Human Rights law and EU law has constrained, to an extent, how different these regimes can actually be in practice.

Section 32(5) UKBA states “The Secretary of State **must** make a deportation order in respect of a foreign criminal (subject to section 33)” (emphasis added). “Foreign criminals” are defined as being individuals who are not British Citizens, who are convicted in the UK of an offence, and to whom one of two conditions applies:

1. Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months (s32(2))
2. Condition 2 is that the person is sentenced to any period of imprisonment relating to an offence which is specified by order of the Secretary of State under s72(4)(a) of the Nationality, Immigration and Asylum Act 2002. (s32(3))

(Note that it is still the Secretary of State who makes the deportation order, and decides at first instance whether an exception under s33 UKBA 2007 applies.)

The statute is phrased in such a way as to suggest that deportation under s32 UKBA 2007 is entirely automatic, subject to certain exceptions which are outlined in s33. However, this betrays how cases are approached in practice: in reality, the exceptions are so broad, and so widely applicable, that it is only in the most exceptional and unusual of cases that none of them apply and in which deportation is truly “automatic”.

The exceptions listed in s33 are summarised below:

1. Where deportation would breach “a person’s rights” (ie. not just the rights of the offender) under the ECHR, or the UK’s obligations under the Refugee Convention.
2. Where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.
3. Where deportation would breach the offender’s rights under the EU treaties (see discussion of EU law below).
4. Numerous situations involving the Extradition Acts 2003 and 1989.
5. Where the offender is subject to various orders and/or directions under the Mental Health Act (or the Criminal Procedure (Scotland) Act 1995).
6. Where the Secretary of State thinks that deportation would contravene the UK’s obligations under the Council of Europe Convention on Action against Trafficking in Human Beings 2005.

It is submitted that a better analysis is that s32 requires the Secretary of State to undertake a balancing exercise in accordance with s33, to the extent that the factors referred to in s33 are relevant. Given that the Secretary of State must consider EU law and Human Rights in any deportation case, and that the relevant provisions of the Immigration Rules outlined in section 1 above are essentially an exposition of Article 8 ECHR, it is suggested that there is a significant amount of overlap between the s32 UKBA 2007 regime, and the IA 1971 regime outlined in sections 1 and 2 above. It is therefore highly misleading to describe s32 as a provision which facilitates “automatic deportation”: the cases in which deportation is actually automatic are truly exceptional.

The position regarding the deportation of the family members of a deported individual is different when the initial deportation order is made pursuant to s32 UKBA 2007 than it is when the individual is deported pursuant to the IA 1971 regime. Under s37 UKBA 2007, deportation orders in respect of the family members must be made within 8 weeks of either: (a) the date on which an appeal can no longer be brought (if the individual does not appeal); or (b) the date on which the appeal is no longer pending (if the individual does not appeal). This differs from the 8 week limit, running from the date the individual leaves the UK, under s3(5) IA 1971. The exceptions to the rule in the IA 1971 do, however, still fully apply in UKBA cases.

4. The influence of EU Law

In 2014, the CJEU made it clear in CS v UK C-304/14, at paragraph 45, that an individual’s criminal record cannot automatically extinguish that person’s rights as an EU citizen – or the rights enjoyed by any other person to the extent that those rights derive from the individual’s status as an EU citizen:

However […] the mere existence of a criminal record cannot, by itself, justify an expulsion decision which may deprive CS’s child of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen. It was already well established that EU rights cannot automatically be lost if a crime is committed but instead that each case must be decided on its own facts. The principle has now also been applied to Zambrano cases based on EU citizenship and derived rights of residence cases.

It follows that, in any decision relating to the deportation of an EU national, the Secretary of State must consider the rights of the individual and his family under EU law, in addition to the provisions of domestic law discussed above.

The most relevant piece of EU legislation is the Citizenship Directive (Directive 2004/38), which was transposed into domestic UK law by the Immigration (EEA) Regulations 2006. The Secretary of State will pay close attention to these regulations when exercising her power under s3(5) IA 1971. Importantly, s33 UKBA 2007 requires the applicability of the regulations to be considered in all cases where automatic deportation under s32 UKBA 2007 might apply. It follows that, in any case with a EU element, the regulations are highly relevant to **all** the methods of deportation discussed above, including so-called “automatic” deportation.

The key regulations are relatively self-explanatory, and are set out below:

* Regulation 19 (directly quoted):

1. Subject to paragraphs (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if—
2. **he does not have or ceases to have a right to reside** under these Regulations [see regulations 11-15]; or
3. he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his **removal is justified on the grounds of public policy, public security or public health** in accordance with regulation 21.
4. A person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom.
5. A person must not be removed under paragraph (3) if he has a right to remain in the United Kingdom by virtue of leave granted under the [IA 1971] unless his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

* Regulation 21: (summarised)
  + Cannot deport if the decision to deport is taken to serve economic ends
  + Cannot deport if the person has a permanent right of residence in the UK under regulation 15 (ie. an EEA national who has resided in the UK pursuant to the regulations for 5 years – note that there are provisions relating to family members and partners too) **unless** the decision to deport is made on “serious grounds of public policy or public security”
  + Cannot deport apart from in “imperative grounds of public security” in respect of any EEA national who has resided in the UK for a continuous period of 10 years prior to the relevant decision, or who is aged under 18 (unless deportation is in the child’s best interests).
  + Where deportation is ordered on the grounds of public policy or public security, the decision must be taken in accordance with the following principles:
    - The decision to deport must be proportionate
    - The decision to deport must be based exclusively on the personal conduct of the person concerned
    - The personal conduct of the person concerned must represent a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”
    - The decision-maker cannot take into account any issues which are “isolated from the particulars of the case or which relate to considerations of general prevention”
    - A person’s previous criminal convictions do not *in themselves* justify the decision
    - The decision maker must consider the following in relation to the individual:
      * Age
      * State of health
      * Family and economic situation
      * Length of residence in the UK
      * Social and cultural integration into the UK
      * Extent of the person’s links with his country of origin
  + Can deport on public health grounds **only** if the person has a disease which has “epidemic potential” within 3 months of the person entering the UK.

Out of the three grounds (public policy, public security, and public health), public policy is the most frequently used in practice. As the regulations find their foundations in an EU Directive, there is also extensive case law from the CJEU relating to how the public policy/public security point is to be approached. This case law is beyond the scope of this article, but the headline is that it is very hard to deport an EU national from the UK. What the position will be post-Brexit is yet to be determined.

Although it is in no way legally binding, a document (dated 5 February 2013) disclosed by the UK Borders Agency pursuant to a FOI request (see [here](https://www.whatdotheyknow.com/request/156896/response/389475/attach/10/Annex%20H%20Notice%2001%202013%20Public%20Policy%20and%20Public%20Security%20FOI27127.pdf)) reveals that it is internal policy for all EEA nationals who have been sentenced to 12 months imprisonment (or more) to be automatically referred from the prison to the Criminal Casework Directorate (CCD) so that the latter can consider whether to pursue deportation. The same document reveals that, internally, deportation is seen as a virtual certainty in any case where the period of imprisonment exceeds 24 months, or where the individual has received 4 or more sentences of 6 months. Although this is not an authoritative reflective of the law in this area, it could be useful when advising clients on what lies ahead. (Paragraph 30 of R v Kluxen does, however, make obiter reference to “the Secretary of State’s [current] policy that no citizen of the EEA will be removed unless the prison sentence imposed is two years or more”.)

Conclusion

It will hopefully be clear by now that there are two deportation regimes which are of relevance: the UKBA 2007 regime, and the IA 1971 regime. Both of these are very similar in that the decision as to whether an individual should be deported is heavily influenced by – if not dominated by – Human Rights considerations, and EU law. The significant influence of these areas of law limits how distinct these two regimes can be in practice. Crucially, the reference to “automatic deportation” in s32 UKBA 2007 is misleading: in the overwhelming majority of cases, there is nothing automatic about it at all.

Further reading:

* Immigration Rules 2006 – Part 13
* Citizenship Directive (Directive 2004/38)
* Immigration (EEA) Regulations 2006
* [Law Commission guide on deportation and criminal sentencing](http://www.lawcom.gov.uk/wp-content/uploads/2015/10/Sentencing_law_in_England_and_Wales_Issues_Pt310-Sentencing-powers-and-duties-Deportation.pdf)
* UK Border Act 2007
* Immigration Act 1971
* R v Kluxen [2010] EWCA Crim 1081
* [UK Borders Agency internal policy document relating to the deportation of EEA nationals](https://www.whatdotheyknow.com/request/156896/response/389475/attach/10/Annex%20H%20Notice%2001%202013%20Public%20Policy%20and%20Public%20Security%20FOI27127.pdf)

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